Revista Brasileira de
Alternative Dispute Resolution

RBADR

08

Ano 04 · Número 08
Jul./Dez. 2022

Publicação Semestral
ISSN: 2596-3201

CBMA | CENTRO BRASILEIRO DE MEDIAÇÃO E ARBITRAGEM

30 anos | FORUM

ano 04 - n. 08 | julho/dezembro - 2022
Belo Horizonte | p. 1-264 | ISSN 2596-3201
R. Bras. Al. Dis. Res. – RBADR

Revista Brasileira de *ALTERNATIVE DISPUTE RESOLUTION*

RBADR

FORUM
CONHECIMENTO JURÍDICO

REVISTA BRASILEIRA DE *ALTERNATIVE DISPUTE RESOLUTION* – RBADR

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Impressa no Brasil / Printed in Brazil / Distribuída em todo o Território Nacional

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Este periódico está indexado no Scopus, da Elsevier.

R454 Revista Brasileira de Alternative Dispute Resolution - RBADR. – ano 1, n. 1 (jan./jun. 2019) –.– Belo Horizonte: Fórum, 2019-.

Semestral; 17cm x 24cm

ISSN impresso 2596-3201
ISSN digital 2674-8835

1. Direito. 2. Direito Processual Civil. 3. Direito Civil. I. Fórum.

CDD: 341.46
CDU: 347.9

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Sumário

DOI: 10.52028/rbadr.v4i8.1

Editorial

Chegamos ao número 8 da Revista Brasileira de Alternative Dispute Resolution – RBADR. Em primeiro lugar gostaríamos de agradecer a todos os leitores do periódico, todos os autores e principalmente à Editora Fórum de Belo Horizonte pela parceria de sucesso e pelo excelente trabalho realizado.

O número 8 é dedicado à solução de conflitos nos BRICS. Portanto, como já tivemos artigos russos e ucranianos no número anterior, este número possui artigos de autores indianos e brasileiros.

São nove artigos de autores indianos (um com coautor sul-coreano) sobre os mais variados temas (negociação, mediação, arbitragem, diversidade na arbitragem, futuro das ADR nos BRICS, etc...) e dois artigos de autores brasileiros sobre mediação e conciliação.

A submissão de artigos indianos foi possível devido ao auxílio de editor convidado daquele país, o Professor Dr. Niteesh Kumar Upadhyay, professor associado da Faculdade de Direito da Universidade de Galgotias. Registramos nosso agradecimento pelo auxílio.

A RBADR vem cumprindo sua missão de ser um hub doméstico e internacional para a publicação de artigos científicos de qualidade sobre soluções de conflito. Seus quatro anos de fundação e a diversidade de autores e escritos ratificam tal fato. Toda contribuição científica sobre a temática é bem-vinda.

Daniel Brantes Ferreira, Ph.D.
Editor-Chefe

Gustavo da Rocha Schmidt
Presidente

Editorial

We present number 8 of the Brazilian Journal for Alternative Dispute Resolution – RBADR. Firstly, we would like to thank all the journal readers, authors, and especially Editora Fórum from Belo Horizonte for the successful partnership and excellent work.

Number 8 focuses on conflict resolution in the BRICS countries. Therefore, as we already had Russian and Ukrainian articles in the previous issue (number 7), this issue has articles written by Indian and Brazilian authors.

There are nine Indian-authored papers (one with a South Korean co-author) on the most varied topics (negotiation, mediation, arbitration, diversity in arbitration, future of ADR in the BRICS, etc...) and two Brazilian-authored papers (on mediation and conciliation).

The submission of Indian articles was possible due to the help of a guest editor from that country, Professor Dr. Niteesh Kumar Upadhyay, associate professor at the Faculty of Law at the University of Galgotias. We express our gratitude to Professor Niteesh.

RBADR has been fulfilling its mission of being a domestic and international hub for quality scientific articles on conflict resolution. Its four years of existence and the diversity of authors and writings confirm this. Any scientific contribution on the subject is welcome.

Daniel Brantes Ferreira, Ph.D.
Editor-in-Chief

Gustavo da Rocha Schmidt
President

DOUTRINA | Artigos

DOI: 10.52028/rbadr.v4i8.2

Negotiation for human beings: what, why and how?

Akshay Verma

Ph.D. Scholar, Faculty of Law, University of Delhi (2018- till date) Member, Project KUTUMB, NLUO, 2022 (Ongoing).

Abstract: The golden words of Kabir Das,[1] "*Kya leke aaya jagat mein, kya leke jaega, do din ki zindagi hai, do din ka mela*"[2] indubitably manifests that the life is too short to indulge in conflicts. However, conflicts do happen. No human being has control over it. A new way forward is to resolve the dispute with the help of negotiation, which is the most common and informal form of dispute resolution. Compared to processes using neutral "third parties", negotiation has the advantage of allowing the parties themselves to control the process as well as the outcome.[3] The negotiation between Nelson Mandela[4] and the South African Government illustrates the success of world's best peaceful diplomatic negotiation in putting an end to racial discrimination, where violence seemed inevitable. However, the whole process involved around 60 meetings over a span of 10 years, which reflects the fact that the art of negotiation demands considerable preparation and lots of patience. Taking into consideration the huge variation in negotiation dynamics across contexts, suggesting a single script to the negotiators on how to go about the process cannot be contemplated.[5] However, this article attempts to elaborate the various stages of negotiation in the order in which they are most commonly used.[6] In this article, the author catalogues several approaches, strategies, styles and techniques to have a successful negotiation, and their usage which primarily varies from one case to another, and especially upon the parties' perceived relative strengths during the bargaining process.[7] Further, the author endeavours to deduce ways to determine the alternatives and achieve the best optimum solution by identifying the best alternative to the negotiated agreement (BATNA).

Keywords: Negotiation. Human beings. Bargaining. Strategies. Alternatives. BATNA.

1 (1440-1518), Kabir Das, was an Indian poet, and spiritual and visionary saint of 15th century, born in a Muslim family, whose writings immensely controlled the Hinduism's Bhakti Movement and his verses are also present in Sikhism's scripture, Guru Granth Sahib. He has unforgettable contribution in harmonizing the two religions, Hinduism and Islam, by conveying a universal path to be followed by all.

2 Translated as "What did you bring into this world, and what can you take away from this world? After all, the life is but a two-day fair".

3 Stephen B. Goldberg, Frank E.A. Sander, *et al.*, *Dispute Resolution: Negotiation, Mediation and Other Processes* 3 (Aspen Law and Business, New York, 3rd edn., 1999).

4 (1918-2013), Nelson Rolihlahla Mandela, was anti-apartheid activist and former President of South Africa. He was awarded Noble Prize for Peace in 1993.

5 Russell Korobkin, *Negotiation Theory and Strategy* 5 (Aspen Law and Business, New York, 2nd edn., 2009).

6 *Ibid.*

7 *Supra* note 3 at 20.

Introduction

"All men are caught in an inescapable network of mutuality".[8]

Martin Luther King[9]

Life is full of problems, and one can hardly or rather never, escape from this very reality. As a human being, in order to sustain, one has to communicate with the people around. No one ever can live in isolation. However, when one starts interacting with the other, in many occasions, the anticipated desires of the participants are actually or apparently in the state of opposition, which in turn leads to interpersonal conflict. This is the time where the participants need to manage and resolve the conflict, which has generally arouse because of the varied cultural, social, regional, attitudinal, emotional, opinion and perception differences. However, one needs to understand that dispute resolution, dispute being the patent stage of conflict, not always includes legal approaches and is far away from extra-legal approaches like physical violence and war. The best possible way to resolve a dispute is through communication and diagnosis of dispute where the participants look beyond their positions and attempt to resolve the dispute by catering the underlying needs, interests and desires of each other. This diagnosis approach of dispute resolution is called Negotiation.

As a matter of fact, only human beings negotiate. Negotiation may happen between employer and employee, lawyer and client, teacher and student, husband and wife, parents and children, so on and so forth. One basic thing which is common in all, is the involvement of humans. Whatever the role, either professional or personal, a person may have, the negotiation takes place between human beings. Therefore, it is immaterial whether the person is strong or weak, big or small, young or old, rich or poor, literate or illiterate. What only matters is the art of negotiation.

In order to inculcate within, the art of negotiation, one has to understand the nitty-gritties of negotiation which predominantly includes the art of communication, knowledge of overall process, efficient use of appropriate strategy, a little bit of effort and lots of patience. Negotiation provides for maximum gains and maximum satisfaction when both the participants are well versed with the entire process of negotiation and are equally prepared. Preparation for negotiation determines its success. Higher the preparation, higher is the success.

[8] As quoted in Laurie S. Coltri, *Alternative Dispute Resolution: A Conflict Diagnosis Approach* 1 (Prentice Hall, an imprint of Pearson, New York, 2nd edn., 2010).

[9] (1929-1968), Martin Luther King, was an American Baptist minister and activist who was awarded the Noble Peace Prize 1964.

Broadly and briefly, the process of obtaining one's objectives from others in our daily lives is negotiation. It is only a dispute resolution process where parties freely engage and come to a peaceful conclusion. The parties urge one another to participate in this non-binding procedure where they voluntarily make themselves liable to the settlement because neither party can impose a settlement on the other. Additionally, the absence of any third parties from the negotiating process gives the parties engaged, complete control over the process and result. Parties increase their chances of achieving a wide range of solutions and mutual benefits by exercising their lateral thinking skills.

After all, the participants have only to talk to each other in a way which is conducive and accommodative to their underlying interests. This is what negotiation means. Every person in this world has a right, rather a birth-right, to have a sleep and whether the sleep is sound depends upon the person's state of mind. Negotiation is nothing, but an instrument which brings in a peaceful state of mind, when everyone is caught in an inescapable network of mutuality and where the chances of indulging in a conflict is inevitable. That is why people negotiate. If the need to negotiate is the first step, the way to do it is the second, and the second step is as important as the first.

II What is negotiation?

When we hear the word "negotiation," we typically picture a big table in a glass conference room with serious-looking people in suits seated at it. However, negotiation is not just the formal action of talking about a particular dispute across a table. It is the unofficial act we engage in whenever we approach someone to ask for anything. It may be our children, parents, partner, boss, co-worker, or friends.[10]

Before understanding the concept of negotiation, one needs to understand the meaning of the more often used words - conflict, interpersonal conflict, and dispute. When one or more of one participant's aims are really or seemingly at conflict with those of another participant, there is an interpersonal conflict between the two parties.[11] A dispute is an interpersonal disagreement that is not latent and is characterised by the emphasis as well as concentration of the disputants on opposing wants, aims, as well as interests.[12]

Through discussion or other forms of communication, disputing parties attempt to settle an interpersonal issue through negotiation. The conversation may

[10] Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation: A Wishbone, Funny bone and A Backbone* 105 (LexisNexis, 2015).

[11] Laurie S. Coltri, *Alternative Dispute Resolution: A Conflict Diagnosis Approach* 1 (Prentice Hall, an imprint of Pearson, New York, 2nd edn., 2010).

[12] *Id.* at 5.

take place verbally over the phone, in writing, or while utilising one of the numerous cutting-edge communication tools currently in use, such as e-mail, text messaging, video calls, or new online video conferencing platforms like webex, google-meet, zoom, etc.

In a negotiation, the parties to the dispute mutually agree on whether and how the conflict should be settled. In other words, the parties to the dispute have total authority over how the issue will turn out. They alone have the authority to decide whether to settle.[13] The participants more often produce an amicable win-win solution when they share positive working relationships and have a sense of mutual dependence.[14]

Negotiation is not only a kind of ADR[15] method, but also the connecting thread to almost all other ADR mechanisms. It is the most prevalent form of dispute resolution mechanism. This popularity of negotiations stems from the absence of a third-party neutral presiding over the negotiation process thereby giving the parties greater autonomy to control the process and its end results. Although certain third-party dispute resolution mechanisms also provide parties the autonomy to control the final outcome but the involvement of a neutral third party definitely reduces the autonomy, parties have in choosing their desired procedures.

Both aided and unaided negotiation is possible. The disputants are the sole players in unassisted negotiation, often known as simple negotiation. Depending on the facilitator's function, negotiation may also be aided or facilitated, with some variations.[16] In fact, dispute resolution mechanism having a third party presiding over them can be further differentiated amongst themselves on the basis of the role of the neutral in imposing a solution on the parties (e.g., conventional adjudication, arbitration) or merely assisting the parties in reaching a mutually amicable solution (e.g., mediation, conciliation).[17]

Mediation seeks to help participants reach a mutual settlement by first enabling them to understand each other's interest, appreciate their respective positions, and aims to make parties reach a compromise which mutually satisfies such interests. A mediator is a facilitator of the conversation and has no power to impose a binding award on the participants. A mediator only manages the negotiation process and guides them towards a possible settlement. Thus, the final

[13] *Id.* at 8.
[14] Peter J. Carnevale and Dean G. Pruitt, "Negotiation and Mediation", *Annual Review of Psychology* 570 (1992).
[15] ADR stands for Alternative Dispute Resolution.
[16] *Supra* note 11 at 8.
[17] *Supra* note 3.

outcome of a successful mediation always embodies the participants' interests and is considered to be a generally win-win settlement.[18]

Conciliation, like mediation is another form of consensual ADR process aimed to resolve dispute, including future interest disputes, with the help of a third neutral party called the Conciliator. Conciliation differs from mediation for the reason that the role of a conciliator, unlike mediator, is more facilitative and more evaluative as the conciliator offers parties proposals for settlement and even suggest solutions. However, in both the ADR forums, the common element is negotiation, accompanied by the mutual agreement to reach a settlement.

On the contrary, the possibility of having effective negotiation fades in other ADR forums like arbitration where the arbitrator (the third party) is not bound to pass an award based on the participants' mutual agreement. In other words, participants neither have any control over the process nor over the outcome. This again increases the popularity of negotiation for it provides party-driven approach to reach a party-driven amicable solution.

Every negotiation is a different animal

Once upon a time a man named 'X' bought a baby goat. With time the baby goat grew and had big horns. 'X', an electric engineer by profession, knew nothing about goats. One fine day he had to put the goat back in the barn. So, he grabbed the goat by the horns and tried to push it back into the barn. The goat resisted his master's attempts and even managed to overthrow 'X'. Later, 'Y', the wife of 'X' came and led the goat back to the barn by gently holding the beard of the goat guiding him to the desired destination. Y knew that beard is the sensitive point of goats which 'X' was totally ignorant about. Hence, it is not about the strongest, smartest or the most experienced ones, but totally depends upon the situation, timing and circumstances.

Phases in Negotiation

In a standard negotiation process, there are four stages in total namely preparation, opening, bargaining and closing. The first stage pertains to preparation of negotiation where the whole focus is on collection of information which helps each participant in understanding the advantages and disadvantages of a particular case. This is the stage where the participants have to work closely and purposely in order to identify the available options and evaluate the same to explore appropriate alternatives. Once the preparation stage is done, the next step is opening where

[18] Yaraslau Kryvoi and Dmitry Davydenko, "Consent Awards in International Arbitration: From Settlement to Enforcement" 40(3) *Brooklyn Journal of International Law* 843 (2015).

both the sides present their initial positions to one another. This is done in order to set the tone for negotiation. The opening stage is followed by bargaining where the goal is to reduce the difference between the two original positions and convince the opposing participant to agree to less than they originally anticipated. Finally, once the bargaining is done, comes the last stage called closing. Closing responds to the capitalization of the work done. Ideally, in a negotiation, both the parties should work collaboratively to reach an amicable, workable and acceptable solution. However, it may also be the case where there is no settlement or one of the participants have achieved more out of the negotiation as compared to the other just because the former was well versed with the use of appropriate bargaining and negotiation strategy.

Types of Negotiation

The type of negotiation predominantly refers to the type of bargaining implemented by the negotiator. In general, there are five types of bargaining which are mentioned as follows:

1 Rights-based bargaining: The customary and established method of negotiation when the participants' main concern is between right and wrong is known as rights-based bargaining. It is merely a blame-centred analysis. For instance, who was reckless, who violated the contract, etc.

2 Positional bargaining (**Position-based bargaining):** When a party adopts oppositional stances without considering the interests of the opposing side, is known as positional bargaining. Each side adopts and adheres to a position.[19]

3 Distributive bargaining: Parties engage in distributive bargaining when they divide the subject matter under discussion. Parties make an effort to share a particular sum of money or other value. There are less possibilities to seek resolutions in such distributive negotiations.[20]

4 Interest-based bargaining takes place when both parties abandon their adversarial stances and take into account their own real interests as well as the interests of the opposing party.[21]

5 Integrative bargaining (Collaborative bargaining) is the best strategy for putting emphasis on interests and taking a comprehensive approach to the conflict. It focuses on adding value to the dispute-resolution process. Integrative negotiation provides a number of advantages, including improved efficacy, a

[19] Delhi High Court Mediation and Conciliation Centre "Samadhan", *Reading Material: 45 Hours of Mediation Training Programme* 46 (2021).

[20] *Ibid.*

[21] *Id.* at 47.

reduction in posturing, the retention of relationships, and a better possibility that parties would uphold the agreement.[22]

Though, there is no rule as such pertaining to the use of a specific bargaining, it totally depends upon the negotiator, timing, facts and circumstances of each case. However, in order to achieve a win-win solution, the use of integrative bargaining is highly recommended.

III Why do humans negotiate?

It is now more evident than ever that in today's world, which is characterised by flatter organisations, rapid innovation, the proliferation of the Internet, and the post-COVID era of digital communication, we frequently have to fall back on dozens, hundreds, or even thousands of people and organisations that we have no direct control over, in order to complete our work and meet our needs. We need to negotiate in order to achieve our objectives.[23]

We are all negotiators, is a truth of life.[24] Every day, everyone engages in negotiations. Children try to convince their parents to allow them to play out for a longer duration. Students ask their teacher to leave the class early. Discussion of spouses where to go for dinner. All these are negotiations.

Sometimes the results of talks affect our life even when we are not directly seated at the negotiating table. When Ukraine and Russia are negotiating the long-awaited cease-fire, millions of people's lives perhaps more may be touched and affected. Thousands of people could lose their livelihoods. New chances could arise. Thousands of people could be uprooted. Families could be split up or reunited. All of this is happening because just two people are negotiating.[25]

The importance of negotiation can be well understood through the following hypothetical situation.

Consider this: You are out on a drive and are on a highway entering into an intersection at a green traffic signal to turn left. You wait for the oncoming cars to pass before you make your move. The light turns yellow, then subsequently changes to red, and you initiate your desired turn to leave the intersection. However, one oncoming car jumps the red light and is coming straight at you. You fortunately

[22] *Ibid.*
[23] Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement Without Giving In* ix (Random House Business Books, London, 3rd edn., 2012).
[24] *Id.* at xxv.
[25] *Supra* note 10 at 106.

avoid a disastrous collision, thanks to your fast reflexes which kick in just at the nick of time.[26]

Now take a short pause before proceeding to next paragraph. Reflect on your perceptions and feelings towards the other driver. Does the situation create any assumptions in your minds with respect to the other driver?[27]

Now proceed for the following paragraph. It gives a description of what is going on inside the head of the other driver.[28]

"I on my way home from the hospital. My wife and I are devout Christians who abstain from alcohol. However, three days ago, when we were on our way home from a friend's wedding, our car was badly hit by a drunk driver. The other car rammed into our car on the passenger side because of which, though I was not hurt too seriously, my wife was hit on the side and was thrown against the windshield. In the hospital, the doctors have been trying their best and doing everything in their power, but she has not yet gained consciousness. The doctors have operated to set her broken tibia. My wife has been subjected to a number of scans to determine why she has not yet regained consciousness. The doctors even had to put a tube in her to enable her to breathe. She is being fed through an IV. I have stayed by her side every moment as I have heard that if you talk to the person and tell her how much you love her then there is a strong chance of her waking up.

But this morning the doctors informed me that the latest MRI scans looked very bad. They said that my wife most probably shall never wake up again. I am numb with extreme pain and shock. The doctors have denied me permission to stay by her side. I have been advised to go home and get some rest as there is nothing more which I can really do for her. She was the love of my life. She was my world. She was the purpose of my living. My whole life is over".[29]

Does this new information change your assumptions about what caused this driver to drive so absentmindedly? Does the new information change your perceptions about this person?[30]

At the end of the day, we all are humans negotiating with humans. Our mind works as we want it to work. In case of any altercation with another human being, if we simply and blindly focus on the facts and circumstances of the case, we will end up having multiple legal proceedings as our mind which is highly influenced by our personal biases, perceptions and interpretations, in such a situation, can only think of legal remedies or violence or even war since we have tuned it to think so. However, if we think intuitively, focusing on emotions and feelings rather

[26] *Supra* note 11 at 53.
[27] *Ibid.*
[28] *Supra* note 11 at 53.
[29] *Ibid.*
[30] *Ibid.*

than facts, there will be ample scope to resolve the oncoming conflict amicably with a mutually gained solution that is acceptable, feasible and workable for the humans involved. Therefore, as and when conflict occurs, we should negotiate whenever and wherever possible. Understanding the other human being is the art of negotiation.

In addition, negotiation as an alternative means of dispute resolution comes up with numerous benefits over the traditional legal system. As the negotiation is an informal and flexible process with no involvement of third party, it saves both time and money of the parties involved. It not only preserves the relationship between the participants but also has the potential to mend the broken relationships. The voluntary aspect of negotiation is the another reason for the people to negotiate as not only the participants voluntarily enter into the process of negotiation but are also equally free to leave the process as and when they feel like. Further, negotiation is a confidential process for it helps the participants resolve their dispute without letting the outer world know about it. Lastly, unlike other dispute resolution mechanisms, both process and outcome of a negotiation are under the exclusive control of participants, and the end result is the mutually agreed party-driven solution.

IV Principled negotiation

A soft negotiator is willing to give, in order to reach a compromise. Despite wanting a peaceful resolution, they frequently end up being taken advantage of and left bitter. On the contrary, a tough negotiator desires to win but frequently comes up with an equally tough response that drains them of their energy and resources and damages their connection with the opposing party.[31]

People typically use either a harsh or soft method of negotiation, avoiding personal conflict or viewing any situation as a clash of wills. Nevertheless, there is a third approach to negotiation known as principled negotiation which is neither firm nor soft but rather combines the best elements of both.[32]

Although every negotiation is distinct, the fundamental components remain constant. An all-purpose approach is principled negotiation. It can be applied whether there is a single issue or many, two parties involved or many, more or less experience, and so on. In contrast to almost all other methods, if the opposing side picks this one up, it actually gets simpler to use.[33]

[31] *Supra* note 23 at xxvi.
[32] *Ibid.*
[33] *Id.* at xxvii.

The four fundamental components of principled negotiation, often known as negotiation on the merits, are as follows:

1. Distinguish the individuals from the issue.
2. Pay attention to your interests rather than your status.
3. Create numerous choices in search of win-win outcomes.
4. Demand that the outcome be based on an objective norm.

These four guidelines provide a simple bargaining strategy that may be applied in practically every situation.[34]

That humans are not machines is addressed in the first point. We are highly emotional beings with a propensity for having wildly divergent perspectives and difficulties intelligibly expressing ourselves. Usually, feelings are mixed up with the problem's logical qualities. As people get more associated with their jobs, taking positions only serves to exacerbate this.[35] Positional bargaining are frequently one-dimensional, unimaginative, and poorly suited to the circumstances and requirements of the participants.[36]

Recognizing that every negotiation can be broken down into two main elements i.e., the relationship shared by the individuals participating in the negotiation, and the problem being dealt by the negotiator, helps to distinguish the individual from the issue. The relationship, which is a component of the negotiation's context, has a big impact on how individuals see the issue, how they emote, and how they communicate with one another. The issue is the objective predicament on which the disputants are trying to bargain via negotiation.[37]

Therefore, the "people problem" should be separated from the "substantive problem" and dealt with separately before moving on to that. The participants should learn to see themselves as cooperating and fighting the issue collectively rather than individually.[38] It is not possible to separate the individuals from the issue once and then ignore it. One must continue to work on it. Dealing with people as individuals and the issue as it stands is the fundamental strategy.[39]

In order to avoid the disadvantage of concentrating on people's stated viewpoints when the goal of a negotiation is to meet their underlying interests, the second point is devised.[40] A successful negotiation requires an understanding of the distinction between interests as well as positions. A participant's position is the stance they take because they believe it will advance their interests. However,

[34] *Supra* note 23 at 11.
[35] *Id.* at 12.
[36] *Supra* note 11 at 27.
[37] *Supra* note 10 at 135.
[38] *Supra* note 23 at 12.
[39] *Id.* at 41.
[40] *Supra* note 23 at 12.

the demands, concerns, objectives, hopes, as well as fears that drive people to negotiate are their interests. We frequently shield our objectives from the opposing party during negotiations or conflicts in order to safeguard our own interests. As a consequence, rather than cooperating on the interests underlying our perspectives, we find ourselves disputing about positions.[41]

Positional bargaining has disadvantages that can be avoided, and there is a chance to achieve better results if the focus is kept on underlying objectives, values, as well as wants while dissuading any emphasis on articulating views and demands.[42]

In short, an interest is what drives a conflict participant to make a demand or have a specific goal. The terms 'demand' and 'aspiration' refer to a disputant's claim to the other disputant of what would be necessary to resolve a conflict and the disputant's definite, particular, material goals for settling the issue, respectively. In a similar vein, underlying interests would be those ambitions that lie behind a disputant's ideals or essential human needs. If values were defined, they would refer to the beliefs that underlie a disputant's attitudes, goals, and underlying interests and would have to do with how important or morally righteous a goal is. The fundamental human needs are the motivating factors behind beliefs, goals, core values, and interests.[43]

The factors that support beliefs, aspirations, fundamental interests, and values are referred to as the basic requirements of people since they are believed to be necessary for a healthy human existence and cannot be compromised. Shallower interests are driven by deeper interests, while all other motives are driven by basic human needs.[44]

If the interests of the opposing side are not taken into consideration, it is unlikely that they will listen to the concerns and discuss the solutions put forth. One must demonstrate their receptivity to the opposing side's recommendations. Firmness and transparency are necessary for a successful negotiation. Therefore, before trying to reach an agreement, one need to invent options for mutual gain, which is the third important component of principled negotiation.[45]

Brainstorming is the most popular technique for coming up with a variety of options, and it really requires lateral thinking and inventiveness.[46] Any negotiation may result in a variety of possible agreements that are acceptable to both parties. As a result, it is crucial to create several of possibilities before choosing one.

41 *Supra* note 10 at 135.
42 *Supra* note 11 at 28.
43 *Id.* at 28-29.
44 *Supra* note 23 at 57.
45 *Supra* note 23 at 12.
46 *Supra* note 10 at 138.

Depending on the parties' shared and opposing interests, come up with something first and decide later.[47]

Lastly, an agreement reached through negotiation must adhere to some impartial criteria that is not determined by each party's bare desires. This does not imply that one must insist that the conditions be based on a particular criterion but rather that the outcome be determined by a reasonable standard, such as market value, an expert's view, custom, established practice, or the law. Instead than debating what the parties desire or not desire to accomplish, these criteria allow both sides to defer to an equitable solution without having to give in to one another. As a result, when reaching an agreement, one must concentrate on the fourth fundamental principle, which is insist on applying objective standards.[48]

Three key things to keep in mind when negotiating with the objective standards:

1. Present each issue as a collaborative effort to find objective standards.
2. Use logic to determine which standards are most appropriate and how to apply them.
3. Never give in to pressure, always stick to your principles.

Focus firmly yet flexibly on objective standards, in other words.[49]

Seven negotiation aspects can be used to summarise the entire concept of principled negotiation. First, an efficient two-way communication followed by an appropriate feedback. Second, relationships that needs to be preserved by continuing to create rapport over time. Thirdly, shared interests that must take into account the needs, wants, worries, expectations, and fears of both parties. Fourthly, options where both participants should make an attempt to fully understand all potential outcomes. Fifth, legitimacy, which while weighing the possibilities should unmistakably reflect justice and equal treatment. The identification of BATNA (Best Alternative to a Negotiated Agreement) and alternatives that relate to possibilities that have been fairly considered come in at number six. Lastly, commitments, or the requirements (dos and don'ts) of the parties that must be satisfied before they agree to the final settlement agreement.

One fundamental aspect of negotiation is that the parties involved are dealing with actual people, not just a group of abstract agents. They are unpredictable, have strong emotions, cherished values, varied backgrounds and different points of view. They are prone to illogical leaps, cognitive biases, and partisan perceptions and the same holds true for the negotiator.[50]

[47] *Supra* note 23 at 81.
[48] *Id.* at 14.
[49] *Id.* at 89.
[50] *Supra* note 23 at 21.

The human element of negotiating can either be advantageous or devastating. The act of reaching an agreement may result in a psychological commitment to a solution that will be satisfying to both parties, which will strengthen and maintain the relationship. People, on the other hand, get irritated, depressed, afraid, disappointed, and offended.[51] Therefore, one must be cautious while dealing with the same identity on the other side.

V How to negotiate?

Identifying and implementing a dispute resolution mechanism of maximum benefit in terms of interests, goals and needs, is the foremost concern of a participant in negotiation. The secondary yet important concern is to minimise the likelihood of a recurrence of the conflict and of new conflicts popping up. Further, preservation or improvisation of an ongoing relationship is another important consideration for negotiation.

In order to achieve the above-mentioned goals, one has to learn the art of negotiation which includes the art of effective communication, use of appropriate negotiation styles and approaches, and application of apposite negotiation techniques. These elements, forming the part of the art of negotiation, are collectively termed as negotiation strategies.

Communication

There can be no negotiation if there is no communication. The backbone of negotiation is persuasive communication through which parties exact out their desired outcome by persuading each other to settle. In simple words, negotiation is a process in which parties communicate back and forth, so that they can reach a joint decision. It is never an easy task, even when the parties share common values and experiences. For instance, couples who have lived together for years can still have misunderstandings between them.[52]

Negotiation is the most ubiquitous form of interaction amongst human beings and is found in the most consequential and the most mundane aspects of our lives. From signing high stake business deals, to rescuing hostages, to setting a child's tv-watching time, all are possible through negotiations.[53] At the same time, every conversation is not a negotiation. If you eat antibiotics every time you sneeze, your body will stop responding to the medication. Hence, do not overdo negotiation.[54]

51 *Ibid.*
52 *Supra* note 23 at 35.
53 *Supra* note 3 at 19.
54 *Supra* note 10 at 106.

People often make mistakes in perception and interpretation, when they are observing other people's behaviour. This same problem arises in communication. The sending and receiving of messages are two equally crucial behavioural actions that are included in any communication. These two acts, nevertheless, are hardly ever executed perfectly.[55]

As they say, no lock comes without a key. On these same lines, there are four important elements which are effective in conflict communication. These are:

1. The capacity to send messages in a way, that is clear, exact and non-escalating.
2. Recognising and adjusting for the perception and interpretation problems that are likely to happen as one receives a communication.
3. Tolerance for imperfections in other people's communication style.
4. The willingness to keep trying after early failures to facilitate good communication.

Negotiation Styles and Approaches

The style of negotiation or negotiating behaviour style relates to one's general philosophy of negotiating. A person may probably use more than one style either equally or alternatively. Every style has its own usefulness given a particular situation. Following are the commonly and substantially used styles and approaches:

1 Withdraw or Avoidance (I don't care if I win or lose): Under this approach, disputants neither pursue their interest nor the interest of the other. They are neither assertive nor interested in cooperation.

This negotiation approach is characterised by a sense of powerlessness, surrender, resignation, and accepting whatever the other side is prepared to provide. Negotiators tend to withdraw and distance themselves from the situation.[56] Issues, under this style of negotiation, are generally not addressed and are either ignored or postponed. This approach might take the form of diplomacy and is most often referred to as "passive aggressive".[57]

2 Defeat or Competitive (I win, you lose): Under this approach, individuals pursue their own concerns at the other participant's expense. Each party looks to reach their own goals without sharing any kind of information with the other, and both stay firm on their own positions because they believe that is right.[58]

[55] *Supra* note 11 at 19.
[56] Ved Kumari, Usha Tandon, *et al.*, *Alternative Dispute Resolution Case Material* 50 (Faculty of Law, University of Delhi, 2020).
[57] *Supra* note 10 at 145.
[58] *Supra* note 10 at 142.

It is just a win-lose game marked by pressure, intimidation, and adversarial interactions, the opposite of an accommodating negotiation. The participant's sole aim is to defeat the opposing party at any costs.[59]

3 Accommodate (I lose, you win): Contrary to competitive negotiation, this negotiation technique involves participants neglecting their own concerns in order to satisfy the needs and the interests of the other participant.[60]

This strategy concentrates on encouraging harmony to keep any significant differences at rest. By prioritising personal ties over a fair result, accommodating negotiators give up their interests in favour of the other party. The only goal of the negotiator under this approach is to accommodate the other participant's needs.[61]

4 Compromise (I win some, you win some): Under this approach, participants seek a quick middle ground position. This approach is defined by compromise, going out of one's way to meet the other side halfway, and settling the issue. The objective of this very style is to find an acceptable agreement. Conflict minimization is more important to compromise profile negotiators than collaboratively solving problems and finding solutions. The goal of this technique is to get at an agreeable solution.[62]

5 Collaborative (I win, you win): Under this approach, the participants involved are willing to work with each other to find one solution that can satisfy the needs and interests of both participants.[63]

Collaborative negotiators show great willingness in investing more time and energy in finding innovative solutions, often referred to as "expanding the pie". They feel secure in the fact that once the pie has been expanded, there will be more value to share out between the participants. Collaborative negotiators tend to have the problem-solving behaviour.[64] A collaborative approach seeks to search for common-interest and gain the possible solution for all thereby looking beyond the issues and limitations. It simply leads to a win-win solution.[65]

Negotiation Techniques

One of the crucial elements of negotiation strategy is what is called as negotiation technique which basically corresponds to the way of negotiating. The art of negotiation is nothing but the identification of the best suitable negotiation

[59] *Supra* note 56.
[60] *Supra* note 10 at 144.
[61] *Supra* note 56.
[62] *Supra* note 56 at 51.
[63] *Supra* note 10 at 140.
[64] *Id.* at 141.
[65] *Id.* at 142.

technique given a particular situation. In general, there are eight negotiation techniques. These are as follows:

1 Salami:[66] Salami is a technique in which a small part of objective is achieved at a time, rather than going for the whole one big objective.[67]

For instance, you want to purchase 5 acres of land from a man, who for some unknown sentimental reasons is not willing to sell more than 1 acres of land at the moment. Additionally, you do not have any pressure to acquire all the 5 acres. Here, when applying Salami technique, you can offer the man to give you 1 acre of land at the moment, and an option can be installed for the other 4 acres, where you can purchase other 4 acres over the next 4 years.[68]

2 Fait Accompli: Fait Accompli is a technique used to accomplish the main objective by not spending the necessary time, effort or expenses to follow or work or related items.[69]

For instance, a person sent you a contract which contained some provision which you were not ready to accept. Here, when we apply the technique of Fait Accompli, you can just remove that provision from the contract and sent it back for correction.

3 Standard Practice: Standard Practice is a tactic used to persuade others to do or not do something based on what are considered to be "standard procedures".[70]

For instance, a builder who was there for the construction of girls' hostel told the University about the terms of payment which were, 60% when the construction started, 20% when the construction will be half completed and 10% on the completion of the hostel. The University was not ready to accept this offer and showed the builder the standard contract, pertaining to industry standard, which was used to prove his point.

The builder finally agreed to accept 30% payment at the start of the construction, 30% when the construction is half completed and 40% when the construction is complete. This gave the University the assurance that the building would be done before the builder could pocket the profit, while also giving the builder enough money to complete the project.

4 Deadline: Time is very important for people and organizations. For the same reason, deadlines can be very important negotiation technique. This is a two-way street. If one party has deadlines, there is a high probability that the other

[66] This technique is said to have been named by Matyas Rakosis, General Secretary of the Hungarian Communist Party.
[67] *Supra* note 56 at 55.
[68] *Supra* note 56 at 55.
[69] *Id.* at 56.
[70] *Ibid.*

party also has some. We can better organize our strategy the more we are aware of the opposing party's deadlines.[71]

E.g., aar salesman sometimes try to draw out quotation price negotiations, hoping the amount of time you have invested will increase your commitment to make the deal. Here, to defuse this strategy, apply the Deadline technique and try to begin your negotiation for a new car by informing the salesman that you have only an hour to make a possible deal.

5 Feinting: Feinting provides the idea that one thing is sought when in reality, a different goal is the main goal.[72]

For instance, an employee is negotiating with their boss for getting a promotion, when in reality the objective is getting a hike in the salary.[73]

6 Apparent Withdrawal: Along with deferring and feinting, apparent withdrawal may also include some deceit. It tries to trick the other negotiator into thinking that you've stopped considering a point when you haven't in reality.

E.g., you want to hire a taxi from airport to your workplace. The taxi driver has offered you a fair which you do not want to pay. Here, apply the apparent withdrawal technique and pretend to move to the other taxi driver. Seeing this, the previous taxi driver may call you offering a lower fair.

7 Good Guy/ Bad Guy: This technique is an internationally used strategy. It involves two participants on one side of the negotiation, one of whom adopts a tough stance while the other is approachable and easy to work with. When the bad guy leaves for a little while, the good guy makes an offer that, given the situation, could be too good to ignore.

e.g., A husband and wife go out to buy a fully HD television. The husband acts in an aggressive and dominant way, complaining about the price and the salesperson's condescending manner. However, the wife takes the salesperson aside and apologises for her husband and whispers a price at which she thinks he will buy.

8 Limited Authority: By stating that anything other would require higher approval, a position with limited authority is an attempt to induce acceptance of that stance.

For instance, a salesperson cannot offer a cash discount which is more than 5%, as that would require approval from a higher authority.

71 *Id.* at 57.
72 *Supra* note 56 at 58.
73 *Ibid.*

Alternatives

Once the participants have identified the potential options available in a negotiation, the next step is to evaluate those options depending upon their acceptability, feasibility and workability in relation to both the participants. These evaluated options, called the alternatives, can further be classified into BATNA, MLATNA, Bottom Line, WATNA and ZOPA.

1 BATNA (Best Alternative to a Negotiated Agreement): Creating your BATNA will likely increase the minimum acceptable agreement, in addition to allowing the negotiator to select what is the minimum acceptable agreement.[74]

The best alternative one has, other than the options that are feasible in a particular negotiation, is referred to as BATNA when taking into account one's goals, interests, values, and requirements. To know one's BATNA, then, is to be aware of one's best course of action in the event when negotiations fail to result in an agreement.[75]

Some too optimistic people will reject a fantastic offer that is significantly better than their alternatives because they are unsure of their BATNAs.[76] For effective use of BATNA, every time you receive an offer from the other side, you need to compare it to your BATNA before rejecting or accepting the offer.[77]

2 MLATNA (Most Likely Alternative to a Negotiated Agreement): It is sometimes, also called as EATNA i.e., Estimated Alternative to a Negotiated Agreement. Knowing MLATNA enables one to be prepared with an alternative if one fail to achieve what one wanted in the negotiation.[78]

3 Bottom Line: By determining in advance the point or the bottom line, beyond which the worst acceptable result, or WATNA, occurs, negotiators frequently attempt to safeguard themselves from a conclusion that has been properly considered rejected.[79]

The ultimate barrier beyond which a discussion will not continue is intended to be the bottom line. It is a technique of defending oneself against the pressure and temptation that are frequently used to compel a negotiator to reach a self-defeating agreement.[80]

Adopting a bottom line comes at a great expense in terms of protection. It restricts one's capacity to gain from what they discover through negotiation. A bottom line is an assertion that should not be modified. To that point, the bottom

[74] *Supra* note 23 at 108.
[75] *Supra* note 11 at 50.
[76] *Supra* note 10 at 154.
[77] *Id.* at 162.
[78] *Supra* note 19 at 45.
[79] *Supra* note 23 at 100.
[80] *Supra* note 10 at 157.

line becomes static and there is no longer any chance of increasing or decreasing it.[81]

A bottom line also limits creativity. It lessens the motivation to come up with an original solution that would reconcile conflicting interests in a way that is better for all parties involved in the negotiation.[82] Adopting a bottom line may prevent one from signing a really terrible deal, but it may also prevent one from coming up with and accepting a solution that is sensible to accept.[83] Therefore, one has to be extra cautious in determining and setting up of bottom line.

4 WATNA (Worst Alternative to a Negotiated Agreement): The worst potential result of a certain option, when the result of picking the option is unclear, is referred to as WATNA considering one's aspirations, interests, values, and requirements. In other words, WATNA is the worst result that may result from a failed attempt to negotiate a deal.[84] Knowing WATNA enables one to assess the advantage of the possible agreement.[85]

5 ZOPA (Zone of Possible Agreement): ZOPA or bargaining range is the range of possible solutions where both the negotiators would be mutually benefited. It commonly exists when there is some overlap in the expectations of the participants regarding the final settlement. It is that zone which if not fully, to an extent, caters the needs, interests and desires of the participants. If the negotiators fail to attain ZOPA, they are considered to be in a negative bargaining which is only possible when the participants are not actually negotiating. Positive bargaining is a common phenomenon whereas negative bargaining is an exception. In general, ZOPA may range between the BATNAS or WATNAS or even the Bottom Lines set out by the participants in a negotiation. Narrower the ZOPA, higher is the possibility of successful negotiation.

VI Conclusion

The most important fact about negotiation, which we must never forget, is that negotiation is for and between the human beings. Negotiation is nothing but a fundamental strategy for gaining what one seeks from others. It is back-and-forth discourse intended to reach an understanding when one party and the other have some.[86]

81 *Supra* note 23 at 100.
82 *Id.* at 101.
83 *Ibid.*
84 *Supra* note 11 at 50.
85 *Supra* note 19 at 45.
86 *Supra* note 23 at xxv.

Separating people from the issue, focusing on interests, inventing multiple mutual gain options and objective standard based result, are highly associated with optimised dispute resolution. In addition, seeking cooperation and identifying alternatives wisely are equally important.

The principled negotiating approach, which focuses on fundamental interests, solutions that satisfy both parties, and just standards, often yields a sensible agreement as opposed to positional bargaining. Separating the people from the issue enables one to interact with the other negotiator in a human-to-human manner, independent of any substantive differences, thus making a peaceful resolution feasible.

Expect the unexpected. Every negotiation will be different. Therefore, it is absolute important to identify and choose the appropriate style and technique depending upon the situation, timing and circumstances. The preparation predominantly includes the knowledge of BATNA. Knowing your BATNA before entering into negotiation gives a sense as to what you will do or what will happen if you fail to reach an agreement in the negotiation at hand. The success rate of negotiation rises when participants negotiate as partners and not as opponents, and work for amicable solutions through collaborative style of negotiation as integrative bargaining maximizes the availability of options. It is rightly said – "Always act never react", for negative reaction causes negative defense position and in such a situation – stop, stay calm and reposition yourself and then continue.

The only idea is, since life is too short, resolve all conflicts before you depart. The trick is, therefore, not having any conflict but to resolve every conflict as soon as you have it. You cannot and should not go to bed having an argument, disappointment, resentment, sorrow and doubt, but rather should try to resolve it for the reason that you are alive, but how long no one knows. So, negotiate today, tomorrow and every day.[87]

> *"Let us never negotiate out of fear, but let us never fear to negotiate".* [88]
>
> John F. Kennedy[89]

[87] Deepak, Cyberlink Power Director, Youtube, *The Story of Kashi Labh Mukti Bhawan*, 2018, *available at* https://www.youtube.com/watch?v=QwVe7WsZXyU (last visited on October 10, 2022).

[88] As quoted in Anuroop Omkar and Kritika Krishnamurthy, *The Art of Negotiation and Mediation: A Wishbone, Funny bone and A Backbone* 187 (LexisNexis, 2015).

[89] (1917-1963), John F. Kennedy, was the 35th President of the United States.

References

Anuroop Omkar and Kritika Krishnamurthy, The Art of Negotiation and Mediation: A Wishbone, Funny bone and A Backbone (LexisNexis, 2015).

Avtar Singh, Law of Arbitration and Conciliation and Alternative Dispute Resolution Systems (Eastern Book Company, Lucknow, 11th edn., reprint 2021).

Deepak, Cyberlink Power Director, Youtube, The Story of Kashi Labh Mukti Bhawan, 2018, available at https://www.youtube.com/watch?v=QwVe7WsZXyU (last visited on October 10, 2022).

Delhi High Court Mediation and Conciliation Centre "Samadhan", Reading Material: 45 Hours of Mediation Training Programme (2021).

Laurie S. Coltri, Alternative Dispute Resolution: A Conflict Diagnosis Approach (Prentice Hall, an imprint of Pearson, New York, 2nd edn., 2010).

Peter J. Carnevale and Dean G. Pruitt, "Negotiation and Mediation", Annual Review of Psychology (1992).

Roger Fisher and William Ury, Getting to Yes: Negotiating an Agreement Without Giving In (Random House Business Books, London, 3rd edn., 2012).

Russell Korobkin, Negotiation Theory and Strategy (Aspen Law and Business, New York, 2nd edn., 2009).

Saurabh Bindal, Avtar Singh's Arbitration & Conciliation and Alternative Dispute Resolution Systems (Eastern Book Company, 12th edn., 2022).

Shashank Garg (ed.), Alternative Dispute Resolution: The Indian Perspective (Oxford University Press, 1st edn., 2018).

Sriram Panchu, Mediation Law and Practice: The Path to Successful Dispute Resolution (Lexis Nexis, 3rd edn., 2022).

Stephen B. Goldberg, Frank E.A. Sander, et.al., Dispute Resolution: Negotiation, Mediation and Other Processes (Aspen Law and Business, New York, 3rd edn., 1999).

Ved Kumari, Usha Tandon, *et al.* Alternative Dispute Resolution Case Material (Faculty of Law, University of Delhi, 2020).

Yaraslau Kryvoi and Dmitry Davydenko, "Consent Awards in International Arbitration: From Settlement to Enforcement" 40(3) Brooklyn Journal of International Law (2015).

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

VERMA, Akshay. Negotiation for human beings: what, why and how? *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 17-37, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.2.

DOI: 10.52028/rbadr.v4i8.3

Navigating the practicalities of achieving diversity in arbitration*

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Abstract: Available literature highlights that though most countries had their own form of private dispute settlement, similar to an unorganized form of arbitration, the development of modern international commercial arbitration, as it exists today, dates back to several concrete steps taken in the twentieth century by Western countries. Decades later, this Western influence continues to be highly pervasive, and is one of the important contributing factors for practitioners from such regions enjoying the greatest number of appointments as arbitrators. This has led to serious debates revolving around diversity and inclusivity in arbitral tribunals. Through this research paper, the authors attempt to examine the various factors that affect these ideas of 'inclusivity' as well as 'diversity', and how these ideas are consistent or inconsistent with the fundamental principles underlying arbitration. The paper discusses various initiatives that have been undertaken to increase all forms of diversity – of nationality, race, gender, culture, and so on- and then evaluates the effectiveness of the same. It also analyzes the idea of 'familiarity' in appointment of arbitrators, including the idea of an arbitrator's previous experience, and if at all it would be fair to ask parties to give up on their autonomy while pushing for diversity in the tribunal. The research is premised on the hypothesis that there exists an inherent tension between these ideas. Given that most legislations recognize the autonomy of contracting parties are extremely essential, any initiative seeking to increase diversity might turn out to be a complex one. The authors also discuss, as a case study, the structure of the Indian judicial system, which in the absence of any definite setup has struggled to create and sustain diversity, particularly from the gender vantage. The paper concludes by discussing plausible solutions, structures and stakeholders, which if identified, as well as regulated efficiently, can play a significant role in pushing for such changes.

Keywords: Arbitration. Bias. Diversity. Tribunal appointments.

Summary: Introduction – Part I: the quest for diversity: a question for legitimacy? – Part II: outline of existing hurdles – Part III: towards a novel solution – Conclusion – References

* This paper was first presented at the 'Conference on Sustainable Diversity in Arbitration, Nagoya University, Japan (November, 2021)'.

Introduction

For the past few years now, the proposition of watching an alien invasion or superhero movie from Hollywood has begun to feel less exciting. This is primarily because of two reasons – Firstly, because most of these invasions take place in either the USA, Europe or some white-majority dominated country. Secondly, because of the borderline laughable attempts by the filmmakers to have diverse representation in the movie. For instance, with India, it is almost always Bollywood dances, Indian spices and food. However, regardless of such stereotyping, the idea that filmmakers of the West are now pushing for diversity, highlights that in a rapidly globalizing world, diversity is increasingly being recognized as not only important, but even necessary, in most formal (or in some cases, even informal) contexts for greater acceptance.

It would seem that governments and think tanks, companies and businesses, even educational and financial institutions are pushing for optimal inclusion at every level, often measuring their performance along 'diversity dimensions,' and attempting to assess and bolster the impact of their diversification initiatives.

Considering that in today's era, a huge number of parties (individuals, corporations, even states) from different geographical locations, contracting in different languages and subject to different sets of laws, are electing to submit their disputes to international arbitration, it hardly comes as a surprise that there has been a uniform push for "*greater diversity, especially in relation to the appointment of arbitrators*"[1] in international arbitration. As captured by a phrase that was catapulted into popular use by its usage at the 2014 ICCA Miami Conference, as of today, the vast majority of international arbitrators are "*male, pale, and stale*",[2] a fact that is well-reflected in the data measuring these appointments. Apart from the visible dominance of senior, male arbitrators, the ICC reported that approximately half of its appointed arbitrators came from five countries (USA, UK, Switzerland, France, and Germany) alone.[3]

This fact is disappointing, though not surprising; even though promisingly, and in step with most other sectors, the arbitration community has identified its 'diversity' problem, and demonstrated at least a willingness to engage with

1 '2021 International Arbitration Survey: Adapting arbitration to a changing world?', White & Case LLP (2021). Available at – https://www.whitecase.com/publications/insight/2021-international-arbitration-survey/diversity-arbitral-tribunals.

2 Winkler, Matteo and Schinazi, Mikael, 'No Longer "Pale, Male, and Stale"? Approaching Diversity and Inclusiveness in International Arbitration' (January 31, 2021). Forthcoming in Liber Amicorum Guillermo Aguillar Alvarez, Available at SSRN: https://ssrn.com/abstract=3776738 or http://dx.doi.org/10.2139/ssrn.3776738.

3 ICC Dispute Resolution Statistics, Arbitration notes (2021). Available at: https://hsfnotes.com/arbitration/tag/icc-dispute-resolution-statistics/.

it through both discussion and action, party autonomy continues to supersede broader inclusivity considerations, preserving the hegemonic status quo. This paper attempts to assess the existing problems and efforts related to the 'diversity push' in international arbitration (partly through a case study of the structure of the Indian judicial system) to discuss possible solutions, structures and stakeholders which, if identified and regulated efficiently, can play a significant role in such a push.

Part I of this paper points to the historical development of arbitration as a system of *private* law, highlighting the problem concomitant with trying to bring greater diversity to arbitral tribunals: where parties are entitled to select their tribunal, 'diversity' and 'inclusivity' as external concepts have to be reconciled with this choice of the parties that is so intrinsic to arbitration. It then addresses why concepts like 'diversity' and 'inclusivity' are important, not only generally, or with respect to the principles of natural justice and legal fairness, but also specifically to international arbitration. It also discusses the impact that these factors have on efficiency and decision-making. Part II outlines the existing hurdles with respect to diversity in international arbitration, furnishing a critical description of the problems that contribute to this lack of diversity. A study of the Indian judicial system is undertaken to shed light on the struggle to generate diversity, particularly from the vantage of gender inclusion, in the absence of any definite setup. Part III discusses how this normative proposition of greater diversity in constituting arbitral tribunals should be implemented, not only by reviewing the existing initiatives related to this idea but also recommending improved and novel solutions, both institutional and individual. It also addresses the need to properly recognize and control any such reform in order to establish a legal framework.

Part I: the quest for diversity: a question for legitimacy?

Arbitration is generally regarded as a private, voluntary dispute-resolution mechanism. Parties to an arbitration agree to confer the power to resolve their dispute on a tribunal, simultaneously depriving courts of that jurisdiction. Because the arbitration procedure is contractual in nature, the parties possess a great deal of autonomy, a critical component of arbitration.[4]

However, arbitration is far from a purely private matter. Over time, it has evolved from a mere creature of the parties' contract to a sophisticated, global dispute-resolution system with numerous aspects of public law. International

[4] 'What is Arbitration?' World Intellectual Property Organization. Available at https://www.wipo.int/amc/en/arbitration/what-is-arb.html.

arbitration rests on an impressive edifice of national and international legislation as well as the rules and procedures of global arbitral institutions.

With this evolution of arbitration, the principle of party autonomy has become less absolute. Party autonomy can be superseded, for example, when the parties are treated unequally or the contract violates public policy. It is obvious that there are "… *many intrusions on party autonomy*"[5] that, over time, "*have been accepted as a natural element of arbitration life*".[6]

The broader concept of diversity, as an idea, refers to the practice or quality of drawing, including and involving people from a variety of backgrounds in any set-up. Diversity in arbitral tribunals, it may be defined with reference to gender, age, regional, ethnic, cultural, or any other factors.

Many have questioned if there are any value additions that diversity might bring to arbitration. This question is in many instances also used as a counter argument to argue whether diversity in international arbitration is important at all. The answer is simultaneously simple and complex. At the outset, it must be noted that diversity, by itself, is merely a fact. Half of the world's population is female. Ninety percent are below the age of sixty-five. Three-fourths reside in so-called 'developing countries'.[7] Diversity in international arbitration is important to ensure that arbitration reflects the reality of the world population. Unless a concerted effort is made to update international arbitral tribunals not to be so overwhelmingly white, male, and American/European, it is likely that arbitration will be left behind in an antiquated era while the rest of the world (and the legal services industry) marches on.

Apart from empirical and ethical considerations, there are other reasons why diversity is desirable, both generally and in international arbitration. To begin with, it is now widely recognized that individuals with varied backgrounds and experiences (naturally) carry their novel perspectives with them. They possess a wider variety of talents that a team can put to use to achieve its goal. A range of diverse viewpoints can even assess a plan and gauge its efficiency before the plan is actually implemented in the real world. On a macro-level, companies with a diverse workforce can compete more effectively in the global market.[8]

This factor has enormous implications for arbitration, which was and remains essentially a decision-making process. The diversification of any group of

[5] Darius J. Khambata, 'Tensions Between Party Autonomy and Diversity', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, (2015) 18 (Kluwer Law International; ICCA & Kluwer Law International) pp. 612-637.

[6] *Ibid*.

[7] Max Roser, Hannah Ritchie and Esteban Ortiz-Ospina (2013) – "World Population Growth". Published online at OurWorldInData.org. Retrieved from: 'https://ourworldindata.org/world-population-growth'.

[8] '12 Benefits of Diversity in the Workplace', (SplashBI). Available at – https://splashbi.com/pdf/benefits-advantages-diversity-in-workplace-pdf.pdf.

decisionmakers concurrently enhances its cognitive capabilities. It allows such a group to draw from a pool of heterogeneous knowledge, experiences, and understandings to reach a comprehensively reasoned decision. This is well-corroborated by data: an analysis of a number of business decisions demonstrated that 'inclusive' decision-making clearly boosted performance. Teams that were formed keeping in mind diversity of gender, age, and geographical location had a clear competitive edge.[9] Moreover, they were able to reach these improved decisions in "*half the time, with half the meetings.*" In empirical terms, when a team was gender-diverse, it performed 6% better than average. When the team was also age-diverse, this percentage climbed to 45. A team that was diverse with respect to gender, age, and geography performed above average a staggering 60% of the time.[10] Clearly, as far as collective decision-making itself is concerned, diverse groups of persons are able to reach the same or even improved decisions and outcomes faster, more efficiently, and more often than average. The same result was replicated in a study of arbitral tribunals' decisions. Diversity had a demonstrable impact on an arbitral tribunal's teamwork, efficiency, and decision-making, as well as expediting and improving the quality of different phases of the hearing.[11] Further, without diversity the idea of 'international' arbitration would paradoxically not be representative of the global community it seeks to serve. Arbitrator's idea of reasoning would be dependent on experiences which consequently give them the ability to understand the circumstances in a dispute.[12] Further, this cannot only help bring fresh perspectives about the diverse issues but also impact the justifications and acceptability of the awards. It can also help push for pluralism in the decision-making process and break the predictable ways in which parties would look into a dispute. However, such pluralism, which has now been looked at as being fundamental to a fair process and outcome, must not be confused with 'unfettered powers' where the arbitrators can go against the generally decided norms while awarding decisions.[13]

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9 Hacking Diversity with Inclusive Decision Making', (Cloverpop,2021), https://www.cloverpop.com/hubfs/Whitepapers/Cloverpop_Hacking_Diversity_Inclusive_Decision_Making_White_Paper.pdf.

10 *Ibid*.

11 Dr. Cristina Iona Floreschu, 'Report on the Diversity Roundtable at Vienna Arbitration Days 2018', (2018) 8(1) International Law Review, pp. 42-59 at 44. See also Franck S., Freda J. Lavin K. Lehmann T. & van Aaken A., "The Diversity Challenge Exploring the 'Invisible College' of International Arbitration", Columbia Journal of Transnational Law, 2015 at p. 496.

12 Naimeh Masumy, 'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role Ensuring Diversity?', Fordham International Law Journal, available at- https://www.fordhamilj.org/iljonline/2020/11/23/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern-and-should-arbitral-institutions-play-a-greater-role-ensuring-diversity#_ftnref8.

13 C. Rogers, 'The Vocation of the International Arbitrator', (2005) 20(5) American University International Law, available at – https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1150&context=auilr.

Part II: outline of existing hurdles

Arbitration is not what it was a few decades ago. With the economy opening up in many countries and the consequent change in economic dimensions, the geographical origins of the disputants are also changing which further exacerbate the urgent need for diverse representation. For example, in 2020, the ICC court of Arbitration had 41.9% of its parties coming from Asia Pacific and Latin American countries.[14] Similarly, for SIAC, in 2020 India and China alone constituted 86.9% of the total cases in Arbitration.[15] However, a glance at the number of arbitrator appointments from these regions will inevitably reflect a growing need for diversity.

Since 2012, when efforts were first made to systematically gather data to highlight the lack of female arbitration practitioners and associated biases in arbitrator appointments, the literature around gender diversity has consistently expanded, gradually becoming an important part of the debates, discussions and discourse of the arbitration community.[16]

2.1 The diversity deficit beyond gender

While these increased discussions have ushered in positive changes in the gender aspects, a parallel issue that has plagued and severely damaged the reputation of arbitration as a truly 'global' dispute-settlement mechanism is the lack of representation from the perspective of race, age and geography. In the 2021 QMUL White & Case International Arbitration Survey, many interviewees stressed upon the serious need for such diversity in investor state arbitration in an effort to enhance the perception of its Arbitration's legitimacy. The report also highlighted that a significant number of interviewees felt that the tribunals composed entirely of arbitrators who have no understanding or relationships with a specific country or culture central to the dispute in question may not be able to appreciate the cultural differences and could subconsciously favour parties from areas or cultures with which they are familiar with.[17]

The path to increase diversity in these aspects is admittedly even more complex, owing to the fact that the lack of such representation has rarely been addressed, let alone properly researched. However, such a lack of diversity can be

[14] ICC Dispute Resolution 2020 Statistics, available at – https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf.

[15] SIAC Annual Report, available at – https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf.

[16] Lucy Greenwood and C. Mark Baker, 'Is the balance getting better? An update on the issue of gender diversity in international arbitration, Arbitration International' (2015) Arbitration International.

[17] 2021 International Arbitration Survey, Adapting Arbitration to a Changing World, The School of International Arbitration (SIA), Queen Mary University of London White & Case, https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

narrowed down to two external factors – the lack of voices highlighting such ethnic and geographical concern (unlike with say, gender, where many women and men alike have started to voice their opinions), and the lack of success in the decolonization of international law and consequently, international arbitration, in many parts of the world. As a result of this, there persists even today an overrepresentation[18] of Americans, Europeans and other Westerners in most realms of public life.

Often identified as a problem of invisible 'glass-ceiling' difficult for diverse candidates to break, this lack of gender diversity in international arbitration is in many ways also mirrored in appointments to judiciary, the elevation of lawyers to designated senior counsels, and higher positions in law firms more generally. The glass-ceiling problem inevitably also contributes to the pipeline leak,[19] as many such underrepresented groups leave the profession because they are unable to overcome numerous invisible barriers. For arbitration, such concerns are inevitably more acute.[20] This is because, as pointed out, tribunal members from diverse backgrounds can add value in understanding certain aspects of an arbitration specific to that particular region, which, for example, an old, white, male arbitrator could not have foreseen.[21]

2.2 Bottle necks in diversity – common for all systems?

There are two broad schools of thought that identify the problem of diversity: supply side issues, according to which the pool of diverse arbitrators is not sufficiently large, and demand-side issues, which puts the onus of increasing diversity on the process of arbitrator appointment and nomination.[22]

The question then remains: which factors have acted as hurdles for an increase in diversity? A general comparison shows that hurdles to diversity of all types are mostly common. Here the controversial, and often debated as a primary hurdle to diversity in arbitration, like repeated appointment of arbitrators

[18] Douglas Pilawa, 'Sifting Through the Arbitrators for the Woman, the Minority, the Newcomer', (2019) 51(14) W. Res. J. Int'l Law, https://scholarlycommons.law.case.edu/jil/vol51/iss1/14.

[19] 'Diversity on arbitral tribunals: What's the prognosis?', White & Case LLP (2021). Available at: https://www.whitecase.com/publications/insight/2021-international-arbitration-survey/diversity-arbitral-tribunals.

[20] Naimeh Masumy, 'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role Ensuring Diversity?', Fordham International Law Journal, available at- https://www.fordhamilj.org/iljonline/2020/11/23/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern-and-should-arbitral-institutions-play-a-greater-role-ensuring-diversity#_ftnref8.

[21] Payel C. and Vyapak D., 'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?'(Wolters Kluwer, 2020), http://Arbitrationblog.Kluwerarbitration.Com/2020/03/01/Is-Increasing-Gender-And-Ethnic-Diversity-In-Arbitral-Tribunals-A-Valid-Concern/.

[22] Gemma Anderson, Richard Jerman And Sampaguita Tarrant, Morrison & Foerster, 'Diversity In International Arbitration', Thomson Reuters Practical Law, https://Uk.Practicallaw.Thomsonreuters.Com/W-019 5028?Transitiontype=Default&Contextdata=(Sc.Default)&Firstpage=True#Co_Anchor_A663452

can be placed,[23] together with other serious bottlenecks like 'Pipeline leak', wherein the pool of people available for appointment to an arbitral tribunal keeps on decreasing.[24] Moreover, most arbitrators appointed are either retired judges or senior counsels, and in most legal systems, minorities are historically and systematically underrepresented in such positions.[25]

At other times, however, the difference lies in the specific nature of the issue – for instance, many might argue that geographical diversity is affected by the country or geography of the dispute as most parties would want to appoint arbitrators who know the region and its history well, whereas such factors do not act as a hurdle for gender diversity. However, the bottom line for such problems is that the solution ultimately lies in recognition and expansion of the circle of arbitrators to provide opportunities to candidates from diverse backgrounds.

In addition to these aforementioned factors, the lack of information about arbitrators and an established reputation also serves as significant deterrent in selection. As *Yves Dezalay* and *Bryant G. Garth* have argued, there exists a feedback loop within arbitral institutions, of which chairs, clients, potential arbitrators and counsels are a part.[26] Such a feedback loop while answering to any queries regarding the quality of potential arbitrators are often conservative and riddled with inherent biases.[27] Such practices could not only raise questions on the merit of the arbitrators selected, but can also at the micro level adversely affect the validity of the proceedings. The only way to counter such a problem is by curing the information asymmetry i.e., making arbitrator information (like their skill level, experience, area of specialization, track record, and so on) accessible to the all interested parties, thereby making such a feedback loop redundant.[28] Many organizations have already begun this process: for example, Arbitrator Intelligence, a not-for-profit organization aims to promote openness, accountability, and diversity in arbitrator selection. This is done by making information about the arbitrators' prior decision-making more widely accessible via the release of AI Reports. Arbitrator

[23] Darius J. Khambata, 'Tensions Between Party Autonomy and Diversity', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, (2015) 18 (Kluwer Law International; ICCA & Kluwer Law International) pp. 612-637.

[24] Gemma Anderson, Richard Jerman And Sampaguita Tarrant, Morrison & Foerster, 'Diversity In International Arbitration', Thomson Reuters Practical Law, https://Uk.Practicallaw.Thomsonreuters.Com/W-019.5028?Transitiontype=Default&Contextdata=(Sc.Default)&Firstpage=True#Co_Anchor_A663452

[25] Fakhruddin Ali Valika, Improving the Participation of Minorities in International Arbitration, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2019/11/10/improving-the-participation-of-minorities-in-international-arbitration/.

[26] Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and The Construction of A Transnational Legal Order, (The University of Chicago Press 1998).

[27] Lucy Greenwood, 'Tipping The Balance – Diversity and Inclusion in International Arbitration', 2017 33 (1) Arbitration International.

[28] C. Rogers, 'The Vocation of the International Arbitrator', (2005) 20(5) American University International Law, available at – https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1150&context=auilr.

Intelligence has garnered support from arbitration practitioners, who agree that more knowledge about arbitrators can enhance international arbitration for everyone. Young and diverse arbitrators, in particular, might benefit immensely from eliminating the information bottleneck that hinders them from creating reputations that boost their chances of future appointments. The use of AI technology on the available databases can improve data analytics to suggest the most suitable candidate for a particular case based on the requirements and preferences of the parties. But whether such technology can completely filter out human biases is a continuing debate with scholars diversely divided.[29] Additionally, use of such technology may be affected by two potential hurdles – Data and Filter. The question of which data must be considered to feed is and such data must be ranked is significant. For instance, any young arbitrator who might register in the platform could display his/her previous work experience in a firm, published opinions or papers as information. However, such data might be much different for an experienced arbitrator, who might have an edge on account of the experience. This could also be true for two similarly aged person with same qualifications and publications but with different number of previous appointments due to different geographical opportunities. The question that then arises, is on the capability of the AI algorithm to differentiate such data while making diverse appointments. The second issue of filter is intricately related to data. For any algorithm, even if all the significant data have been included, the power of using a filter will lie with the consumer – which in most if not all cases is the party. There is every chance that the parties will in such cases suffer from consumer biases. To build on this argument, imagine this, if Mr. X wants to buy a smartphone and found 2 models on the same price range with the exact same features but one of them is from a company that is launching its first product (which is the phone), while the other is from a company that has established itself in this business from the last 10 years. Inevitably, in most cases, the consumers would buy the latter phone, owing to the trust that the brand has built. To think of it, the idea of choosing an arbitrator is not much different. It is not necessary for the parties to select a filter of diversity which instructing the algorithm to choose potential matches.

In the recent years, several institutions have created and supported initiatives to increase gender, ethnic and racial representation. But this has not necessarily translated into a tangible positive impact. Taking gender diversity as an example, Lucy Greenwood and Mark Baker highlight the statistics of American Arbitration Association's International Centre for Dispute Resolution (ICDR). The ICDR had

[29] Matthew Hutson, 'Even artificial intelligence can acquire biases against race and gender' (Science, 13 April 2017), available at www.sciencemag.org/news/2017/04/even-artificial-intelligence-can-acquire-biases-against-race-and-gender.

taken steps to increase the number of women arbitrators in the roster, but had later observed out that mere inclusion of women in arbitrator rosters have not led to a corresponding increase in the number of female arbitrator appointments.[30] Therefore, while recognizing the issues of information asymmetry or pipeline leak is important, addressing it alone cannot solve the problem. Rather, both these issues point to an overall structural problem and the pressing need for a comprehensive reform. The screening and appointing of arbitrators, as discussed above, often takes place through word of mouth, which is severely limited in scope. As a result, diverse and qualified candidates, who are less visible or are not part of such circles, do not make the cut.[31]

2.3 The geographical problem

Arbitration suffers from a colonial hangover – there are no two ways of saying this. More than three centuries ago, the Jay Treaty was concluded between the United States and Great Britain. This treaty created a private mechanism to resolve property-disputes, which later developed into modern arbitration. Despite the passage of hundreds of years, this original Anglo – European influence on arbitration remains visible even today.[32] This can be narrowed down to the impact of decades of colonization and its consequent influence on the judicial systems of a number of countries. Additionally, even today, for most countries, a large portion of the business comes from Anglo-European countries, which has led to several bilateral agreements where the preferred institutions are mostly Anglo European, barring a few exceptions.[33] This in most instances also has to do with the commercial or investment interest that western companies bring to the poorer or less developed countries, which inevitably impacts the bargaining power. Many critics have pointed out the practices in international investment law as an attempt to maintain Anglo European hegemony in non-European states, thereby linking it with colonialism and protection of oppressive commercial interests.[34]

[30] Lucy Greenwood and C. Mark Baker, 'Is the balance getting better? An update on the issue of gender diversity in international arbitration, Arbitration International' (2015) 31 (3) Arbitration International.

[31] Gemma Anderson, Richard Jerman And Sampaguita Tarrant, Morrison & Foerster, 'Diversity In International Arbitration', Thomson Reuters Practical Law, https://Uk.Practicallaw.Thomsonreuters.Com/W-019.5028?Transitiontype=Default&Contextdata=(Sc.Default)&Firstpage=True#Co_Anchor_A663452.

[32] Investor-State Dispute Settlement, Office of The U.S. Trade Representative (2015). https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.

[33] James E. Meason & Alison G. Smith, 'Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench', (1991) 12 Northwestern Journal of International Law & Business, https://scholarlycommons.law.northwestern.edu/njilb/vol12/iss1/7/.

[34] Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (CUP 2013) 21.

Further, there is an evident cyclical pattern – the parties tend to trust arbitrators with a proven record of 'expertise' or 'experience' over their diverse background, which given the history of appointments are mostly Anglo European men. Significant to mention here, although the HKIAC and SIAC can be in many ways termed as outlier, a closer look will show that it is inevitably the Anglo European community who have dominated and contributed to its development immensely.

2.4 Comparisons with the Indian Judicial System – Policy Commonalities

We now undertake a case study of the Indian judicial system from the viewpoint of diversity. Any attempt to draw a comparison of arbitration with the Indian judicial setup can be potentially countered with argument that both these systems are vastly different, insofar as the very nature of public law is sharply distinct from private law. However, the influence of national law on arbitration as well as the concerted attempts to project arbitration as an effective alternative to courts cannot be undermined. The general understanding of arbitration has thus shifted to the point that it can no longer be considered to be a purely private law, and even in the narrowest sense will have elements of public law.[35] Considering such a perspective, it might not be completely unwarranted or unhelpful to compare and understand the dilemma surrounding diversity that has plagued many 'national' judicial systems to better innovate solutions for an 'international' system of arbitration.

Moreover, the problem of a lack of gender diversity in the judiciary is hardly an Indian one. To identify this, the UN published a Special Rapporteur report focusing on 'gender equality in the judiciary' which examined the current situation of women's representation in judicial systems. The report identified the obstacles preventing their sufficient access, advancement, and retention in the court and prosecution services, and throughout the report, pointed out the variety of obstacles women experienced in gaining entry to and succeeding in a job in the legal system. It highlighted that underrepresentation of women in decision-making positions or their restriction to particular sections of the legal system are the results of many regulatory impediments and institutional, structural, and cultural barriers that contribute to discrimination against women in the judicial system. The research also suggested that gender stereotypes were one of the primary reasons for discrepancy in the number of women judges in the various courts and tribunals,

[35] Darius J. Khambata, 'Tensions Between Party Autonomy and Diversity', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, (2015) 18 (Kluwer Law International; ICCA & Kluwer Law International) pp. 612-637.

as well as putting women judges and prosecutors at a greater risk of aggressiveness or other kinds of workplace harassment.[36]

Though the empirical survey suggested that the share of women in certain jurisdictions had already surpassed 50 percent, such as Europe, where women make up an average of 54 percent of judges, that statistic that is bolstered by countries such as Latvia (81 percent) and Romania (74 percent) (79 percent). In other parts of the world, such as in Nepal, women comprise six percent of judges and magistrates, and in Pakistan, Egypt, and the United Arab Emirates, women constitute fewer than one percent of the bench. Moreover, in 2019, Kuwait, Oman, Saudi Arabia, and Somalia had no female judges whatsoever. Another notable result of the paper was that women judges tend to congregate around courts that deal with matters deemed suitable for their gender, such as family courts at the lower levels, obfuscating the data.[37]

This study of the Indian judicial system highlights certain common elements which are often identified as root causes for the lack of diversity, which include a lack of transparency in the appointment process, historical underrepresentation, structural problems, and so on. Moreover, much like arbitration, the pipeline issue has often been cited as an important underlying reason for the lack of gender representation. However, with the passage of time, the relevance of this reason diminishes sharply.

The India Justice Report 2020,[38] which examined diversity in administrative and judicial bodies, highlighted a very significant observation: unlike other public authorities, the data for diversity in the judiciary, particularly in the lower or subordinate courts, was not available. For the higher judiciary especially in the Supreme Court, much like arbitration, although there has been some visible progress, the relative proportion even today remains low. In fact, much of this progress owes to the appointment of just two women in 2018 and another three in 2021, bringing the tally of currently serving women judges to four in the Supreme Court of the country (constituting a mere 12%.).[39]

The appointment of judges to Supreme Court is described under Article 124 (3) of the Indian Constitution, which identifies the following people to become judges -

[36] 'UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers', 26 May 2015, A/HRC/29/26/Add.3, available at: https://www.refworld.org/docid/558410d84.html.

[37] *Ibid*.

[38] 'India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid, India Justice Report 2020', https://www.tatatrusts.org/Upload/pdf/ijr-2020-overall-report-january-26.pdf.

[39] Sumant Sen, Jasmin Nihalani & Vignesh Radhakrishna, Data, 'Only 11 women Supreme Court judges in 71 years, three of them appointed in 2021', (The Hindu, Sept. 03, 2021, https://www.thehindu.com/data/only-11-women-supreme-court-judges-in-71-years-three-of-them-appointed-in-2021/article36272407.ece.

(a) 'has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or

(b) 'has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or

(c) 'is, in the opinion of the President, a distinguished jurist.[40]

What is notable here is that although the President is the appointing authority, the selection is carried out by a collegium composed of the CJI and the next four senior-most judges of the Supreme Court, who consult with one another to determine the next set of judges.

To contextualize the pipeline issue in judicial appointments, we must consider the representation of women in High Courts as well as subordinate courts. For High Courts, where the appointment is once again done through a collegium, women constitute around 12-13% of the total number of judges,[41] while, in subordinate or lower courts, where the appointments take place by selection through a competitive exam, women constitute approximately 40%.[42] While the numbers for the subordinate judiciary are better, though not satisfactory, the significant dip of almost 18-20% in the higher judiciary, where all of the responsibility and discretion lies with the collegium, points to the prevailing biases within the system.

Empirical studies have identified such biases to be operative in two forms – *structural* or *systemic biases*, which reflect stereotypes based on gender, caste, class, race, ethnicity and age, and *discretionary* or *cognitive biases*, which describe the unfettered powers granted to the biased authorities making such appointments.[43]

As discussed above, structural or systemic bias refers to the institutional patterns and practices that confer advantage to some and disadvantage to others based on identity. A standard structural bias operates in the following way: the positions of power of influence are largely held by members of a dominant group, because (and also a result of which,) "merit" is commonly identified with that group. All of this causes attention to be centred on members of that group, creating

[40] Article 124, The Constitution of India, https://www.constitutionofindia.net/constitution_of_india/the_union/articles/Article%20124.

[41] Soni Mishra, 'Gender parity elusive in Indian judiciary; mere 11.96 pc judges in higher courts are women', (The Week Sept. 03,2021), https://www.theweek.in/news/india/2021/09/03/gender-parity-elusive-in-indian-justice-system-mere-11-96-pc-higher-courts-judges-are-women.html.

[42] Arijeet Ghosh, 'Tilting the Scale: Gender Imbalance in the Lower Judiciary', Vidhi Centre for Legal Policy, (Feb. 12, 2018), https://vidhilegalpolicy.in/2018/02/12/report-on-gender-imbalance-inthe-lower-judiciary/.

[43] Aishwarya Chouhan, 'Structural And Discretionary Bias: Appointment Of Female Judges In India', (2020) 21 (3) Georgetown Journal of Gender and the Law, https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2020/08/Structural-and-Discretionary-Bias_Appointment-of-Female-Judges-in-India.pdf.

a "norm" that faces little threat of disruption.[44] These norms go unexamined, creating a set of standards, expectations, assumptions and beliefs, that come to define key aspects of organizational culture. Because they uphold the "norm", they are invisible to the dominant group, who do not understand their unearned privilege or the fact that these advantages/benefits/rewards not available to all.[45]

Discretionary or cognitive biases refer to unconscious patterns of thought which have the unintended effect of conferring advantage to some and disadvantage to others. These biases exist at the individual level, cumulatively giving rise to entrenched structural biases.[46] These biases may be causes by a variety of underlying psychological factors. Examples include confirmation bias, which refers to the human tendency to interpret information to confirm their preconceptions, essentialism wherein decisionmakers are guilty of categorizing people and things according to their "essential nature" regardless of variations, and halo effect, which refers to the tendency for one's positive or negative traits to "spill over" from one area of personality to another in others' perceptions.[47]

Such forms of biases are in many ways commonly associated with most countries' judicial and legal setups and can be easily transposed to the arbitration setup as well. The reason we highlight the diversity and inclusivity issues with India's judicial setup is to showcase that, unlike what many have asserted, the problems do not always lie with the 'leaking pipeline', they rather often lie with the individual – be it the parties, the arbitrators, or the institution's representatives, as well as to the extent these individuals are willing to consider change, because in the largest number of scenarios, they are the decision-makers. The issue of arbitration is also closely connected to the judiciary in another way – a large number of these judges later go on to serve as arbitrators, which again highlights the importance of having diversity at every possible level of the legal system.

There are a number of well-documented structural obstacles to gender diversity in arbitral appointments and proceedings, as noted in the literature and commentary. These include issues that contribute to the low retention of women in the legal profession; the impact of unconscious bias on female professional development; the challenges female lawyers may face due to a lack of flexible working arrangements; and issues relating to gender-based and sexual harassment

[44] P. McIntosh, 'White privilege: Unpacking the invisible knapsack', (1998) Re-visioning family therapy: Race, culture, and gender in clinical practice.

[45] Rosette, Ashleigh Shelby, and Leigh Plunkett Tost. 'Perceiving social inequity: when subordinate-group positioning on one dimension of social hierarchy enhances privilege recognition on another.' (2013) 24 (8) Psychological science, doi:10.1177/0956797612473608.

[46] Krieger, 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity' (1995) Stanford Law Review, https://www.jstor.org/stable/1229191.

[47] Reskin, Barbara, 'The Proximate Causes of Employment Discrimination.' (2000) 29 (2) Contemporary Sociology 319–28, https://doi.org/10.2307/2654387.

and bullying in the workplace. These are the structural biases that prevent women from reaching or ascending in the pool of arbitrators.

However, it may be argued that discretionary bias is far more insidious in international arbitration. This owes to the fact that word-of-mouth is the most preferred source of information about arbitration candidates. Consequently, arbitration users may not have access to, or may not proactively acquire, information on new, more diverse arbitrator candidates who may be well-qualified for the post of arbitrator in a given case. Unconscious prejudice may potentially influence the parties' choice. According to a Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings, unconscious bias may impact the perception of the best candidate in favour of male applicants due to an implicit link between 'masculine' attributes and those of a successful arbitrator, such as gravity or aggressiveness.[48] Recent debates and discussions have focused on the influence of unconscious prejudice on arbitrator selection, which has been defined as one of the single most important causes for the discrepancy between male and female representation on international courts. The Report also emphasises that the strongest qualification for the position of arbitrator may be past experience, making it difficult for applicants to be appointed for the first time. This may be especially troublesome for women, since studies have shown that males are promoted based on their potential, while women are promoted based on their experience.[49]

Part III: towards a novel solution

Identifying the causes responsible for the problem only constitutes half of what is considered 'innovating' for solutions, as it is rather the construction of solutions and their subsequent implementation wherein the primary hurdle lies. At the institutional level, increased transparency through a public listing of names and cases associated with these arbitrators is surely a welcome change, but such listing alone cannot even begin to change the prevailing biases. Lucy Greenwood argues for the need to create an '*objective and descriptive list of characteristics'* that an arbitrator possesses, distinct from the prevailing system, wherein an arbitrator' capabilities are simply described using generic terms such as 'expertise' and 'influence'. This, has helped in creating an objective list of people based on the most necessary criteria, rather than depending so heavily on individual

[48] 'ICCA Reports No. 8: Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings', https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf.

[49] *Ibid*.

recommendations.[50] Another positive trend from certain institutions has been the relaxation offered to clients to select arbitrators outside the institutional pool.[51] However, any step towards creating a diverse tribunal would depend on multiple stakeholders, not only at the individual and institutional level, but also on how the parties or clients who are completely detached from these discussions perceive this issue when presented between a choice of party autonomy and diversity. Therefore, all actors involved must play a significant role in achieving diversity.[52] While any diversity in arbitration can only be maintained by balancing it with party autonomy without any conflict that harms the interests of the parties,[53] it must be recognized that any lack of concrete actions or reforms could be viewed as mere symbolic gestures to avoid repercussions towards the overall system of arbitration.

The onus must also lie with the firms and counsels, who can, within their limits, informally push to convince their clients for hiring and appointing more diverse candidates wherever possible. This can be done by enlisting the benefits of such appointments to the clients – which can depend on circumstances including lower arbitrator fees or more specific subject matter expertise.[54] Law firms can also adopt various training, sponsorship and mentorship initiatives to ensure that when called for – there is a pool of diverse candidates waiting for chances. Furthermore, networking is a significant part of the any arbitration circle – here too the firms can invite diverse candidates as delegates or speakers to boost their profile among the community.

This also holds true for the already-appointed arbitrators, who must together appoint another arbitrator. These individual players have a significant role to play in bringing organic change, so long as diversity and qualifications complement each other in the process of selection.[55] As long as such ethical conundrums are kept at bay, and clients feel reassured that they will not be confronted with an underqualified arbitrator, stakeholders can always argue for the benefits of

[50] Lucy Greenwood, 'Moving Beyond Diversity Toward Inclusion in International Arbitration', Axel Calissendorff and Patrik Schöldstrom (eds), Stockholm Arbitration Yearbook, (Wolters Kluwer 2019) Volume 1, pp. 93-102

[51] Darius J. Khambata, 'Tensions Between Party Autonomy and Diversity', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, (2015) 18 (Kluwer Law International; ICCA & Kluwer Law International) pp. 612-637.

[52] Rothman Deborah, 'Gender Diversity In Arbitrator Selection' (2012) 18 Dispute Resolution Magazine 22, https://deborahrothman.com/wp-content/uploads/2017/03/April12_ABA-Disp.Res_.J._Rothman_GenderDiversity_FINAL.pdf.

[53] Sumant Sen, Jasmin Nihalani & Vignesh Radhakrishna, Data, 'Only 11 women Supreme Court judges in 71 years, three of them appointed in 2021', (The Hindu, Sept. 03, 2021, https://www.thehindu.com/data/only-11-women-supreme-court-judges-in-71-years-three-of-them-appointed-in-2021/article36272407.ece.

[54] Paula Hodges, May Tai and Elizabeth Kantor, 'Inside Arbitration: Diversity – What Has Been Done So Far and Can the Arbitration Community Do More?', https://www.herbertsmithfreehills.com/insight/inside-arbitration-diversity-what-has-been-done-so-far-and-can-the-arbitration-community-do.

[55] Samaa A.F. Haridi, 'Towards Greater Gender and Ethnic Diversity in International Arbitration', (2015) 2 Bahrain Chamber for Dispute Resolution International Arbitration Review. 305-316.

diversity, the most significant of which might be potentially lower costs cost involved in appointment.

Another, potentially controversial means of achieving diversity is through the introduction of quotas or affirmative measures. The language of standard arbitral clauses in contracts or/and the procedure of arbitrator appointment in different institutional rules can integrate an aspect of diversity in conjunction with intersectionality to ensure a balanced panel. Such clauses could as a consequence create a mandated place for diverse arbitrators when adopted. The limitation of such an initiative though is that it can only be suggestive without stretching party autonomy. However, even though not obligatory, putting such suggestion on the rules can impact a party to 'think and consider' diverse options – which they might not otherwise. Kaufmann-Kohler and Michele Potestà in their work on 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' had suggested for similar steps by arguing that – there should be consideration of "*inserting aspirational language or quantitative targets ... at least for a transitional period until such time when gender balance is achieved naturally*" if and when a multilateral investment tribunal is put in place.[56]

While many have argued against quotas or affirmative actions – as being rather symbolic and a path to moral licensing, historically it has been an effective way to increase diversity in corporate boards. If reservations to diverse candidates in tribunal selections can be provided without compromising on the quality of the appointments, it would give a seat to the people who have so far been in the pool but have been deprived of any opportunity. Over the course of time, it would be possible to create a pool of diverse and experienced arbitrators who can then serve as role models for future generations as they instantiate public values.[57] Moreover, numerous studeis show that an increased number of women in the pool does not necessarily lead to more appointments, especially when the process of selection is closed, opaque and discretionary. Studies though have shown the positive impact on women representation through introduction of mandatory quotas which in some cases could be as high as 20%.[58] A counter argument to any such initiative could be a dip in the capability or quality of the arbitrators, but for any such argument, we must remember that the current procedure appears to be keeping qualified people

[56] Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' (Report, Geneva Center for International Dispute Settlement, 15 November 2017) 41 [66] http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf archived at https://perma.cc/RY7S-CSAM.

[57] 'Quotas and The Transatlantic Divergence of Corporate Governance' (2014) 34 Northwest Journal of International Law & Business 249.

[58] Nienke Grossman, 'Shattering The Glass Ceiling in International Adjudication', (2016) 56(2) Virginia Journal of International Law, Https://Www.Ohchr.Org/Documents/Hrbodies/Hrcouncil/Advisorycom/Submissions/Annex4-UBSL.Pdf.

off the seat, and while the jury is out on such a debate, any such assumption might be counterproductive to arbitration's global image. To ensure that parties have autonomy over arbitrators, the institutions can provide a list of diverse arbitrators based on factors affecting the dispute from which the parties can label each listed arbitrator as either acceptable or not. A similar approach of pointing out a few acceptable arbitrators to the provider can be made through the use of strike and rank method.[59] Moreover, this should be a unified global institutional approach so that parties do not choose forums/institutions to escape such rules.

Changes sometimes require creativity, even at the cost of being radical. Institutions can work with firms and counsels to provide parties with the option of arbitrator panels in addition to individual arbitrators. These panels can be formed keeping in mind the subject matter, geography, experience, diversity and other significant elements of the dispute. For example, in a dispute pertaining to a shareholder dispute in Namibia, the institutions can have a readymade three-member tribunal which represents in addition to legal acumen the elements of diversity. Although radical, such ideas are not unheard of, the idea of permanent panel of arbitrators – though a little divergent from our proposal, has been tinkered with, as a means to improve selection, recruitment and diversity.[60] Additionally, while we discussed the issues with the over dependence on AI algorithms to solve problems on diversity, it is important to appreciate that the introduction of technology into arbitration is at a nascent stage and any development from here should only benefit the increase in diversity.

Conclusion

The conversations surrounding diversity have started to garner importance in all spheres of the corporate setup from boardrooms to entry level hires. With such reckoning worldwide, it is imperative that a system that presents itself as a global solution to disputes follows suit. Interestingly each of this setup identifies similar barriers for the lack of diversity of all forms – be it in corporate boards, arbitral tribunals or judicial systems. What studies around them also consistently highlight is that the introduction of diversity has helped improve performances, broadening of opinions as well as benefited setups with new perspectives and diversity of

[59] Sarah Rudolph Cole, 'Arbitrator Diversity: Can It Be Achieved?', (2021) 98 (3) Washington University Law Review. Available at: https://openscholarship.wustl.edu/law_lawreview/vol98/iss3/11.

[60] Hoffman & Lamont E. Stallworth, 'Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity', (2008) 63(1) Dispute Resolution Journal, https://arbitrationlaw.com/library/leveling-playing-field-workplace-neutrals-proposal-achieving-racial-and-ethnic-diversity.

thoughts.[61] For arbitration, diversity and inclusion are important not only because of these factors of improvement but to avoid any possible backlash that might result from the lack of it. The homogenous idea of 'male, pale and stale' does not represent the shifting trends in global economics, where many countries from Asia and Africa today demand for a greater stake. The change therefore is much rather an impending need for survival, legitimacy and adaptability for the idea of arbitration to remain relevant. The importance of having diverse ethnic, social and geographical representation in tribunals was well highlighted in the *Chevron v. Ecuador*[62] where the interim award faced criticism for its lack of understanding of the indigenous issues.

While solutions identified in the paper could definitely influence change, much of it dives down to individual responsibility. The legal system in most countries, including the judiciary in India functions in a top-down approach where a collegium of the Supreme Court decides everything – from appointment to transfer of new judges. Therefore, onus for change almost always lies with them. Similar to this, in arbitration too, the realization, conversations and ultimately change must start from counsels, arbitrators as well as institutions who presently play a major role or are very known in arbitration around the world. Any arbitrator, institution or counsel must realize that if they have any influence on a large circle of arbitrators or on the process of appointments, then they must exert their influence to take positive steps, as the onus lies on each to bring change given the nature of the problem. It is probably quiet befitting to then take the liberty to end this paper with the words Mahatma Gandhi on what should guide us towards the attitude necessary for achieving an inclusive and diverse system of arbitration, "*We but mirror the world. All the tendencies present in the outer world are to be found in the world of our body. If we could change ourselves, the tendencies in the world would also change. As a man changes his own nature, so does the attitude of the world change towards him. This is the divine mystery supreme. A wonderful thing it is and the source of our happiness. We need not wait to see what others do*".

All it could potentially take, therefore, is for the ones associated with the world of 'arbitration', be it counsels, parties or institutions – to change their attitude and not necessarily wait to see what steps others take to bring down the hegemony or biases associated with the system to make the process a truly 'international' one in letter and spirit.

[61] Stephanie, Mary-Hunter, Sakshi, Jared, 'When and Why Diversity Improves Your Board's Performance', (Harvard Business Review, March 27, 2019), https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance.

[62] Chevron v. Ecuador, Interim Award, Jan. 15, 2012.

References

'Quotas and The Transatlantic Divergence of Corporate Governance' (2014) 34 Northwest Journal of International Law & Business 249.

'UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers', 26 May 2015, A/HRC/29/26/Add.3, available at: https://www.refworld.org/docid/558410d84.html.

Aishwarya Chouhan, 'Structural And Discretionary Bias: Appointment Of Female Judges In India', (2020) 21 (3) Georgetown Journal of Gender and the Law, https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2020/08/Structural-and-Discretionary-Bias_Appointment-of-Female-Judges-in-India.pdf.

C. Rogers, 'The Vocation of the International Arbitrator', (2005) 20(5) American University International Law, available at – https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1150&context=auilr.

Darius J. Khambata, 'Tensions Between Party Autonomy and Diversity', in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, (2015) 18 (Kluwer Law International; ICCA & Kluwer Law International) pp. 612-637.

Douglas Pilawa, 'Sifting Through the Arbitrators for the Woman, the Minority, the Newcomer', (2019) 51(14) W. Res. J. Int'l Law, https://scholarlycommons.law.case.edu/jil/vol51/iss1/14.

Dr. Cristina Iona Floreschu, 'Report on the Diversity Roundtable at Vienna Arbitration Days 2018', (2018) 8(1) International Law Review, pp. 42-59 at 44. See also Franck S., Freda J. Lavin K. Lehmann T. & van Aaken A., "The Diversity Challenge Exploring the 'Invisible College' of International Arbitration", Columbia Journal of Transnational Law, 2015 at p. 496.

Fakhruddin Ali Valika, Improving the Participation of Minorities in International Arbitration, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2019/11/10/improving-the-participation-of-minorities-in-international-arbitration/.

Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' (Report, Geneva Center for International Dispute Settlement, 15 November 2017) 41 [66] http://www.uncitral.org/pdf/english/working-groups/wg_3/CIDS_Supplemental_Report.pdf archived at https://perma.cc/RY7S-CSAM.

Gemma Anderson, Richard Jerman And Sampaguita Tarrant, Morrison & Foerster, 'Diversity In International Arbitration', Thomson Reuters Practical Law, https://Uk.Practicallaw.Thomsonreuters.com/W-019 5028?Transitiontype=Default&Contextdata=(Sc.Default)&Firstpage=True#Co_Anchor_A663452.

Hacking Diversity with Inclusive Decision Making', (*Cloverpop*,2021), https://www.cloverpop.com/hubfs/Whitepapers/Cloverpop_Hacking_Diversity_Inclusive_Decision_Making_White_Paper.pdf.

Hoffman & Lamont E. Stallworth, 'Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity', (2008) 63(1) Dispute Resolution Journal, https://arbitrationlaw.com/library/leveling-playing-field-workplace-neutrals-proposal-achieving-racial-and-ethnic-diversity.

James E. Meason & Alison G. Smith, 'Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench', (1991) 12 Northwestern Journal of International Law & Business, https://scholarlycommons.law.northwestern.edu/njilb/vol12/iss1/7/.

Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 21.

Krieger, 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity' (1995) Stanford Law Review, https://www.jstor.org/stable/1229191.

Lucy Greenwood and C. Mark Baker, 'Is the balance getting better? An update on the issue of gender diversity in international arbitration, Arbitration International' (2015) Arbitration International.

Lucy Greenwood, 'Moving Beyond Diversity Toward Inclusion in International Arbitration', Axel Calissendorff and Patrik Schöldstrom (eds), Stockholm Arbitration Yearbook, (Wolters Kluwer 2019) Volume 1, pp. 93-102.

Lucy Greenwood, 'Tipping The Balance – Diversity and Inclusion in International Arbitration', 2017 33 (1) Arbitration International.

Max Roser, Hannah Ritchie and Esteban Ortiz-Ospina (2013) – "World Population Growth". *Published online at OurWorldInData.org.* Retrieved from: 'https://ourworldindata.org/world-population-growth'.

Naimeh Masumy, 'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role Ensuring Diversity?', Fordham International Law Journal, available at- https://www.fordhamilj.org/iljonline/2020/11/23/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern-and-should-arbitral-institutions-play-a-greater-role-ensuring-diversity#_ftnref8.

Nienke Grossman, 'Shattering The Glass Ceiling in International Adjudication', (2016) 56(2) Virginia Journal Of International Law, Https://Www.Ohchr.Org/Documents/Hrbodies/Hrcouncil/Advisorycom/Submissions/Annex4-UBSL.pdf.

P. McIntosh, 'White privilege: Unpacking the invisible knapsack', (1998) Re-visioning family therapy: Race, culture, and gender in clinical practice.

Paula Hodges, May Tai and Elizabeth Kantor, 'Inside Arbitration: Diversity – What Has Been Done So Far and Can the Arbitration Community Do More?', https://www.herbertsmithfreehills.com/insight/inside-arbitration-diversity-what-has-been-done-so-far-and-can-the-arbitration-community-do.

Payel C. and Vyapak D., 'Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?'(*Wolters Kluwer*, 2020), http://Arbitrationblog.Kluwerarbitration.Com/2020/03/01/Is-Increasing-Gender-And-Ethnic-Diversity-In-Arbitral-Tribunals-A-Valid-Concern/.

Reskin, Barbara, 'The Proximate Causes of Employment Discrimination.' (2000) 29 (2) Contemporary Sociology 319–28, https://doi.org/10.2307/2654387.

Rosette, Ashleigh Shelby, and Leigh Plunkett Tost. 'Perceiving social inequity: when subordinate-group positioning on one dimension of social hierarchy enhances privilege recognition on another.' (2013) 24 (8) Psychological science, doi:10.1177/0956797612473608.

Rothman Deborah, 'Gender Diversity In Arbitrator Selection' (2012) 18 Dispute Resolution Magazine 22, https://deborahrothman.com/wp-content/uploads/2017/03/April12_ABA-Disp.Res_.J._Rothman_GenderDiversity_FINAL.pdf.

Samaa A.F. Haridi, 'Towards Greater Gender and Ethnic Diversity in International Arbitration', (2015) 2 Bahrain Chamber for Dispute Resolution International Arbitration Review. 305-316.

Sarah Rudolph Cole, 'Arbitrator Diversity: Can It Be Achieved?', (2021) 98 (3) Washington University Law Review. Available at: https://openscholarship.wustl.edu/law_lawreview/vol98/iss3/11.

Soni Mishra, 'Gender parity elusive in Indian judiciary; mere 11.96 pc judges in higher courts are women', (The Week Sept. 03,2021), https://www.theweek.in/news/india/2021/09/03/gender-parity-elusive-in-indian-justice-system-mere-11-96-pc-higher-courts-judges-are-women.html.

Stephanie, Mary-Hunter, Sakshi, Jared, 'When and Why Diversity Improves Your Board's Performance', (Harvard Business Review, March 27, 2019), https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance.

Sumant Sen, Jasmin Nihalani & Vignesh Radhakrishna, Data, 'Only 11 women Supreme Court judges in 71 years, three of them appointed in 2021', (The Hindu, Sept. 03, 2021, https://www.thehindu.com/data/only-11-women-supreme-court-judges-in-71-years-three-of-them-appointed-in-2021/article36272407.ece.

Winkler, Matteo and Schinazi, Mikael, 'No Longer "Pale, Male, and Stale"? Approaching Diversity and Inclusiveness in International Arbitration' (January 31, 2021). Forthcoming in Liber Amicorum Guillermo Aguillar Alvarez, Available at SSRN: https://ssrn.com/abstract=3776738 or http://dx.doi.org/10.2139/ssrn.3776738.

Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and The Construction of A Transnational Legal Order,* (The University of Chicago Press 1998).

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

BORDOLOI, Animesh Anand; SINGH, Natasha. Navigating the practicalities of achieving diversity in arbitration. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 39-60, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.3.

DOI: 10.52028/rbadr.v4i8.4

Resolving disputes with an healing effect: the practice of mediation in India

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Abstract: This paper has traced the background and evolution of mediation movement in India. Discussing about the beginning of the advocacy for ADR and mediation in the late 1990, how the mediation movement has gained momentum in past two decades. It is pertinent to note the policy and legislative introduced to popularize mediation and encourage its adoption. Also, the statistical data presented from various sources reflects about the efforts undertaken towards augmenting appropriate infrastructural and human resource to strengthen its ecosystem. However, the brightness of these development must not blindfold us to ignore about the gaps that still exist. Unless these gaps are addressed the future of mediation will remain uncertain.

Keywords: Dispute resolution. Court Annexed Mediation. Singapore Mediation Convention. Online mediation. Legislative policy.

Introduction

The landscape of dispute resolution literatures enunciates a wide catalogue of aspirations involving several values identified with the effectiveness of a dispute resolution system. These aspirations continue to increase with time. With the advent of modern constitutions embedded with values of democracy, liberalism and rule of law; dispute resolution was idealized to feature characteristics of distributive fairness, impartiality and procedural independence to secure the ends of fair trial and justice. This was further fortified with some typical features that define the goals of accessibility, speed, expense, procedural flexibility and finality. Finally, the

values of collaborative problem solving, confidentiality and giving adequate attention to human emotions, feelings and relationships were intertwined into the web. Therefore, an effective dispute resolution system is a conglomeration of these aspirations not just a well-conducted or well-favoured proceeding or formula.

Adversarial adjudication in public courts has always been the primary mode of formal dispute resolution. But it is bunged with the problems of backlog, delay and its limited accessibility to many citizens. These reasons have forced to search for alternatives. This movement began in the latter half of nineteenth century globally. Many alternatives were proposed. But mediation has emerged as the most viable alternative. Mediation is a voluntary dispute resolution method that attempts to settle disputes with an amicable approach. It is usually characterized as relatively more expeditious, inexpensive and confidential process compared to adjudication. However, the intrinsic values of mediation are autonomy to parties, participatory nature of the process and disputants right to self-determine the outcome of their disputes.

Amicable methods of dispute resolution have been always part of Indian culture and tradition. But the discourse of modern mediation practice in India is about two decades old. Compared to the global movement which started in 1980, the discourse of mediation as an alternative to adversarial adjudication has started much later in India. But since the inception of the mediation discourse, it is envisaged as an initiative to make dispute resolution more affordable, accessible and save judicial resources. Policy and legislative changes are introduced to encourage use of mediation at pre and post litigation in civil and commercial matters. The apex court of India has also supported mediation. The apex court has pronounced judgements extending its support to mediation. Also, steps are initiated to sensitize the member of the bar and litigants about the advantages of mediation. The mediation movement in India although being comparatively recent, has made significant progress and continues to gain popularity and confidence among all stakeholders.

In this context this paper sets out to provide an account of the jurisprudential development of mediation practice in India and its future discourses. The paper will begin by reviewing the characteristic features of modern mediation and how it helps to resolve dispute with a healing effect. The second section of the paper will review the development of mediation in India along with the evolution of its regulatory framework for mainstreaming the practice of mediation in India. Section three will describe how the public perception, institutionalization and human resource development for mediation has evolved overtime. Finally in the fourth section the paper will be deliberating upon the issues and challenges in current mediation practice and the future discourse to strengthen mediation in India. The paper will conclude with setting out certain agendas for future discourse of mediation in India.

[I] Why to choose mediation

Mediation involves settlement of disputes by putting parties face to face facilitated by a neutral third person to work out the modalities for reaching a mutually acceptable solution to their ongoing dispute. Since, disputes are settled through a consensual approach it is generally complied by the parties without need for any additional procedure for appeal or legal enforcement. Usually compared to other methods of dispute resolution it is expeditious, inexpensive and maintain greater confidentiality. From the perspectives of administration of justice, it reduces court congestions and saves judicial resources.[1] But these factors don't sufficiently justify the benefits of mediation. One has to explore the more intrinsic advantages of mediation process. Also, it is necessary to inquire into the positive effects of mediation compared to adversarial adjudication on parties with reference to overcoming their differences and restoring future relationships.

Any dispute is generally much deeper than it is apparently visible. Looking from a purely legalist perspective every dispute is either a trade-offs involving legal claims or economic considerations measured in terms of monetary damages or compensations.[2] However, research from other disciplines like human psychology and behavioural studies has evidenced that generally a dispute has three sets of factors, or interests at work. They are categorised as three 'Es' i.e. economic, emotional and extrinsic factors. These factors form the three sides of a dispute triangle and represent competing sets of interests that all must be comprehended and addressed to reach an effective and sustainable solution.[3]

An adversarial approach of dispute resolution will only focus on the economic aspect translating it into legal language of right vs. breach/liability or damages/ compensation vs. exoneration. But focusing only on the economic interests just allow to look at the surface of the problems. They are more visible because they are more tangible and easily definable by a corresponding legal norm. But the actual root of the dispute lies much deeper, wherein lies the emotional components which causes the internal push and pull of parties and the extrinsic factors e.g. social factors (how the resolution will appear to a third party). These three sides of the dispute triangle are interrelated.[4] Paying attention to only economic factors and disregarding the emotional and extrinsic elements leads to only unsatisfactory resolution or continued impasse. Therefore, the adversarial approach with its

1 SUPREME COURT. Mediation Training Manual of India, p.16, https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf.

2 SUPREME COURT. Mediation Training Manual of India, p.11-13 https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf.

3 FOLBERG Jay; GOLANN, Dwight. Lawyer's Negotiation Theory, Practice and Law. Wolters Kluwer, 2016.

4 KOROBKIN, Russel; GUTHRIE, Chris. Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer. Texas Law Review, v.76, n.77, 1997-1998.

central attention to contestable legal questions ignores the other complexities of the dispute.[5]

Further, the adversarial attitude of '*lawful winner takes it all*' promotes a partisan view of dispute resolution that seems like its sole objective is to maximize individual gain, in a war like situation, masking the facts and information and attending polarized results or a mindless midpoint settlement. But thinking from a more realistic point of view is 'winning' the only achievable objective from a dispute resolution exercise. Sometimes even a literal 'winner' may be at loss if in achieving it the other side is so stressed or regretful that it impairs their relationship permanently or compliance of the decision becomes difficult.[6]

However, according to some scholar's adversarial system is unparallel and unique because it mitigates the existing irreconcilable social and economic differences and delivers fair and just results. Prof. Owen Fiss had argued that although courts may take a longer time, use complex procedures and relatively expensive, but still cannot be replaced by gentler methods because they will fail to effectively calibrate the pre-existing inequality and power imbalances among parties.[7] He observes "*Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment*".[8] The heart of his argument relies on a reflection of public adjudication as the only means of delivering fair justice, both in terms of distributive fairness as well as procedural fairness. But he ignores that fairness is always a subjective principle. What a winner of a lawsuit considers fair process, resulting to a fair outcome, may be completely contrary in the opinion of the looser of the lawsuit.[9] The studies on access to justice emerging globally has revealed that pre-existing inequalities can reduce parties' capacity to effectively seek resolution of their disputes in litigation.

This takes us to the question what are the criterion for a fair outcome? and it can be stated that fairness can be judged by four basic but competing principles: equality, need, generosity and equity. Any dispute resolution process that treats parties in equal footing; address their actual needs and concerns; ensures that one parties outcomes doesn't exceed the outcomes achieved by others and ensures that distribution of the outcome's benefits parties' relative outcomes, can

5 MEADOW, Carrie M. Legal Negotiation: A Study of Strategies in Search of a Theory. American Bar Foundation Research Journal, 905, 1983.

6 FOLBERG, Jay; GOLANN, Dwight. Lawyer's Negotiation Theory, Practice and Law. Wolters Kluwer, 2016.

7 FISS, Owen. Against Settlement. Yale Law Journal, v.93, n.1073, 1983-1984.

8 MEADOW, Carrie M. Legal Negotiation: A Study of Strategies in Search of a Theory. Am. B. Found. Res. J, 905, 1983.

9 WELSH, Nancy A. Perceptions of Fairness in Negotiation. Marquette Law Review, v.87, n.753, 2004.

be perceived as a fair process. Mediation portrays all these values of fairness in its procedural settings and final outcome.[10]

But this attitude of looking adjudication as only way to deliver fair justice has developed due to the mainstreaming of the '*cultural of adversarialism*'[11] in our legal system. The predominant legal culture and legal education promote a narrative about the propriety of courts in delivering justices. The narrative (thou changing now) is that justice can only be achieved by means of elaborate arguments, attacking and humiliating the other side and following the long and formalist procedures. This cultural narrative inevitably resists any other discourse about achieving justice. It legitimizes all means to attack and humiliate your opponent how degrading it may be from a moral perspective. Describing about the pitfalls of the adversarial culture Jus. Warren Burger had observed "*Our system has become too costly, too painful, too destructive, too inefficient for truly civilized people*".[12]

However, this adversarial narrative of justice is contradicted by philosophers. Max Lucado the celebrated American novelist has observed "*conflicts are inevitable but combat is optional*".[13] In the words of Abraham Lincon "*discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man".*[14] Similarly, M.K. Gandhi has expressed that "*we may attack measures and systems. We may not and must not attack men*".[15] In his works he has argued that results obtained by treacherous, coercive and ways that humiliate others leads to destruction and remorse. His works on conflict resolution renounces all those practices that promotes toughness, coercion, deception and lies and embraces more gentler and non-violent ways to resolve conflicts.[16]

Mediation as opposed to the established narrative of dispute resolution adopts a more therapeutic approach to heal parties' differences by using fair procedure and more innovative remedial imaginations. Apart from being expeditious, inexpensive, confidential, mediation promotes values of joint-gain, collaborative solution searching and produces different behaviours and different outcomes. It is as a gentler and more caring technique of problem-solving because it compels

[10] RUMMEL, Rudolph J. The Subjectivity Principle, in The Conflict Helix. New Jersy: Transaction Publishers, 1991.

[11] FISS, Owen. Against Settlement. Yale Law Journal, v.93, n.1073, 1983-1984.

[12] 1982 (*68 A.B.A.J. 274).*

[13] LUCADO, Max. When God Whispers Your Name. Nashville: W Publishing Group, 1999.

[14] LINCOLN, Abraham. Notes for a Law Lecture, Collected Works of Abraham Lincoln, Maryland: Wildside Press, v.2, 2008.

[15] WEBER, Thomas. Gandhian Philosophy, Conflict Resolution Theory and Practical Approaches to Negotiation. Journal of Peace Research, v. 38, n. 4, 2001.

[16] GANDHI, Mohandas K. An Autobiography or the Story of my Experiments with Truth. Ahmedabad: Navajivan, 1940.

parties to see each other's difficulties, probe into their underlying individual and shared interests and collaborate in exploring mutually satisfying solutions to settle their differences. It establishes an environment which promotes the values of compassion, mutual-belief, transparent information sharing and cooperation. Mediation resolves differences comprehensively, restore relationships and settle disputes with a healing effect.

Mediation therefore transforms the approach of dispute resolution narrative from naming, shaming, blaming and regressive behaviour to a healing process by adhering to the following practices:

(a). compelling disputants to change from total denial of any responsibility to making them reflect and accept that knowing or unknowingly they may also have some role in the problem;
(b). after accepting their part, they are willing to sacrifice to ensure a mutual beneficial settlement to be reached in resolution of the dispute;
(c). then having established necessary trust with each other, express their desires about the necessary compromises that they are willing to do to reach a mutually satisfactory end of the problem; and
(d). reach a mutually acceptable solution, experience a change in their emotions, reconciled with each other and heeled and renewed as individuals.[17]

[II] Evolution of mediation in India

India has a long history and rich traditions of amicable and informal institutions of dispute resolution. The institution of Panchayat[18] was very effective in settling disputes arising out of family and close relations. The Privy Council affirming the decision of a Panchayat had observed that the "village Panchayat is the time-honoured method of deciding disputes of this kind…that it is comparatively easy for the panchayatdars to ascertain the true facts, and that, as in this case, it avoids protracted litigation…".[19] But these private and informal institutions lost their relevance over time and was wholly replaced by the adversarial system. Although the Constitution of India promised to secure all citizens' access to justice, but preferred to continue with the adversarial model of centralized judicial

[17] WILLIAMS, Gerald R. Negotiation as a Healing Process. Journal of Dispute Resolution, v.1, 1996.
[18] Panchayat is the oldest system of local government in the Indian subcontinent. The word Panchayat means assembly (ayat) of five (panch). Traditionally Panchayats consisted of elderly and wise people chosen by the local community, who used to settle disputes between individuals and villages. The leader of the panchayat used to be called as Mukhya or Sarpanch. Generally, the elder-most or most senior person would be elected to this position. (For more details see What is a Panchayat (pria.org)).
[19] Sitanna v. Marivada Viranna, AIR 1934 PC 105.

system. But within passage of a short time problems started to crop in and the Indian judicial system fell into the clutches of many pitfalls like delay, arrears, lack of resource, shortage of judges, lack of adequate infrastructure etc.[20] It was inevitable to deal with these problems that alternative mechanisms for dispute resolutions are introduced.

Use of mediation for settling disputes in family matters was introduced in 1976 by way of amending the Code of Civil Procedure, 1908. It casted a duty on courts dealing with family disputes to make an endeavour at first instance, where the court think it is possible, to make a compromise with the nature and circumstances of the case and to every case and proceedings.[21] This was followed by series of other reforms in various statutes governing personal law matters to encourage parties to resort to conciliatory methods. With the establishment of family courts, it was made a mandatory obligation to make efforts for settlement by way of mediation before taking evidence in the case. To facilitate the process of mediation the statute establishing the family courts provided for appointment of permanent counsellors. Addressing the question as to whether resorting to mediation is mandatory after the introduction of the Family Courts Act, the Supreme Court has held that mediation is mandatory in family disputes and cannot be avoided or circumvented. For the purpose of settlement of family disputes emphasis is laid on mediation and achieving socially desirable results and eliminating adherence to rigid rules of procedure and evidence.[22] The Supreme Court went further to emphasize the need of even using mediation, if possible, in the cases involving domestic violence or criminal proceedings alleging cruelty on wife at matrimonial home.[23]

Conciliation under Arbitration and Conciliation Act, 1996

This was followed by introduction of private and voluntary conciliation in resolution of commercial disputes by the Arbitration and Conciliation Act, 1996. Although called as conciliation the process as adopted by this legislation is almost similar to mediation with a more interventionist role of the conciliator.[24] The legislation has introduced detailed procedure for conducting conciliation based on the UNCITRAL Rules on International Commercial Conciliation, 1985. According to this law parties are required to commence conciliation in commercial disputes by entering into an agreement in writing.[25] Parties have the autonomy to choose the

[20] LAW COMMISSION REPORT, 2009, p.222.
[21] Order 32-A which was inserted in the Civil Procedure Code, 1908 by the Code of Civil Procedure (Amendment) Act, 1976.
[22] SUPREME COURT. Baljinder Kaur vs. Hardeep Singh, AIR 1998 SC 764.
[23] SUPREME COURT. K Srinivas Rao vs. D.A. Deepa, (2013) 5 SCC 226.
[24] RAVEENDRAN, R.V. Mediation: Its Importance and Relevance, PL 2010.
[25] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec. 62.

conciliator/ conciliators,[26] the manner of appointment of the conciliator/conciliators[27] and the place of conciliation.[28] Conciliation proceedings are not bound by the Code of Civil Procedure and Evidence Act and the parties are free to agree upon the rules for conducting the conciliation proceeding in consultation with the conciliator/ conciliators.[29] But the parties shall in good faith participate in the conciliation proceedings and attempt to resolve their dispute.[30] The legislation also bars any party to resort to arbitration or litigation during the continuance of the conciliation proceedings.[31]

The legislation mandates conciliation proceedings to be completely confidential.[32] Even the confidentiality extends to the settlement agreements unless such disclosure is necessary for the purpose of implementation and enforcement of the settlement.[33] The legislation prohibits the conciliator/conciliators to act as an arbitrator or counsel for any of the parties in further legal or arbitral proceedings and parties right to introduce the conciliator/conciliators as witness in any further proceedings.[34] All the views, suggestions expressed by parties, admissions and proposal made including expression of willingness by any party to accept any proposal made by the other party in a conciliation proceeding is non-admissible as evidence in other proceedings between the parties.[35] The Supreme Court upholding the importance of ensuring the confidentiality of conciliation proceedings.[36] The Court has held "*It is clear, therefore, that both the conciliator and the parties must keep as confidential all matters relating to conciliation proceedings… if there are insidious encroachments on confidentiality, a free and fair settlement may never be arrived at, thus stultifying the object sought to be achieved by Part III of the 1996 Act*".[37] Also, dealing with the complex question as to whether the confidentiality norm of conciliation/mediation can be breached the Supreme Court has observed that "*the process of mediation is founded on the element of confidentiality… Instead of an adversarial stand in adjudicatory proceedings, the idea of mediation is to resolve the dispute at a level which is amicable rather than adversarial. In the process, the parties may make statements which they otherwise*

[26] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec. 63.
[27] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec. 64.
[28] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec. 69.
[29] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec. 66.
[30] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 71.
[31] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 77.
[32] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 75.
[33] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 75.
[34] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 80.
[35] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 81.
[36] SUPREME COURT. Moti Ram vs. Ashok Kumar, (2011) 1 SCC 466.
[37] SUPREME COURT. Govind Prasad Sharma vs. Doon Valley Officers Cooperative Housing Society Ltd., (2018)11SCC501.

they would not have made while the matter was pending adjudication before a court of law. Such statements which are essentially made in order to see if there could be a settlement…if the statements are allowed to be used at subsequent stages, the element of confidence which is essential for healthy mediation/conciliation would be completely lost".[38] However, the Court in this case held that this normal principle of confidentiality may be breached in exceptional cases.[39] Once there is a clear exception in favour of categories stated therein, principles in any other forms of mediation/conciliation or other modes of Alternative Dispute Resolution regarding confidentiality cannot be imported.[40]

The legislation also provides for a mechanism to reach settlements, its formulation, authentication and enforcement. It states that when the possible terms of settlement are arrived in a conciliation, the conciliator shall formulate the same and submit it for parties' consideration. If a party provides some observations, then the terms may be reformulated.[41] Once the parties agree to the terms of the settlement it shall be drawn into an agreement either by the parties themselves in assistance of the conciliator or by the conciliator. The same shall be first signed by the parties and then authenticated by the conciliator and given to the parties. A settlement agreement signed by the parties and authenticated by the conciliator shall be final and binding upon the parties or anyone claiming under them and will have the same status and force of an arbitral award on agreed terms under the Act.[42] Various High Courts have held that when a settlement agreement is reached, signed by parties and authenticated by the conciliator then such an agreement is binding upon parties and enforceable under the Act as an arbitral award and no additional requirements or technicalities can be imposed upon it.[43] But a settlement agreement drawn without following the procedure discussed above or doesn't bear the signature of the parties then the same is not enforceable under the Act.[44] The legislation finally prescribes that conciliation proceedings shall be terminated either naturally after the settlement agreement is authenticated by the conciliator and delivered to the parties or where no settlement is arrived by written declaration of the conciliator that further efforts for conciliation is not justified.[45]

[38] SUPREME COURT. Perry Kansagra vs. Smriti Madan Kansagra, 2019(3) SCALE 573.
[39] Such as matters concerning custody or guardianship issues and the Court, in the best interest of the child, must be equipped with all the material touching upon relevant issues in order to render complete justice.
[40] SUPREME COURT. Perry Kansagra vs. Smriti Madan Kansagra, 2019(3) SCALE 573.
[41] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 73.
[42] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 74.
[43] See generally DELHI HIGH COURT. Anuradha SA Investments vs. Parsvnath Developers Limited, 2017(4) ARBLR72(Delhi); Angle Infrastructure Pvt. Ltd. v. Ashok Manchanda 2016 SCC OnLine Del 1534; Rohit Ahuja v. Additional, Principle Judge, Family Court, Lucknow 2009 SCC OnLine All 312.
[44] SUPREME COURT. Haresh Dayaram Thakur vs State of Maharashtra (2000) 6 SCC 179.
[45] CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996. Sec 76.

Post Litigation and Court annexed Mediation

Realizing the potential value of ADR and address the problem of delay and arrears in administration of justice in India the legislature introduced by way of amendment in the Code of Civil Procedure power of civil courts to refer parties before it to resort to ADR methods to resolve their disputes.[46] Section 89 inserted to the Code in 1999 expressly granted power to civil courts in pending litigation to refer parties to ADR where in the opinion of the court exist elements of settlement. The section provides that referral can be made by courts in consultation with the parties to any of the five methods of ADR namely Arbitration, Conciliation, Mediation, Judicial Settlements and Lok-Adalat. Upholding the constitutionality of this section the Supreme Court held "*It is quite obvious that the reason why Section 89 has been inserted is to try to see that cases, which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws delays and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date*".[47] However, the Court in this case observed that among the various ADR procedures prescribed by Section 89 there is no regulatory framework governing mediation and may cause difficulty in its implementation. Accordingly, Supreme Court directed the Law Commission of India to draft rules relating to practice of mediation referred by civil courts under Section 89.[48]

The Law Commission of India recommended draft ADR Mediation Rules 2003 for court mediation referred by Section 89.[49] The Supreme Court recommended all High Courts to adopt mediation rules in the line of rules drafted by the Law Commission.[50] These rules provide for the procedure to be followed by parties and courts for choosing a particular method of ADR and rules to be followed in mediation process referred under Section 89(2)(d). In sum and substance, the rules were similar to the rules provided for conciliation under the Arbitration and Conciliation Act, 1996. But three significant differences were prescribed in the ADR Mediation Rules 2003. Firstly, the role of mediator compared to a conciliator was limited to a purely facilitative role and having no power to suggest or impose upon parties any terms of settlement.[51] Secondly, fixed time limit of sixty days to

[46] Section 89 inserted by The Code of Civil Procedure (Amendment) Act 46 of 1999.
[47] SUPREME COURT. Salem Advocates Bar Association v. Union of India, (2003) 1 SCC 49.
[48] SUPREME COURT. Salem Advocates Bar Association v. Union of India, (2003) 1 SCC 49.
[49] LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 (CPADRM) (http://chdslsa.gov.in/right_menu/rules_regulationslsa/pdf_files/cpadrm-rules-2003.pdf).
[50] SUPREME COURT. Salem Advocates Bar Association case, AIR 2005 SC 3353.
[51] LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 Rule 15.

complete the mediation process and on process stands automatically terminated on expiry of such time limit.[52] Thirdly, once the settlement agreement was reached the mediator shall communicate such terms of settlement in writing to the court which referred the matter for mediation and court after issuing notice to the parties shall record such settlement and pass a decree in accordance to the terms of settlement.[53]

The procedure for ADR reference under Section 89 was further strengthen by the Supreme Court by providing appropriate guidelines for its implementation.[54] These guidelines states that parties can be referred to mediation with or without their consent. Where in the opinion of any civil court their exist possibility of settlement, but parties are unable to reach an agreement on choice of the appropriate ADR method. Then courts can refer the parties to mediation at its own behest.[55] Further to encourage parties to resolve their disputes in mediation courts must incentivize the parties by returning the court fees amount in cases where settlement is arrived in mediation.[56]

United Nations Convention on International Settlement Agreements Resulting from Mediation 2018 and India

Mediation was not generally seen as a commonly used dispute resolution mechanism in international commercial disputes, this was pointed by scholars to the lack of a comprehensive legal framework for the enforcement of settlement agreements compared to arbitration and litigation.[57] Arbitration was preferred over mediation as an alternative dispute resolution because of the enforcement of arbitral awards and agreements ensured through The New York Convention. Only later did the efforts to enforce the mediation settlements come through as light was shed on mediation as a cost-effective process. There was also hope that mediation better preserves party relationships. Hence the UN Convention on International Settlement Agreement Resulting from Mediation or otherwise known as Singapore Convention on Mediation was introduced to ensure the enforcement of settlement agreements arising out of mediation.[58]

[52] LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 Rule 18.

[53] LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003. Rule 25.

[54] SUPREME COURT. Afcons Infrastructure Ltd. vs. M/S Cherian Varkey Construction 2010 (8) SCC 24.

[55] SUPREME COURT. Afcons Infrastructure Ltd. vs. M/S Cherian Varkey Construction 2010 (8) SCC 24.

[56] SUPREME COURT. The High Court of Judicature at Madras vs. M.C. Subramaniam 2021 SCC OnLine SC 109.

[57] HIOUREAS, Christina G. The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward. Ecology Law Quarterly, v.46, n.61, 2019.

[58] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

The Convention provides for mandatory enforcement of settlement agreements resulting from international mediation. It envisions enforcement in a way that after the settlement agreement, the parties can approach the competent state authority of a contracting state and the state shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention.[59] The requirements for such an application insist to supply a settlement agreement signed by the parties along with the evidence that the settlement is a result of mediation and the competent authority may require any necessary document in order to verify the requirements of the Convention have been complied with.[60] Article 5 provides particular grounds on which domestic courts can refuse enforcement of settlement agreements.[61] In situations where a settlement agreement is against public policy[62] or the subject matter of the dispute is not capable of settlement by mediation under the law of that party, the authority can deny enforcement of the same.[63]

The preamble of the Convention states that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social, and economic systems would contribute to the development of harmonious international economic relations.[64] India is a signatory to the Convention, however it has not ratified it yet. Without the ratification, it is not possible to enforce the settlement agreements sought through international mediation. It is also important that when India legislates a law, it provision must be consistent with the Singapore Convention. The Mediation Bill 2021 neither included the enforcement of settlement agreements resulting from international mediation within its scope nor has it maintained coherence with the Convention in the enforcement of international mediation. The mediation settlement is enforceable as a decree or judgment from the court. Singapore Convention excludes such settlements hence parties would hardly choose India for international mediation.

The Mediation Bill 2021

Although there are significant developments to promote mediation in India there is no specific law governing mediation. An artificial difference has been

[59] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. Art. 3.
[60] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. Art.4.
[61] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. Art.5.
[62] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. Art. 5 (2)(a).
[63] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019. Art. 5 (2)(b).
[64] SINGAPORE. Convention on International Settlement Agreements Resulting from Mediation, 2019.

established between mediation and conciliation due to Section 89 of Code of Civil Procedure and conciliation is treated differently from mediation. Similarly, the Mediation Rules enacted by High Court to govern mediation that are referred by civil courts under Section 89 also don't apply to mediation conducted under other statutes[65] or purely private mediation. In the backdrop of ongoing developments in the field of mediation and alternate dispute resolution, the Mediation Bill 2021 was introduced in Rajya Sabha in December 2021. The Mediation Bill applies to mediation conducted in India, and all or both parties habitually reside in or incorporated in or have a place of business in India, or the mediation agreement provides that the dispute shall be resolved in India or there is international mediation.[66] Although Central or state government or its entities enjoys a privilege of exemption from it unless it is a commercial dispute.

The Bill considers mediation and conciliation as synonymous with each other, a similar take is seen in a Supreme Court case[67] and the UN Convention on International Settlement Agreement Resulting from Mediation also used the terms interchangeably. Within the existing conception, a conciliator has more powers than a mediator, where the former can make a proposal and provide terms of settlement and the latter only acts as a facilitator. The role of a mediator is evolving from a mere facilitator to actively participating in decision-making and giving advice to parties. The Mediation Bill proposes to substitute Part-III of the Arbitration and Conciliation Act, 1996 by the provisions prescribed under it.[68]

The Bill list subject matter that will not come under the purview of mediation.[69] The parties can choose a mediator of their choice or else a mediator will be appointed through the mediation service provider. The bill states that the mediator shall assist the parties in an independent, neutral, and impartial manner in their attempt to reach an amicable settlement of their dispute.[70] The neutrality, integrity, and impartiality of mediators are important aspects of mediation.[71] The Bill provides for a pre-litigation mediation in matters of a civil or commercial dispute before parties approach a court or tribunal.[72] The objective behind the section

[65] CENTRAL GOVERNMENT. Companies Act, 2013. Section 442 provides for referral of company disputes to mediation by the National Company Law Tribunal and Appellate Tribunal; Section 12A of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, which provides for mandatory pre-institution mediation; Section 32(g) of the Real Estate (Regulation and Development) Act, 2016, which provides for amicable conciliation of disputes.

[66] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 2.

[67] SUPREME COURT. Afcons Infrastructure Ltd. vs. M/S Cherian Varkey Construction 2010 (8) SCC 24.

[68] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 64 and Schedule-IV.

[69] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021, Schedule-II.

[70] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021, sec.17.

[71] See, Honourable Mr. Justice N. V. Ramana, the Chief Justice of India, Supreme Court of India address at India-Singapore mediation summit: 2021 mediation for everyone: realizing mediation's potential in India. https://www.livelaw.in/pdf_upload/cji-speech-at-mediation-summit-396853.

[72] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec.6.

seems to put mediation as an easy way to dispute resolution without getting into the long proceedings of the Court.

The Bill as per section 8 provides that in exceptional cases the parties may seek interim relief before the court or tribunal before the commencement or during the continuation of mediation.[73] It further provides that the court or tribunal shall after granting or rejecting interim relief, refer the parties to undertake mediation if deemed appropriate. The language of the Bill shows that preference is given to mediation over the court proceedings. Using phrases like 'exceptional cases' and 'refer the parties to undertake mediation' while seeking interim relief shows that it is not highly entertained. Although the parties may choose this option or they have the liberty to opt-out of the mediation process after two sessions to reach the court or a tribunal.[74] The time limit for the completion of mediation is 180 days.[75] The Bill creates no distinction between international and domestic mediation conducted in India. The mediated settlement will be enforceable as a decree or judgment.[76] Settlements that are treated as a judgment are excluded from the consideration of the United Nations Convention on International Settlement Agreements Resulting from Mediation.[77] These elements reduce the scope of international mediation in India, as they would not be able to enforce them abroad. The definition of international mediation should also not be limited to commercial disputes.

Another important feature of the Mediation Bill is the provision for online mediation. Section 32 provides online mediation and for maintaining the integrity and confidentiality of the proceedings as well. The mediator may take appropriate steps to ensure this. Confidentiality of mediation is otherwise also mentioned in the Bill as the process demands that. But it is important to take extra care for individuals to feel safe and seen in the online medium. Finally, the Mediation Bill proposes for establishment of a Mediation council.[78] Mediation Council to be headed by a person appointed by the central government. The mediation Council envisaged not as a usual government regulatory body that can be handled exclusively by the executive.[79] The previous draft provided for a former judge of the Supreme Court or former Chief justice of the High Court as the head of the Council. Mediation in

[73] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 8.
[74] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec.20(1).
[75] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021Id. Sec.21.
[76] The settlement may be challenged on the grounds of fraud, corruption, impersonation, or relating to disputes not fit for mediation.
[77] SINGAPORE, Convention on International Settlement Agreements Resulting from Mediation, Art.1, 2019.
[78] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec.33(1).
[79] JIGEESH, A.M. Mediation Council can't be handled exclusively by the Executive, Dec. 28, 2021. The Hindu, https://www.thehindubusinessline.com/news/mediation-council-cant-be-handled-exclusively-by-the-executive/article38050878.ece.

India has grown with the guidance shown by judges and their unique expertise is needed in the field.

The Mediation Bill after its introduction met with very strong criticism from all stakeholders and was referred to a Parliamentary Standing Committee for reconsideration. The Committee submitted its report stating several drawbacks and recommending changes. The Committee observed that making pre-litigation mediation mandatory may actually result in delaying of cases and may prove to be an additional tool in hands of litigants to delay the disposal of cases.[80] An example of prelitigation mediation exploring its scope in India is at 'Samadhan,' a court-annexed mediation centre established in Delhi High Court in 2006. Their data shows that among 1935 prelitigation mediations registered 559 cases are settled as of now. However, there are contradictory opinion as Chief Justice of India while addressing in the India-Singapore Mediation Summit, opined that 'prescribing mediation as a mandatory first step for resolution of every allowable dispute will go a long way in promoting mediation'.[81] Studies have shown option of pre-litigation mediation should ideally bridge the gap between the persons and the justice system, but for many, making it compulsory may build a longer bridge to reach the Court itself. Italy follows an opt-out model where parties need to attend initial stages to get introduced to mediation and for a possible resolution, then they can either opt-out or continue mediation.[82] A similar system has been successful in Turkey and Brazil. In countries like Romania, mandatory prelitigation has become mere compliance before filing a case before the Court.[83] But the concern is from the perspective of a common person about the effectiveness of mediation as such. The realities of Indian litigation culture and the ability to provide a large number of mediators need to be considered before establishing such a system. It has been suggested that introducing mandatory prelitigation in a phased manner of a selected categoryof disputes and eventually expanding it to a wide range may be a more successful method.[84]

The Bill also gave powers to Supreme Court and High Court to frame rules for court-annexed mediation.[85] Court annexed mediation centres are already in existence in Supreme Court and in Various High Courts working with the guidelines established by them. The Parliamentary standing committee opposed the proposed

[80] JIGEESH A.M, Mediation Bill: House panel recommends against compulsory mediation, role for judiciary, Jul.11, 2022 22:50 IST.

[81] Honourable Mr. Justice N. V. Ramana, the Chief Justice of India, Supreme Court of India address at India-Singapore mediation summit: 2021 mediation for everyone: realizing mediation's potential in India.

[82] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

[83] GAVRILA, Constantin A; CHEREJI, Christian R. Don't Rush. Kluwer Mediation Blog, Mar. 2, 2015.

[84] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

[85] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 26(1).

provision and stated that when a specific statute will be in force, giving power to High Court and Supreme Court to make rules or guidelines would be unconstitutional.[86]

The Mediation Bill introduces a provision for Community mediation in matters which are likely to affect peace, harmony, and tranquility amongst the residents or families of the area or locality.[87] A panel of three mediators would conduct the community mediation. India has a long history of community-oriented dispute resolution mechanisms, although those mechanisms are rooted in caste and religious-based administration and their decisions would be detrimental to underprivileged individuals and communities. A rights-based approach to eliminating the biases is needed and an opportunity like this when implemented rightly, can solve disputes easily. Along with that, the benefits of mediation will be successfully introduced to a large group of people.

Similar concerns are also raised in mediation where the Central Government, State Government, or any of their entities is one of the parties. The Central Government and State Government can frame any schemes or guidelines regarding mediation and mediation may be conducted in accordance with those schemes or guidelines.[88] Central and State Governments, council members, mediators, mediation institutes, and mediation service providers are protected from legal action for acts done in good faith under the Bill.[89] There is no provision for mediator accountability for addressing grievances against mediators and their timely disposal, such a provision can be found in the jurisdiction of the United States.[90]

The Mediation Bill must consider the existing legal system as well as facilities and envision a growth process based on that. An important step would be education and training provided to mediators, lawyers, students, and the general public. As this intends to build trust among people to rely on mediation, the commitment must be shown by Government also. Government should not exempt itself from the process and should resolve mediation to solve its disputes.

Online Mediation

Our ideas of mediums for education, business, and even legal mechanisms have changed over the pandemic period. With the unprecedented times of the pandemic, our judicial system itself adapted well to the e-court system and video conferencing and set an example to all other fields. We could see a growth in providing online services in government departments also in the last decade. This

[86] JIGEESH, A.M. Mediation Bill: House panel recommends against compulsory mediation, role for judiciary, Jul.11, 2022 22:50 IST.
[87] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 44.
[88] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 49.
[89] RAJYA SABHA. Mediation Bill. Bill No. XLIII of 2021. Sec. 51.
[90] US. Uniform Mediation Act, 2005.

has positively set the stage for online mediation in India. Online mediation uses emails, texts, video conferencing, etc and here the mediator or mediation service providers assist the parties through online modes of communication.

Internationally many countries have tried online mediation. Subordinate Courts in Singapore provide Online Dispute resolution for cases filed in the Small Claims Tribunal. Online mediation and arbitration are provided by Court Mediators or Judge Mediators from the Judicial system.[91] UNICITRAL adopted a non-binding, descriptive Technical Notes on Online Dispute Resolution, with the aim of assisting states, particularly developing states in Online Dispute Resolution[92] [Hereinafter ODR]. UN General Assembly adopted a resolution on the same. The scope of ODR is stated as useful for disputes arising out of cross-border, low-value e-commerce transactions. Online Dispute Resolution is an umbrella term used for all dispute resolutions conducted through online mediums. In India, NITI Ayog released a report on ODR in 2021 that considers the possibilities and challenges of Online Dispute Resolution in India.[93]

The shift from physically being present at a particular place to communicating through an electronic medium makes the process convenient, cost-effective, and fast. Mediation itself is proven to be cost-effective and quick compared to litigation, and adapting an online mode ensures a quick and low-cost result. Online mediation would be very useful for parties coming from different places or having their business established in a different place. It is also suggested that online dispute resolutions particularly through texts and emails reduce bias caused by human judgment and focus on the information and claims produced before.[94]

In various countries, private parties and institutions provide mediation services. Private corporations like eBay, PayPal, and ICANN incorporated ODR into their system where disputes are quickly decided, by this they intend to maximize the number of successful transactions. In India certain ODR service providers like Sama,[95] YesSettle,[96] Presolv 360,[97] webnyay,[98] and many other similar providers give a platform for online dispute resolution services. In the private sector, one may build an in-house ODR platform or approach third-party platforms that provide tech-driven solutions, or independent ODR institutions that offer both platform solutions

[91] HATTOTUWA, Sanjana; TYLER, Melissa C. An Asian perspective on online mediation. Asian Journal on Mediation, v.1 n.1, 2005.

[92] UNCITRAL Technical Notes on ODR, 2017 https://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf.

[93] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

[94] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

[95] Sector agnostic, with a focus on financial disputes, servicing Lok Adalats and consumer forums to go online.

[96] Telecom, Insurance, Banking, Business and Government disputes.

[97] Banking, Commercial, Consumer, Employment, Family, Government, IPR, Property & Tenancy disputes.

[98] Civil and Commercial disputes across all sectors, both domestic and cross-border.

and dispute resolution professionals. There are other NGOs and organizations also that work towards providing and supporting ODR.

NITI Ayog report suggests that collaboration with the private sector will be beneficial with certain examples from around the world where Government run or court-annexed ODR platforms have collaborated with the private sector.[99] Association with the private sector would probably ensure high-quality services and advanced tools in mediation, but the issue of privacy and confidentiality is huge and the government must ensure that it is conducted properly and the personal data and information of parties are protected.

Online Mediation is one of the various mechanisms of ODR. One of the mediation centres in India, named, 'Samadhan' in the Delhi High Court conducts online mediation. With the pandemic hitting, Bangalore Mediation Centre, an initiative of the High Court of Karnataka also started online mediation. A comprehensive legal framework is lacking in the area, although the Mediation Bill provides for online mediation and the issues like confidentiality is generally addressed, it lacks a proper vision about implementing such a system in India.

The uneven access to the internet and technology is a concern for a country like India. If the convenience mentioned in the online mode of mediation is divided and only certain people with greater access to technology, yield the benefits of uninterrupted communication, that creates a bias in the process and thereby results in injustice.

Hybrid models of incorporating technological tools into the mediation process will be helpful in introducing online modes to people and building their confidence in online mediation.[100] Building proper infrastructure and facilities and at the same time, building faith among people about online mediation is very important. The existing mediation centres need to be upgraded in their infrastructure and ensuring digital access to everyone must be taken as a priority. The training and education in mediation should be expanded to online modes also and online mediation competitions and workshops may be included in the curriculum. It is important that lawyers and law students are updated on the subject and they are equipped with the skills in the online medium also.

[III] Development of Mediation Institution in India

Promotion of mediation has been the thrust area of the Government and Judiciary to secure prompt delivery of justice and reduce court congestions for

[99] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.
[100] NITI AYOG. Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

the past two decades.[101] Attention has been given to augment the infrastructure, manpower development to facilitate use of mediation in India.[102] The vision statement adopted jointly by the government and judiciary in 2009 emphasized on introducing steps to promote oy of court settlement and use of ADR methods.[103] Accordingly, the Supreme Court has setup the Mediation and Conciliation Project Committee (MCPC). According to the statistics available on the MCPC website there are 839 functional mediation centres in India having 6480 MCPC trained and certified mediators. The mediation services available in these centres is free of cost.[104] The MCPC has initiated a 40 hours training program for training and certification of mediators. It has also initiated training of trainers for mediation awareness among all stake holders. The MCPC has 147 expert trainers who are conducting mediation training all around the country. It has prepared the necessary curriculum, methodology and training manual for conducting theses training.[105]

The High Courts have also established mediation centres. Some of these prominent mediation centres are Bangalore Mediation Centre established by Karnataka High Court,[106] Samadhan established by Delhi High Court,[107] Tamil Nadu Mediation and Conciliation Centre established by Madras High Court[108] and Allahabad High Court Mediation and Conciliation Centre.[109] A study commissioned by Department of Justice, Government of India stated in its report that based on the data collected from Delhi and Bangalore Mediation Centres that the referral to mediation has increased over years but it is still not satisfactory. Similarly, the rate of settlement arrived is also low and less than 50 percent of the total referral.[110]

The Legal Services Authorities instituted at national to taluk level under the Legal Services Authorities Act, 1987 has also undertaken efforts to promote speedy and affordable justice by establishing and administering mediation services. The mission statement of NALSA attempts to develop a robust mechanism of ADR and mediation mechanism to attain its goal of an inclusive and integrated model of legal service delivery. Especially the role of NALSA in providing mediation service

[101] INDIAN EXPRESS, 2022, https://indianexpress.com/article/cities/ahmedabad/courts-must-actively-make-mediation-mandatory-in-cases-cji-ramana-7861453/ (visited on 27.3.2022).

[102] SUPREME COURT. Report of the Mediation and Conciliation Project Committee, https://main.sci.gov.in/pdf/mediation/Brochure%20-%20MCPC.pdf (visited on 27.4.2022).

[103] Vision Statement presented jointly by the CJI and Union Law Minister at the National Consultation for Strengthening Judiciary Towards Reducing Pendency and Delays, 2009 https://cdnbbsr.s3waas.gov.in/s35d6646aad9bcc0be55b2c82f69750387/uploads/2022/03/2022032560.pdf.

[104] MCPC Brochure https://main.sci.gov.in/pdf/mediation/Brochure%20-%20MCPC.pdf.

[105] https://main.sci.gov.in/mediation.

[106] https://nyayadegula.kar.nic.in/aboutus.html.

[107] http://dhcmediation.nic.in/about-us.

[108] https://tnmcc.tn.gov.in/.

[109] https://www.allahabadhighcourt.in/mediation/mediation.html.

[110] KUMAR, Alok P; JAUHAR, Ameen; VOHRA, Kritika *et al*. Strengthening Mediation in India, A report on court-annexed mediations. Vidhi Centre for Legal Policy, 2016 https://vidhilegalpolicy.in/wpcontent/uploads/2019/05/26122016_StrengtheningMediationinIndia_FinalReport.pdf.

has become very significant after the introduction of mandatory pre-litigation mediation[111] for all commercial cases valued upto 3 lakhs.[112] Accordingly, the legal services institutions are conducting pre-institutional mediation in respect of commercial disputes across the country.[113] The latest statistics available at NALSA website states that there 572 mediation centres. These centres are manned by 16,360 mediators and overall, they have resolved 52,568 cases through mediation. Compared to this in the year 2020 only 32,042 cases were settled through mediation.[114] Therefore nearly 20000 cases were settled using mediation in 2020-21 period. This is really very optimistic piece of information regarding growing faith in mediation in India. Specially with reference of pre-litigation mediation of commercial disputes the data shows that total 32,591 cases were referred for mediation. Among these in only 1059 cases parties actually agreed to attempt mediation for resolution of their dispute and of these in 578 cases settlement were arrived by way of mediation.[115] This however remains discouraging evidence.

There are also many private ADR and Mediation service providers in the urban and metropolitan hubs of India. Among them some prominent institutions are Indian Institute of Arbitration and Mediation (IIAM),[116] Centre for Advanced Mediation Practice (CAMP),[117] and Foundation for Comprehensive Dispute Resolution (FCDR)[118] and Centre for Mediation and Conciliation (CMC)[119] etc. These institutions are engaged in providing mediation service. Every institution has developed its own institutional mediation clause that recommend to adopt to facilitate the reference to mediation under these institutional rules. There is no statistics available with regard to these private institutions. They are maintaining list of recommended mediators and their details of experience and specialist practice areas. They have also been involved in promoting training of mediator, mediation counsels and awareness programs on benefits of adopting mediation.

[IV] Existing challenges and future of mediation in India

This paper has traced the background and evolution of mediation movement in India. Discussing about the beginning of the advocacy for ADR and mediation in

[111] CENTRAL GOVERNMENT. The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015. Sec. 12A; See also the Commercial Courts Rules, 2018.
[112] One lakh is equal to 100 thousand.
[113] https://nalsa.gov.in/services/mediation/pre-institutuion-mediation-in-commercial-matters.
[114] https://nalsa.gov.in/library/statistical-snapshot/statistical-snapshot-2020.
[115] https://nalsa.gov.in/library/statistical-snapshot/statistical-snapshot-2021.
[116] https://www.arbitrationindia.com/services.html.
[117] https://www.campmediation.in/.
[118] https://www.fcdr.in/.
[119] http://centre4mediation.com/eminent-mediators/#EminentMediators.

the late 1990, how the mediation movement has gained momentum in past two decades. It is pertinent to note the policy and legislative introduced to popularize mediation and encourage its adoption. Also, the statistical data presented from various sources reflects about the efforts undertaken towards augmenting appropriate infrastructural and human resource to strengthen its ecosystem. However, the brightness of these development must not blindfold us to ignore about the gaps that still exist. Unless these gaps are addressed the future of mediation will remain uncertain.

There are not many studies undertaken till date to access the progress and effectiveness of mediation. One study was commissioned by the Department of Justice, Government of India in 2015 conducted by Vidhi Centre for Policy Research.[120] The study undertook a detailed inquiry into the working of mediation in India especially the court connected mediation under Sec 89 of Code of Civil Procedure, 1908. The empirical evidence for the study was collected court connected mediation centres in Delhi, Bangalore and Allahabad. Study also had a comparative analysis with certain foreign jurisdiction where mediation has been very successful and effective. The study after its detailed analysis highlighted some major gaps in India and recommended changes to address these gaps to strengthen mediation in future. The gaps identified by the study can be grouped in three broad head (i). legislative gap; (ii). quality control and popularizing mediation; and (ii). lack of mediation profession. These findings have been supported by other papers.[121]

In terms of the legislative gap the study identified several challenges due to lack of an appropriate legislation governing mediation. As discussed in this paper also, there is no regulatory framework on conduct of private mediation. The Arbitration and Conciliation Act, 1996 is regarded unapplicable to mediation. Also, mediation and conciliation are identified as two different processes in India. Further, the regulation of court referred mediation has a judicial status[122] and thus treated as different from a private conciliation and mediation. This regulatory gap damaging the future of mediation because several legal issues involved in the process of mediation remains uncertain. Mediation is regarded still as a voluntary method with no certainty of bindingness and enforceability of the settlement agreement.

The issue of quality control of mediators is very significant because we lack in evolving a uniform curriculum, training methodology and accreditation process

[120] KUMAR, Alok P.; JAUHAR, Ameen; VOHRA, Kritika *et al*. Strengthening Mediation in India, A report on court-annexed mediations. Vidhi Centre for Legal Policy, 2016.

[121] See RAVEENDRAN, R.V. 2010; OLLAPALLY, Tara. The Mediation Gap: Where India Stands and How Far It Must Go.

[122] SUPREME COURT. Afcons Infrastructure Ltd. v. M/S Cherian Varkey Construction 2010 (8) SCC 24.

for mediators. The current trainings are grossly inadequate and also there is no centralized regulator for mediators. The norms that govern the independence, impartiality and ethics of mediator are quite limited and no institutional framework exist for regulating the practice of mediators. So, parties have little recourse against cases where mediators commit gross malpractice. Further, in the court connected mediation majority of mediators are chosen from retired judicial officers and lawyers. They bring often with them their burdens of long adversarial experience and turns mediations into adversarial process. These mediators offer parties decision for settlement. Sometime, they take decisions also without consulting or communicating with the parties. These practices are not healthy and shakes the confidence of citizens in mediation. The legal profession of India by and large is still envious of mediation. It primarily doesn't advise their clients to resort to mediation or cooperate with the mediators. Mediation for them is still a formality which needs to be by gone. There is also lack of awareness among common citizens about ADR or mediation. Mediation compared to courts are not seen as less effective and with less authority.

Also, compared to other jurisdictions that have been successful in promoting mediation, in India there is no independent profession of mediation. It is still treated as a part-time or post court job of lawyers or retired judges. Even the ADR Mediation Rules 2003 for the purpose of selecting panel of mediators for court connected mediation states that qualified persons are retired judges; lawyers having fifteen years of professional experience; other professionals having fifteen years standing experience; or retired bureaucrats or executives.[123] This doesn't help in developing an independent profession for mediation. Mediation should be a full-time profession. Professionally trained mediators, lawyers and non-lawyers, who can devote their time and energies to the mediation centre full–time, are crucial to expand the operations at such centres. There is require to establish appropriate professional courses, psychological and communication training. Only those who undertake and complete those courses must be allowed to become mediator. Therefore, it is essential that a pan-India professional body to regulate mediation is absolute inevitable. This body should have power to regulate right to admission to the practice of mediation in India, the education and training of mediators, establish and administer code of ethics and professional responsibilities of mediators and have disciplinary powers. All this can be achieved by enacting the necessary legislation. The mediators must be also complemented in their efforts by the existing legal profession and judiciary.

[123] LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003. Rule 4.

Finally, promoting increased use of online mediation is the need of the hour. However, uneven access to the internet and technology is a concern for a country like India. At present the convenience of online mode of mediation is accessible to only a certain section of the citizens. Therefore, greater access to technology, uninterrupted communication, and user-friendly mediation platforms, and privacy of online communication must be prioritized. Hybrid models of incorporating technological tools into the mediation process will be helpful in introducing online modes to people and building their confidence in online mediation.[124] Therefore, building proper infrastructure and facilities and at the same time, building faith among people about online mediation is essential. The current mediation centres are required to be upgraded by infrastructural changes. Every citizen must have digital access.

References

CENTRAL GOVERNMENT. Arbitration and Conciliation Act, 1996.

CENTRAL GOVERNMENT. Companies Act, 2013.

CENTRAL GOVERNMENT. The Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts Act, 2015.

FISS, Owen. Against Settlement, Yale Law Journal, v.93, n.1073, 1983-1984.

FOLBERG; Jay; GOLANN, Dwight. Lawyer's Negotiation Theory, Practice and Law, Wolters Kluwer, 3rd Ed, 2016.

GANDHI, Mohandas. K. An Autobiography or the Story of my Experiments with Truth. Ahmedabad: Navajivan, 1940.

GAVRILA, Constantin A; CHEREJI, Christian R. Don't Rush. Kluwer Mediation Blog, Mar. 2, 2015.

HATTOTUWA; Sanjana; TYLER, Melissa C. An Asian perspective on online mediation. Asian Journal on Mediation 1(1), 2005.

HIOUREAS, Christina G. The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward. Ecology Law Quarterly, v.46, n.61, 2019.

JIGEESH A.M, Mediation Bill: House panel recommends against compulsory mediation, role for judiciary, Jul.11, 2022 22:50 IST.

JIGEESH, A.M. Mediation Council can't be handled exclusively by the Executive, Dec. 28, 2021. The Hindu.

KOROBKIN, Russel; GUTHRIE, Chris. Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer, Texas Law Review, v.76, n.77, 1997-1998.

KUMAR, Alok P; JAUHAR, Ameen; VOHRA, Kritika; et al. Strengthening Mediation in India, A report on court-annexed mediations. Vidhi Centre for Legal Policy, 2016.

LAW COMMISSION OF INDIA. Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003.

[124] NITI AYOG, Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

LINCOLN, Abraham. Notes for a Law Lecture, Collected Works of Abraham Lincoln, v.2 Maryland: Wildside Press, 2008.

LUCADO, Max. When God Whispers Your Name. Nashville: W Publishing Group, 1999.

MEADOW, Carrie M. Legal Negotiation: A Study of Strategies in Search of a Theory, American Bar Foundation Research Journal, 905, 1983.

NITI AYOG, Designing the Future of Dispute Resolution: The ODR Policy Plan for India, October 2021.

OLLAPALLY, Tara. The Mediation Gap: Where India Stands and How Far It Must Go.

RAJYA SABHA. Mediation Bill, 2021, Bill No. XLIII of 2021, (Dec. 21, 2021).

RAVEENDRAN, R.V. Mediation: Its Importance and Relevance, 2010.

RUMMEL, Rudolph J. The Subjectivity Principle, in The Conflict Helix. New Jersy: Transaction Publishers, 1991.

SINGAPORE, 2019, United Nations Convention on International Settlement Agreements Resulting from Mediation, UNCITRAL, Aug.7, 2019.

SUPREME COURT. Afcons Infrastructure Ltd. vs. M/S Cherian Varkey Construction, 2010 (8) SCC 24.

SUPREME COURT. Baljinder Kaur vs. Hardeep Singh, AIR 1998 SC 764.

SUPREME COURT. Govind Prasad Sharma vs. Doon Valley Officers Cooperative Housing Society Ltd.

SUPREME COURT. Haresh Dayaram Thakur vs State of Maharashtra, (2000) 6 SCC 179.

SUPREME COURT. K Srinivas Rao vs. D.A. Deepa, (2013) 5 SCC 226.

SUPREME COURT. Mediation Training Manual of India.

SUPREME COURT. Moti Ram vs. Ashok Kumar, (2011) 1 SCC 466.

SUPREME COURT. Perry Kansagra vs. Smriti Madan Kansagra, 2019(3) SCALE 573.

SUPREME COURT. Report of the Mediation and Conciliation Project Committee.

SUPREME COURT. Salem Advocates Bar Association v. Union of India, AIR 2005 SC 3353.

SUPREME COURT. Salem Advocates Bar Association vs. Union of India (2003) 1 SCC 49.

SUPREME COURT. The High Court of Judicature at Madras vs. M.C. Subramaniam, 2021 SCC OnLine SC 109.

US, Uniform Mediation Act, 2005.

WEBER, Thomas. Gandhian Philosophy, Conflict Resolution Theory and Practical Approaches to Negotiation, Journal of Peace Research, Vol. 38, No. 4 (Jul., 2001).

WELSH, Nancy A. Perceptions of Fairness in Negotiation 87 Marquette Law Review. v.87, n.753, 2004.

WILLIAMS, Gerald R. Negotiation as a Healing Process. Journal of Dispute Resolution. v.1, 1996.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

CHAKRABORTY, Anirban; SARKER, Shuvro Prosun. Resolving disputes with an healing effect: the practice of mediation in India. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 61-84, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.4.

DOI: 10.52028/rbadr.v4i8.5

The Singapore Convention in the framework of the investor-state dispute settlement system

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Abstract: This contribution is aimed at analysing the extension of the scope of the Singapore Convention on Mediation to include settlement agreements arising out of investor-State mediation. To this end, the paper firstly approaches the ISDS crisis jointly with the UNCITRAL Working Group III reform proposals. Secondly, analyses the use of mediation in the scope of investor-State disputes and the rise of the Singapore Convention on mediation. Finally, argues for the applicability of the Convention to the context of ISDS. In addition, this work comprises the hypothetical-deductive methodology, through the analysis of normative texts, cases and international instruments.

Keywords: Investor-State Mediation. Singapore Convention. Investor-State Dispute Settlement.

> *"Mientras ciertos países latino-americanos están adoptando instrumentos que contemplan el arbitraje internacional como un medio para resolver litigios inversor-Estado, otros se han embarcado en una tendencia opuesta de terminar o disminuir el ámbito de aplicación de los compromisos existentes..."*
>
> Emmanuel Gaillard[1]

Introduction

One amidst the characteristics of a globalised society is the constant flow of foreign investment, channelled through the strong presence of transnational enterprises and their contractual network in different state economies. The regulatory webs that creates the international investment law are characterised by their complexity and mutability, traditionally considering two main assumptions: (i) the existence of International Investment Agreement (IIAs) systematising general practises between investors and host States; and (ii) the regulatory complementarity built through the practice of investment arbitration.

The tension between the two poles – host State and foreign investor – has a pendulum effect on the regulation of foreign investments. In the current century, recent developments, particularly related to the high political and financial cost of investment arbitration, have brought as a result the questioning of the legitimacy of the traditional model of conflict resolution between investors and States and of the international investment law itself.

The intense arbitration activity, particularly arising from the institutional system established by the World Bank in 1965 – through the Washington Convention – has been a source of significant criticism. The extensive interpretation of the standards of treatment of foreign investors by arbitration tribunals, questioning the regulatory capacity of national States – as exemplified by the cases "Magyar Farming and others v. Hungary",[2] "ESPF and others v. Italy",[3] "9REN Holding v. Spain"[4] and "CEF Energia v. Italy"[5] – has led to the perception that this system is highly protective of foreign investors to the detriment of the sovereign rights of the host State.

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1 GAILLARD, Emmanuel. *Tendencias anti-arbitraje en América Latina. Contratos Internacionales*. Coord. Diego P. Fernández Arroyo/Adriana Dreyzing de Klor, Asunción: CEDEP, 2008., pp. 311-315.

2 UNITED NATIONS. *United Nations Conference on Trade and Development*. Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

3 UNITED NATIONS. *United Nations Conference on Trade and Development*. Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

4 UNITED NATIONS. *United Nations Conference on Trade and Development*. Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

5 UNITED NATIONS. *United Nations Conference on Trade and Development*.Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

This perspective, together with the investment arbitration crisis, led the United Nations Commission on International Trade Law (UNCITRAL) to deepen their studies in the reform of the Investor-State Dispute Settlement which, since 2017, has offered significant advances in the area. Nonetheless, nothing definitive has been signed yet – which leaves relative autonomy to States, through Bilateral Investment Treaties, Free Trade Agreements, Cooperation and Facilitation of Investment Agreements or similar instruments to regulate the matter of foreign investments and dispute resolution.

Moreover, initiatives on the use of mediation have been increasingly perceived, albeit they are not yet widespread. This is justified by the lack of guarantees that the parties have in relation to the enforcement of international agreements arising from mediation, even though these are characterised by a high degree of enforceability motivated by the voluntariness. As mentioned by Schneider[6] "to talk about mediation and its various modalities is to talk about a multidisciplinary structure of approach to conflict, which requires a comprehensive and systemic look at the conflict, the parties and their interactions".

However, when it comes to public interest the guarantees are even narrower. This is where the performance of the Singapore Convention would play an important role, in case its scope also allows the execution of agreements arising from investment relations. This paper applies the hypothetical-deductive methodology, through the analysis of normative texts, cases and international instruments.

Firstly, it addresses the crisis of the system of Investor-State dispute settlement, followed by the reform of the UNCITRAL system. Secondly, it proposes the mediation as a suitable proposal for Investor-State dispute settlement. Finally, it traces notes on the Singapore Convention and the application of the Singapore Convention to the Investor-State Dispute Settlement.

1 The crisis of the investor-state dispute settlement system

International Investment Law, although highly controversial, is amongst the oldest fields of public international law. Considering the investor-State dispute settlement, the first known investment claims dispute mechanism was the one established by the Jay Treaty (1794) between the United States and Great Britain – which had the aim at maintaining peace among those two States through economic and commercial cooperation. Regarding international investment law, this treaty is particularly relevant because of its dispute resolution system characterised by

[6] SCHNEIDER, Patricia Dornelles. Uma visão sistêmica do procedimento de mediação – As lições do pensamento de Maturana. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 03, n. 06, p. 193-200, jul./dez. 2021. DOI: 10.52028/rbadr.v3i6.11.

mixed-claims tribunals or commissions with sitting arbitrators. That was the United States' primary method of settling international claims.[7]

In the 19th century, the method of gunboat diplomacy arose as a vent of imperialism. Albeit the use of the expression "diplomacy", this dispute settlement mechanism was not in essence peaceful or amicable. In other words, the outcome was based on the nations' power and influence. This way of dispute resolution is based on the demonstration, threat, or use of limited naval force for political objectives.[8]

In the late 19th century, with the advent of the Permanent Court of Arbitration, investors used to request the diplomatic protection of their own countries in order to litigate in the State-to-State Arbitration. Diplomatic protection is considered to be the main procedural mechanism against the lack of compliance in international public law – since it allows the individual to request that his State represent him in judicial or arbitral proceedings in such a way that the two parties are sovereign States. This has proven not to be the best resource because of the likely political and economic disturbances between the host-State and the State giving its diplomatic protection to the domestic investor.

As for Latin America, the Calvo Doctrine is cited – a doctrine manifested by a resistance to the internationalisation of disputes, giving rise to the investor's renunciation of diplomatic protection and its subjection to the domestic regime through the Calvo Clause.[9] According to Moreno Rodríguez,[10] in his private international law course in the Hague Academy, the Calvo Doctrine can be referenced in three main aspects: (i) since sovereign States are free and independent, they cannot suffer interference of any sort by other States, either by force or diplomatically; (ii) foreign investors should receive no better treatment than that accorded to the host States' own nationals. Each State could establish its own standard of treatment, which had to be accepted by foreigners conducting business there; and (iii) settlement should be achieved by the domestic courts of the host State alone.

And furthermore, investors could choose to submit disputes to the domestic courts of the countries receiving investment. But, precisely because of their State nature, those courts offered resistance to condemning the State itself for the benefit of the foreign investor. In this meanwhile, in 1965, within the framework of

7 LILLICH, Richard B. The Jay Treaty Commissions. 37 *St. John's L. Rev.* 260 (1962-1963).

8 MANDEL, Robert. The Effectiveness of Gunboat Diplomacy. *International Studies Quarterly*, Volume 30, Edição 1, Março 1986, pp. 59–76.

9 CAETANO, F. A. K. Direito Internacional dos Investimentos na atualidade: uma análise da posição brasileira, in *Revista Científica do Departamento de Ciências Jurídicas, Políticas e Gerenciais do Uni-BH*, Belo Horizonte, vol. III, n. 1, jul-2010. Disponível em: www.unibh.br/revistas/ecivitas/ Acesso em: 07 Fev. 2021.

10 RODRIGUEZ, Jose Antonio Moreno. *The Hague Academy of International Law*. Summer Courses on Private International Law. Private International Law and Investment Arbitration. 2021.

the World Bank's activities, the Washington Convention took place, establishing the International Centre for Settlement of Investment Disputes (ICSID). The Convention, ratified by 156 countries, waives the requirement of diplomatic protection and therefore allows investors direct access (mixed arbitration).

However, recent complaints about the lack of neutrality, impartiality and transparency of the decisions, as well as the simple repetition of judgements, have caused several countries to withdraw from the Washington Convention and to question the legitimacy of investment arbitration – for example Venezuela and Bolivia. According to Sornarajah it is a consequence of the "allegations that investment arbitration is dominated by a select group of arbitrators who usually decide in favour of foreign investors and create expansive law".[11]

Specifically with regard to transparency in investment arbitration, which seems to be one of the main current challenges, it is important to note that some argue that the lack of transparency gives rise to a violation of constitutional principles, such as the right of access to information and documents of public interest, the publicity of decisions and hearings and, outside the constitutional sphere, the requirements for admission of amicus curiae, their respective access to documents and the effectiveness of their participation.[12]

Whereas one of the biggest drivers of the investment arbitration crisis is the transparency factor, UNCITRAL developed in 2014 the "United Nations Convention on Transparency in Treaty-based Investor-State Arbitration" or "Mauritius Convention on Transparency". To date, only 9 countries are party to the Convention, although it has 23 signatures. The main criticism of the Convention, and what helps to justify its very low adherence, is that the provisions are very open and vague so that it is left to the State Party to apply it as it sees fit.

Thus, it is not farfetched to argue that the advocacy and civil society movement has played a much greater and more relevant role in publicising procedures and decisions. This is because it is a matter of public interest, regulatory autonomy and public budget. Foreign direct investment, in its most classic model, has been subject to great criticism by these groups, since it is not uncommon for companies established in the host States to infringe labour or environmental laws in favour of economic improvement.

[11] SORNARAJAH, M. *The international law on foreign investment*. Fourth edition. Cambridge, United Kingdom; New York, USA: Cambridge University Press, 2017.

[12] SCHLEE, Paula. Transparência em arbitragens internacionais investidor-Estado. *Rev. secr. Trib. perm. revis.* Ano 3, Nº 5; Março 2015; pp. 95-113. Disponível em: http://www.revistastpr.com/index.php/rstpr/article/download/130/122 Acesso em: 12 Mai. 2021.

2 The reform of the uncitral system

In 2017, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III brought up the possible reform of investor-State dispute settlement (ISDS) mainly based on the aforementioned crisis of ISDS. Among the main concerns at this early stage were: (i) the arbitral process and outcomes; (ii) arbitrators and decision-makers; and (iii) perceptions of States, investors and the public. According to the report[13] for the 34th session, concerns expressed regarding procedural aspects of ISDS include: (i) lengthy duration and extensive cost of ISDS; (ii) lack of transparency in the proceedings; (iii) lack of an early dismissal mechanism to address unfounded claims; and (iv) lack of a mechanism to address counterclaims by respondent States.

In addition, concerns about the outcomes were also perceived, such as relating to the coherence and consistency in topics with respect to investment protection standards, lack of harmonisation in awards – for instance cases relate to a single measure by a State or a similar fact pattern or are based on identical or similar treaty provisions, divergent outcomes have been observed[14] – and finality of the award and review mechanisms. Furthermore, the arbitrators and decision-makers were not left out. The appointment and ethical requirements of those were also pointed out.[15]

The 41st session, which happened in November 2021, aimed to discuss the draft[16] of the Code of Conduct and its means of implementation and enforcement. In this sense, the status of work of UNCITRAL Working Group III comprises the initial drafts for comments and preparation and workplan for 2021 and 2022. The initial drafts for comments[17] are made of three main topics, which are the "assessment of damages and compensation", "mediation and other forms of alternative dispute resolution (ADR)" and, finally, the "standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters".

13 UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Thirty-fourth session. Disponível em: https://undocs.org/en/A/CN.9/WG.III/WP.142. Acesso em: 04 Set. 2021.

14 UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Thirty-fourth session. Disponível em: https://undocs.org/en/A/CN.9/WG.III/WP.142. Acesso em: 04 Set. 2021.

15 UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Thirty-fourth session. Disponível em: https://undocs.org/en/A/CN.9/WG.III/WP.142. Acesso em: 04 Set. 2021.

16 UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Forty-one session. Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/a_cn_9_1086_advance.pdf. Acesso em: 31 Jan. 2021.

17 UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Disponível em: https://uncitral.un.org/en/working_groups/3/investor-state. Acesso em: 04 Set. 2021.

Moreover, the list of initial drafts in preparation[18] comprises the "appellate mechanism", the "cost of establishing a permanent body", the "dispute prevention and mitigation", the "enforcement of decisions by a court or appellate body", the "procedural rules reform and cross-cutting issues", the "selection and appointment of arbitrators" and "treaty interpretation". Although these are early stage initiatives and the final project will take years to come out, this demonstrates a concern and an awareness of the status quo regarding ISDS.

3 Mediation as a suitable solution for investor-state dispute settlement

Mediation, despite the specific characteristics applied to each different concept and kind of mediation procedure, is generally described as a process of dispute resolution involving a third, neutral and impartial party. This amicable method has been used since ancient times – even before the creation of the law and of the States. For instance, "mediation existed in the Middle East hundreds of years ago. In fact, the notion of deferring to a neutral and objective third-party for a decision towards the resolution of a dispute is well steeped in Arabic/Islamic traditions".[19]

Likewise, peace mediation or facilitation is well known as a means of conflict resolution in the context of wars. Richmond[20] highlights that "during the Cold War, and since, international mediation has become a well-recognised tool of conflict management and diplomacy, used by the US [...], the UN, a range of international non-governmental organisations (INGOs) and private actors". As noted by Mansur[21] "as peacemakers, mediators have abundant opportunities to face and embrace the suffering of other people", especially relevant for peace mediation. Although mediation had undergone transmutations, especially when referring to the rediscovery and exploration of alternative dispute resolution in the USA in the early 1970s, today, more than ever, mediation is seen as an effective method to solve international conflicts.

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18 UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Working Group III (Investor-State Dispute Settlement Reform). Disponível em: https://uncitral.un.org/en/working_groups/3/investor-state. Acesso em: 04 Set. 2021.

19 FATAHI, Negin. The History of Mediation In The Middle East And Its Prospects For The Future. *Kluwer Mediation Blog*. Disponível em: http://mediationblog.kluwerarbitration.com/2018/01/23/history-mediation-middle-east-prospects-future/. Acesso em: 01 Jan. 2022.

20 BERCOVITCH, 1992 apud RICHMOND, Oliver P. A genealogy of mediation in international relations: From 'analogue' to 'digital' forms of global justice or managed war?. *Cooperation and Conflict Journal*. Volume 53, Número 3. Setembro 2018, pp. 301-319. Disponível em: https://www.jstor.org/stable/48512978?read-now=1&refreqid=excelsior%3A5daff20f7dd5083afac126b49fb6ddce&seq=1#page_scan_tab_contents. Acesso em: 04 Fev. 2022.

21 MANSUR, Maria Luisa. Viktor Frankl and the Art of Mediation. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 02, n. 04, p. 133-143, jul./dez. 2020.

The founding instrument of the United Nations, namely, the UN Charter, an instrument of soft law globally binding, provides, and encourages, in its article 33, the peaceful mechanisms, as well as self-composition, as appropriate means in the resolution of international conflicts. Therefore, mediation, as an extrajudicial mechanism, self-compositive and based on the interests of the parties emerges as a consensual method of dispute resolution very effective.

Marieke Koekkoek, explains the consensual nature of mediation and enlightens that parties are free to withdraw from the process at any time. She also suggests that, as a consequence, it is more likely that a mediated settlement agreement will be followed by the parties because it may comprise their interests – whether on a personal or business level.[22]

In other words, this is an expression of voluntariness, a core principle of mediation, and signifies that the parties are free to withdraw from the procedure whenever they feel the need and the agreement, which is designed by them, tends to be considered fair as it is made on the basis of their interests. Thus, the sealed agreement largely embraces creative and durable solutions. Furthermore, mediation tends to be faster and less costly than arbitration, which is why it has been a widely used option for sealing international commercial disputes. In this sense, based on data from the Global Pound Conference,[23] J. Stipanowich reports that efficiency, given by the ratio of time and cost, is the most influential factor in the choice between dispute resolution processes.

In the scope of international commerce, mediation has been a strong tool towards the preservation of the commercial partnership alongside the personal relationship between the parties, besides being cost and time efficient. It is surely a practice that has great space in the bigger international ADR chambers, such as the International Chamber of Commerce (ICC) and the Vienna International Arbitration Centre (VIAC). Moreover, the United Nations Commission on International Trade Law (UNCITRAL) developed its Model Law on International Commercial Mediation – that amended the past model law on conciliation in 2002.

According to Nadja Alexander, the model laws adopted by the UN General Assembly functions as a model for states to establish the premises as part of their domestic legislation and can even be amended.[24]

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[22] KOEKKOEK, Marieke. *Mediation of investor – State disputes in China: Mediation as complementary method of dispute settlement to arbitration in investor – State disputes*. Thesis (L.L.M. em Direito Internacional do Comércio e Direito Internacional dos Investimentos) – University of Amsterdam. Amsterdã, 2012.

[23] STIPANOWICH, T. J. What Have We Learned from the Global Pound Conferences?. *Kluwer Arbitration Blog*, Wolters Kluver. 2017. Disponível em: http://arbitrationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/. Acesso em: 19 Jun. 2021.

[24] ALEXANDER, Nadja. *UNCITRAL and International Mediation*. International and Comparative Mediation, Global Trends in Dispute Resolution. Volume 4. Holanda: Kluwer Law International, 2009. pp. 337 – 384.

This law "has been amended in 2018 with the addition of a new section on international settlement agreements and their enforcement".[25] The Commission also structured its mediation rules (updated in 2021)[26] and released the UNCITRAL Notes on Mediation (2021).[27] Finally, in order to establish the maestro of the orchestra, responsible for guiding its practical effectiveness, UNCITRAL developed the Singapore Convention on Mediation (2019) – which is responsible for guiding the enforcement of settlement agreements arising out of international mediation.

The ICC statistics have shown that, in 2020, its International Centre for ADR "received a total of 77 new cases registered under the Mediation Rules, Expert Rules, Dispute Board Rules and DOCDEX Rules – the largest number of cases registered in a year".[28] As of mediation itself, there were a record number of 45 new requests[29] involving 112 parties from 39 countries.

Specifically regarding investment relations, it is well known that investment treaties often provide for trying amicable solutions, whether in the cooling-off period or not, before going to adjudication. For instance, the US model of bilateral investment agreements[30] has shown a tendency of adopting third party consultations before entering into an arbitration procedure – this can also be seen as a type of combined dispute board, which is also considered a peaceful method of conflict prevention.

It is also a common practice, mainly when it comes to commercial contracts, the establishment of an escalation ADR clause that includes a series of steps the parties should follow when a conflict arises – usually negotiation and mediation are the first steps, while arbitration or judicial litigation are the last ones. In investment agreements, especially those that are newer, one can foresee a strong tendency

[25] UNITED NATIONS. *United Nations Commission on International Trade Law*. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018. Disponível em: https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation. Acesso em: 04 Fev. 2022.

[26] UNITED NATIONS. *United Nations Commission on International Trade Law.* UNCITRAL Mediation Rules. Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_mediation_rules_advance_copy.pdf. Acesso em: 04 Fev. 2022.

[27] UNITED NATIONS. *United Nations Commission on International Trade Law.* UNCITRAL Notes on Mediation (2021). Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v2107071_mediation_notes.pdf. Acesso em: 04 Fev. 2022.

[28] INTERNATIONAL CHAMBER OF COMMERCE. *ICC Dispute Resolution 2020 Statistics*. Disponível em: https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf. Acesso em: 04 Fev. 2022.

[29] INTERNATIONAL CHAMBER OF COMMERCE. *ICC Dispute Resolution 2020 Statistics*. Disponível em: https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf. Acesso em: 04 Fev. 2022.

[30] Rwanda – United States of America BIT (2008), United States of America – Uruguay BIT (2005), Bahrain – United States of America BIT (1999), Mozambique – United States of America BIT (1998), Lithuania – United States of America BIT (1998), Azerbaijan – United States of America BIT (1997), Jordan – United States of America BIT (1997), Croatia – United States of America BIT (1996), Honduras – United States of America BIT (1995) and Latvia – United States of America BIT (1995).

towards the use of mediation. The European Union – setting aside its initiative on the Multilateral Investment Court and its reluctance to the Singapore Convention – has been including investor-State mediation in all agreements comprising the new generation of free trade agreements.

The United States-Mexico-Canada Agreement (USMCA), that replaced NAFTA, also has provisions on the use of mediation in the article 31.5: "1. Parties may decide at any time to voluntarily undertake an alternative method of dispute resolution, such as good offices, conciliation, or mediation".[31]

The Energy Charter Secretariat has evolved, in 2016, its guide on investment mediation[32] and in there highlighted the feasibility of mediation to be applied as a part of the Energy Charter Treaty (ECT) dispute settlement mechanism. In relation to procedural rules, the International Bar Association (IBA) designed in 2012 the first initiative: The IBA 2012 Rules on Investor-State Mediation.[33] These rules "establish clear guidelines for the commencement of mediation and for the appointment of a mediator in absence of party agreement".[34] Rafael Morek, being positive about it, argued that the Rules contain "many standard clauses seen also in other institutional mediation rules, the Rules provide also for some innovative regulations, including the rule on 'Mediation Management Conference' (Article 9)".[35]

In 2018, the International Centre for Settlement of Investment Disputes (ICSID), being aware of the ISDS crisis and the success of international commercial mediation, developed its own investor-State mediation institutional rules.[36] These rules, however, are the object of the working papers on amendment of ICSID rules – for example with regard to the registration of requests and the resignation and replacement of mediators.

It is noteworthy to mention that the Centre has taken many initiatives to promote the practice through training and partnerships. Recently, in March 2021,

[31] USMCA. *Chapter 31: Dispute Settlement. Section A: Dispute Settlement*. Disponível em: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31%20Dispute%20Settlement.pdf. Acesso em: 04 Fev. 2022.

[32] ENERGY CHARTER SECRETARIAT. *Guide on Investment Mediation*. 2016. Disponível em: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf. Acesso em: 04 Fev. 2022.

[33] INTERNATIONAL BAR ASSOCIATION. *IBA Rules for Investor-State Mediation*. 2012. Disponível em: https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C. Acesso em: 04 Fev. 2022.

[34] ALI, Shahla F.; REPOUSIS, Odysseas G. Investor-State mediation and the rise of transparency in international investment law: opportunity or threat?. *Denver Journal of International Law and Policy*. Volume 45. Número. 2, 2018. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216254. Acesso em: 04 Fev. 2022.

[35] MOREK, Rafael. Investor-State Mediation: New IBA Rules. *Kluwer Mediation Blog*. 2012. Disponível em: http://mediationblog.kluwerarbitration.com/2012/11/09/investor-state-mediation-new-iba-rules/. Acesso em: 04 Fev. 2022.

[36] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *Investor-State Mediation*. Disponível em: https://icsid.worldbank.org/services-arbitration-investor-state-mediation. Acesso em: 24 Abr. 2021.

ICSID and the Singapore International Mediation Centre entered into a cooperation agreement, the first for ICSID with a centre that is exclusively focused on mediation.[37] Purposely, ICSID in its 2021 Annual Report also recognizes that there is a "growing number of international investment agreements that specifically refer to mediation in their dispute settlement provisions to resolve investor-State disputes".[38]

Nonetheless, as far as known, there is a lack of investment mediation cases. This situation can be motivated by (i) the utilisation of ad hoc procedures based on strict confidentiality between the State and the investor; (ii) the use of institutional commercial mediation to settle investment disputes; and (iii) the difficulty to enforce international negotiated agreements that came out of a mediation process.

The most famous case of investor-State mediation is a result of the aforementioned second reason. In 2016, the ICC administered between a French investor and the State of Philippines – where the investor called the application of the ICC Mediation Rules and the IBA Investor-State Mediation Rules.[39] Unfortunately, the mediation did not terminated in an agreement and, despite the difficulty faced by the case managers to contact a State and its right representative in a mediation, scholars have defended that this process helped the parties to further their communication and relationship.[40] In addition to this first known case, there were a few more like Olyana Holdings v. Rwanda, Pan African Burkina v. Burkina Faso, Odebrecht-Tecnimont-Estrella Consortium and the Dominican Republic and its state-owned electricity company, Corporación de Empresas Eléctricas Estatales (CDEEE)[41] – but as Andrea Kupfer Schneider and Nancy Welsh stated it is still not clear if the parties involved reached an agreement and if the mediation was a formal investor-State mediation.[42]

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[37] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *2021 Annual Report*. Disponível em: https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR21_CRA_bl1_web.pdf. Acesso em: 26 Out. 2021.

[38] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *2021 Annual Report*. *Idem*.

[39] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 Fev. 2022.

[40] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 Fev. 2022.

[41] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 Fev. 2022.

[42] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.

Furthermore, Frauke Nitschke referred to seven considerations that the parties should consider when thinking of investment mediation:[43] (i) willingness to engage in negotiations; (ii) comprehensive assessment of the dispute; (iii) analysis of the stakeholders in relation to the dispute and stakeholders for a possible solution; (iv) desired structure/design/form of the dispute resolution process; (v) desire to maintain control of the outcome; (vi) financial resources to cover the costs of the dispute resolution process; and finally (vii) desired time frame to resolve the dispute.

And, although arbitration is currently the main method of dispute resolution in the investment field, it tends to be closer and closer to the ordinary judicial procedure. This is so true that, as Julien Cazala teaches, the desire of States to regain control of arbitral tribunals was reflected by the development of investment arbitration, which directly impacted the provisions present in treaties, especially BITs.[44]

Certainly the objective of this contribution is not to defend the inadequacy of arbitration to disputes between investors and the State, on the contrary, by the classical theory of Frank Sander, the so-called "multidoor courthouse", it is possible that, by the characteristics and distinctions of each dispute, the most appropriate method is arbitration. Likewise, it is plausible that it is mediation or even hybrid methods – those that integrate mediation and arbitration. Therefore, it is well known that mediation has a low esteem in international society since agreements, although with high compliance rates, were not enforceable when one party refused to comply with it. With the advent of the Singapore Convention, this panorama tends to change as the Convention offers mechanisms that aim to facilitate such enforcement.

4 First lines on the Singapore convention

The Singapore Convention, which, after 46 signatures, entered into force on 12 September 2020, aims to intensify the progressive harmonisation and

edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 Fev. 2022.

43 NITSCHKE, Frauke. Part I – How to Assess the Suitability of Mediation for Investment Disputes. 2021. *Kluwer Mediation Blog*. Disponível em: http://mediationblog.kluwerarbitration.com/2021/10/06/part-i-how-to-assess-the-suitability-of-mediation-for-investment-disputes/. Acesso em: 04 Fev. 2022.

44 "*Le développement de l'arbitrage en matière d'investissement a incontestablement rendu nécessaire un raffinement progressif des énoncés conventionnels, traduisant une volonté de reprise en main par les États face à des tribunaux arbitraux dont certaines audaces ont parfois réussi à inquiéter tant les gouvernements que les investisseurs et plus largement la société civile".* CAZALA, Julien. La réforme de l'arbitrage d'investissement dans l'Accord Canada – États-Unis – Mexique devant se substituer à l'Accord de libre-échange nord-américain. *Cahiers de l'arbitrage – Paris Journal of International Arbitration*. 2019. número 4, pp. 782-790.

unification of international trade law, observing the interests of all international players, especially developing countries. The adoption of this tool is aimed at complementing the existing legal panorama regarding international mediation and seeks to harmonically develop international economic relations.

According to Manson, the Convention "will reduce/remove trade disputes as obstacles to trade flows by encouraging companies engaged in international trade to use mediation to resolve them – mediation whose outcomes will be enforceable across borders".[45]

To this end, its main characteristics are: i) in principle, it applies only to international commercial agreements resulting from mediation (art. 1, 1); ii) it does not apply to agreements that are enforceable as judgements or arbitral awards (art. 1, 3); and iii) it also does not apply to settlement agreements concluded for personal, family or domestic purposes, as well as agreements arising from family, inheritance or labour law (art. 1, 2).

According to Butlien, the Convention "is best viewed as a solution to the main barrier that hampered the use of mediation in settling international disputes",[46] that is, the possible failure to comply with the mediated settlement agreement. And failing such compliance or a mechanism that enforces this compliance, the parties would rely on arbitration or court proceedings anyway. It is also noteworthy to mention that, despite the mediation is characterised by voluntariness and, therefore, the agreements are more likely to be complied upon, in the international context the situation changes – especially when it comes to the presence of a State.

Moreover, the scope of the Singapore Convention is to become an essential instrument in the facilitation of international trade and the promotion of mediation as an appropriate and effective method of resolving commercial disputes. The Convention meets the main concern of the parties with regard to international mediation, which is the difficulty of enforceability when the parties disagree on this issue. Thus, in order to make the agreement binding and enforceable, in a simplified manner, it intends to be for mediation what the 1958 New York Convention is for arbitration: a catalyst effect for change and promotion of acceptance.

A research conducted by the professor S. I. Strong, in 2014, with many practitioners, suggested that

> international commercial mediation and conciliation may be developing along the same path as international commercial arbitration. At one time, international commercial arbitration was extremely rare, with a

[45] MASON, Paul Eric. A Convenção de Cingapura e seus benefícios para o Brasil. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 02, n. 04, p. 181-193, jul./dez. 2020.

[46] BUTLIEN, Robert. The Singapore Convention on Mediation: A Brave New World for International Commercial Mediation. *Brooklyn Journal of International Law.* 46. Número. 1. 2020. pp. 183-214.

> significant expansion in the number of proceedings only occurring after the adoption of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1958.[47]

Hioureas goes in the same direction and argues that "international arbitration has been preferred over international mediation. This is in part because the widely adopted New York Convention provides a predictable framework for the recognition and enforcement of arbitral agreements and awards".[48] Furthermore, senior contracting parties consider using mediation since, on the verge of a dispute, parties tend to terminate the business relationship. However, mediation, for all its attributes, provides a forward-looking view aimed at maintaining these relationships.

5 The Singapore convention and the investor-state dispute settlement

The Singapore Convention, despite expressly providing that it only applies to disputes arising from international trade, may mean a paradigm shift in the resolution of disputes between investors and states. This is because these disciplines tend to come closer together, given the fine line between international investment law and international trade law. This scenario is, in fact, what happens in practice.

Although, due to the World Trade Organisation crisis and the need for structural reforms, Free Trade Agreements are losing some space in international society, they still make up a significant portion of the world economy. And, due to the challenges brought about by digitalisation, the new face of geopolitical conflicts and the pressing need for a more sustainable trade, the largest trade agreements also bring in their scope the matter of direct foreign investments.

The main examples are the Mercosur-European Union Agreement – which, despite not being in force, has been negotiated for over 20 years, which is the reason why the interconnection between the matters in time is proven, the European Union and China Agreement, the European Union and Canada Agreement and the European Union and the Association of Southeast Asian Nations (ASEAN) Agreement. All examples deal with commercial treaties that bring among their main objectives the increase of the flow of investments.

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[47] STRONG, S. I. Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation. *Legal Studies Research Paper Series Research Paper*. Número 2014-28. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302. Acesso em: 04 Fev. 2022.

[48] HIOUREAS, Christina. The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward. *Berkeley Journal of International Law*. 37. Número 2. 2019. pp. 215-224.

Thus, at least half of the aforementioned agreements expressly provide for investment mediation as an appropriate means for resolving such disputes. And those that do not bring it directly, defend the use of consensual means even before the instauration of the arbitration or judicial procedure. In light of the urgency for a concise international investment law and the rise and greater acceptability of international mediation, the International Bar Association and the ICSID, the international centre for investment dispute resolution, have coined their own investor-state mediation rules – as mentioned before in the text.

That is, States have increasingly sought to develop this practice so as to require the ICSID, the main investment dispute resolution centre in the world, to create new rules on investor-State mediation. In response, ICSID has announced that it is developing a completely new set of mediation rules, which take investor and state proposals into account and are designed to expand mediation capacity. Moreover, the already existing rules define a complementary relationship to the existing rules of institutional arbitration in this Centre. It is extremely valid to point out that the IBA rules differ from the ICSID rules since the former, soft law, may be applied to institutional or ad hoc procedures.

Meanwhile, in her doctoral defence at the University of Paris Ouest, Olivia Danic points out that "*le droit international général a montré son inefficacité à protéger les investissements étrangers. Même si certains standards et normes existaient, ils n'ont pu empêcher la vague de nationalisation qui a suivi la décolonisation"*. In other words, it appears that even with the existence of standards and principles that guide this branch, international law is inefficient in protecting foreign direct investments.

Thus, with the help of the Singapore Convention and considering the crisis in the system of investment dispute resolution and, above all, arbitration, the protection of the rights of investors and receiving States can be carried out in a less costly, timely manner, without putting an end to the existing long-term commercial relationship, as the Convention facilitates and simplifies the enforcement procedure of agreements arising from mediation.

The cited research conducted by professor Strong also points out that disputes involving an ongoing relationship are definitely amenable to mediation,[49] especially considering the opinion of the great majority (74%) of the participants in his survey. Also, one can also argue that disputes involving parties from two different countries or cultures can be better settled through mediation or conciliation. That is because

[49] STRONG, S. I. Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation. *Legal Studies Research Paper Series Research Paper*. Número 2014-28. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302. Acesso em: 04 Fev. 2022.

the process of communication – which could have been prejudiced by the cultural differences – is facilitated by the acting of an expert mediator.

Joséphine Hage et al. have spoken about how "the missing third piece in the international dispute resolution enforcement framework", here the Singapore Convention, can promote the international economic relations[50] – stating also that "three specific regions could benefit from the entry into force of the Singapore Convention: the Asia-Pacific are, the region covered by the BRI [Belt and Road Initiative] and Europe facing Brexit".[51]

The World Investment Report 2021, provided by the United Nations Conference on Trade and Development (UNCTAD) states that the top 10 host economies of FDI inflows are the United States, China, Hong Kong (China), Singapore, India, Luxembourg, Germany, Ireland, Mexico and Sweden. This data shows that all the specific regions cited by the aforesaid research comprise, precisely, those 10 countries (and also the others pointed by the UNCTAD report).

In conclusion, likewise as argued by Hage *et al.*, the Singapore Convention was the missing piece of the puzzle. Investment disputes usually involve long relationships, with culturally different parties, a number of stakeholders and tends to be time and cost consuming, mainly with regards to international investment arbitration. Therefore, if the application of the Convention to negotiated investment agreements arising out of an investment mediation is feasible, then it is reasonable to expect an improvement in the ISDS crisis and also in the investment and economic relations worldwide.

Conclusion

A highly controversial shaping factor of the international economy has been the foreign investment. Yet, data from the United Nations Conference on Trade and Development elucidates that there are more than 2200 Bilateral Investment Treaties in force and more than 300 treaties with investment provisions also in force.[52] Those comprises likewise the new generation of free trade agreements, including the new treaties signed by the European Union with the world's leading economic powers. It is not reasonable to expect that the conflicts arising out of

[50] CHAHINE, Joséphine Hage; LOMBARDI, Ettore M.; LUTRAN, David; PEULVÉL, Catherine. The Acceleration of the Development of International Business Mediation after the Singapore Convention. *European Business Law Review*. 32. Número 4. 2021. pp. 769-800.

[51] CHAHINE, Joséphine Hage; LOMBARDI, Ettore M.; LUTRAN, David; PEULVÉL, Catherine. The Acceleration of the Development of International Business Mediation after the Singapore Convention. *European Business Law Review*. 32. Número 4. 2021. pp. 769-800.

[52] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *Investment Policy Hub*. International Investment Agreements. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

these treaties would be perfectly settled by the means of investment arbitration considering its so-called lack of legitimacy and that many countries have withdrawn from the ICSID Convention.

It is not by chance that the UNCITRAL and the ICSID are working together in promoting the reform of the ISDS system and in bringing out alternatives to those who are not willing to settle their disputes using investment arbitration. The international society is aware of the fact that mediation is increasingly gaining relevance through trade relations but not limited to. ICSID is working hard to foster investor-State mediation and is taking into account the recent developments in international mediation favoured by the Singapore Convention on mediation.

Nonetheless, the scope of application of this Convention is adamant that it will only apply to commercial disputes. This is the focus of this paper. That is, this paper addresses the fact that currently the practical distinctions between trade and investment international relations are faint. It is not rare to find trade agreements with chapters on foreign investment. And it is virtually not rare to find trade relations within investment relations (or related to). The web of legal relations that comprise these two subjects forms what is called international economic law, one of the most relevant areas in the international context.

Thus, the spread of mediation among investment disputes would be easier and faster if the enforcement of these agreements could rely on the Singapore Convention. In this sense, it is worth noting that mediation proposes to be a less time-consuming and less costly dispute resolution technique than arbitration – which increases its practical efficiency. All this, in line with recent ICSID initiatives, helps to prove the necessary relationship between the factors.

Finally, this article uses the hypothetical-deductive methodology, through the analysis of normative texts, cases and international instruments, and firstly has approached the ISDS crisis and the subsequent reform of the UNCITRAL investment system. This contribution has also addressed the use of mediation in investment disputes and has traced out the Singapore Convention on mediation and its applicability to investor-State dispute settlement.

Resumo: O intuito da presente contribuição é analisar a plausibilidade da extensão do escopo da Convenção de Cingapura sobre Mediação para incluir acordos decorrentes da mediação investidor-Estado. Para este fim, o documento aborda primeiramente a crise do sistema de resolução de controvérsias entre investidores e Estados, em conjunto com as propostas de reforma do Grupo de Trabalho III da UNCITRAL. Em segundo lugar, analisa o uso da mediação no âmbito das disputas investidor-Estado e o surgimento da Convenção de Cingapura sobre Mediação. Finalmente, argumenta a aplicabilidade da Convenção ao contexto das disputas de investimento, considerando sua complexidade. Ademais, este trabalho compreende a metodologia hipotético-dedutiva, através da análise de textos normativos, casos e instrumentos internacionais.

Palavras-chave: Mediação investidor-Estado. Convenção de Singapura. Sistema de Resolução de Controvérsias entre Investidores e Estado.

References

AIBEL, H. J. Mediation Works: Opting for Interest-Based Solutions to Range of Business Needs, Dispute Resolution Journal. 24, 26, 1996.

ALEXANDER, Nadja. UNCITRAL and International Mediation. International and Comparative Mediation, Global Trends in Dispute Resolution. Volume 4. Holanda: Kluwer Law International, 2009. pp. 337 – 384.

ALI, Shahla F.; REPOUSIS, Odysseas G. Investor-State mediation and the rise of transparency in international investment law: opportunity or threat?. Denver Journal of International Law and Policy. Volume 45. Número. 2, 2018. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216254. Acesso em: 04 Fev. 2022.

BERCOVITCH, 1992 apud RICHMOND, Oliver P. A genealogy of mediation in international relations: From 'analogue' to 'digital' forms of global justice or managed war?. Cooperation and Conflict Journal. Volume 53, Número 3. Setembro 2018, pp. 301-319. Disponível em: https://www.jstor.org/stable/48512978?read-now=1&refreqid=excelsior%3A5daff20f7dd5083afac126b49fb6ddce&seq=1#page_scan_tab_contents. Acesso em: 04 Fev. 2022.

BUTLIEN, Robert. The Singapore Convention on Mediation: A Brave New World for International Commercial Mediation. Brooklyn Journal of International Law. 46. Número. 1. 2020. pp. 183-214.

CAETANO, F. A. K. Direito Internacional dos Investimentos na atualidade: uma análise da posição brasileira. Revista Científica do Departamento de Ciências Jurídicas, Políticas e Gerenciais do Uni-BH. Belo Horizonte, vol. III, n. 1, jul-2010. ISSN: 1984-2716. Disponível em: www.unibh.br/revistas/ecivitas/. Acesso em: 07 Fev. 2021.

CAZALA, Julien. La réforme de l'arbitrage d'investissement dans l'Accord Canada – États-Unis – Mexique devant se substituer à l'Accord de libre-échange nord-américain. Cahiers de l'arbitrage – Paris Journal of International Arbitration. 2019. Número 4. pp. 782-790.

CHAHINE, Joséphine Hage; LOMBARDI, Ettore M.; LUTRAN, David; PEULVÉL, Catherine. The Acceleration of the Development of International Business Mediation after the Singapore Convention. European Business Law Review. 32. Número 4. 2021. pp. 769-800.

DANIC, Olivia. L'emergence d'un droit international des investissements: contribution des traités bilatéraux d'investissement et de la jurisprudence du CIRDI. Tese (Doutorado em Direito Público) – Université Paris Ouest Nanterre la Défense, U.F.R. de Sciences juridiques, administratives et politiques. Paris, 2012.

ENERGY CHARTER SECRETARIAT. Guide on Investment Mediation. 2016. Disponível em: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf. Acesso em: 04 Fev. 2022.

FATAHI, Negin. The History Of Mediation In The Middle East And Its Prospects For The Future. Kluwer Mediation Blog. Disponível em: http://mediationblog.kluwerarbitration.com/2018/01/23/history-mediation-middle-east-prospects-future/. Acesso em: 01 Jan. 2022.

GAILLARD, Emmanuel. Tendencias anti-arbitraje en América Latina. Contratos Internacionales. Coord. Diego P.Fernández Arroyo/Adriana Dreyzing de Klor, Asunción:CEDEP, 2008., pp. 311-315.

HARVARD LAW SCHOOL. Program on Negotiation. What is the Multi-Door Courthouse Concept: Multi-door courthouse and the benefit negotiation brings to litigation. 22 Ago. 2019. Disponível em: https://www.pon.harvard.edu/daily/international-negotiation-daily/a-discussion-with-frank-sander-about-the-multi-door-courthouse/. Acesso em: 19 Jun. 2021.

HIOUREAS, Christina. The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward. Berkeley Journal of International Law. 37. Número 2. 2019. pp. 215-224.

INTERNATIONAL BAR ASSOCIATION. IBA Rules for Investor-State Mediation. 2012. Disponível em: https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C. Acesso em: 04 Fev. 2022.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. 2021 Annual Report. Disponível em: https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR21_CRA_bl1_web.pdf. Acesso em: 26 Out. 2021.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. ICSID Rules and Regulations Amendment – Working Papers. Disponível em: https://icsid.worldbank.org/resources/rules-amendments. Acesso em: 06 Mai. 2021.

INTERNATIONAL CHAMBER OF COMMERCE. ICC Dispute Resolution 2020 Statistics. Disponível em: https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf. Acesso em: 04 Fev. 2022.

KOEKKOEK, Marieke. Mediation of investor – State disputes in China: Mediation as complementary method of dispute settlement to arbitration in investor – State disputes. Tese (L.L.M. em Direito Internacional do Comércio e Direito Internacional dos Investimentos) – University of Amsterdam. Amsterdã, 2012.

LILLICH, Richard B. The Jay Treaty Commissions. 37. St. John's L. Rev. 260 (1962-1963).

MANDEL, Robert. The Effectiveness of Gunboat Diplomacy. International Studies Quarterly. Volume 30. Edição 1. Março de 1986. pp. 59–76.

MANSUR, Maria Luisa. Viktor Frankl and the Art of Mediation. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 02, n. 04, p. 133-143, jul./dez. 2020.

MASON, Paul Eric. A Convenção de Cingapura e seus benefícios para o Brasil. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 02, n. 04, p. 181-193, jul./dez. 2020

MOREK, Rafael. Investor-State Mediation: New IBA Rules. Kluwer Mediation Blog. 2012. Disponível em: http://mediationblog.kluwerarbitration.com/2012/11/09/investor-state-mediation-new-iba-rules/. Acesso em: 04 Fev. 2022.

NITSCHKE, Frauke. Part I – How to Assess the Suitability of Mediation for Investment Disputes. 2021. Kluwer Mediation Blog. Disponível em: http://mediationblog.kluwerarbitration.com/2021/10/06/part-i-how-to-assess-the-suitability-of-mediation-for-investment-disputes/. Acesso em: 04 Fev. 2022.

RODRIGUEZ, Jose Antonio Moreno. The Hague Academy of International Law. Summer Courses on Private International Law. Private International Law and Investment Arbitration. 2021.

SCHLEE, Paula. Transparência em arbitragens internacionais investidor-Estado. Rev. secr. Trib. perm. revis. Ano 3, Nº 5; Março 2015; pp. 95-113. Disponível em: http://www.revistastpr.com/index.php/rstpr/article/download/130/122. Acesso em: 12 Mai. 2021.

SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. St. Thomas L.J. 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 Fev. 2022.

SCHNEIDER, Patricia Dornelles. Uma visão sistêmica do procedimento de mediação – As lições do pensamento de Maturana. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 03, n. 06, p. 193-200, jul./dez. 2021. DOI: 10.52028/rbadr.v3i6.11.

SINGAPORE. Singapore Convention on mediation. The Convention Text. Disponível em: https://www.singaporeconvention.org/convention/the-convention-text/. Acesso em: 06 Mai. 2021.

SORNARAJAH, M. The international law on foreign investment. Fourth edition. Cambridge. United Kingdom; New York, USA: Cambridge University Press, 2017.

STIPANOWICH, T. J. What Have We Learned from the Global Pound Conferences?, in Kluwer Arbitration Blog, Wolters Kluver, 2017. Disponível em: http://arbitrationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/. Acesso em: 19 Jun. 2021.

STIPANOWICH, T. J. Arbitration: The "New Litigation". University of Illinois Law Review. Volume 2010. Disponível em: https://illinoislawreview.org/wp-content/ilr-content/articles/2010/1/Stipanowich.pdf. Acesso em: 19 Jun. 2021.

STRONG, S. I. Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation. Legal Studies Research Paper Series Research Paper. Número 2014-28. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302. Acesso em: 04 Fev. 2022.

UNITED NATIONS. United Nations Conference on Trade and Development. Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

UNITED NATIONS. United Nations Conference on Trade and Development. Investment Policy Hub. International Investment Agreements. Available at: https://investmentpolicy.unctad.org/international-investment-agreements.

UNITED NATIONS. United Nations Commission on International Trade Law. UNCITRAL Mediation Rules. Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_mediation_rules_advance_copy.pdf. Acesso em: 04 Fev. 2022.

UNITED NATIONS. United Nations Commission on International Trade Law. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

UNITED NATIONS. United Nations Commission on International Trade Law. UNCITRAL Notes on Mediation (2021). Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v2107071_mediation_notes.pdf. Acesso em: 04 Fev. 2022.

UNITED NATIONS. United Nations Commission on International Trade Law. Working Group III (Investor-State Dispute Settlement Reform). Disponível em: https://uncitral.un.org/en/working_groups/3/investor-state. Acesso em: 04 Set. 2021.

UNITED NATIONS. United Nations Commission on International Trade Law. Working Group III (Investor-State Dispute Settlement Reform). Thirty-fourth session. Disponível em: https://undocs.org/en/A/CN.9/WG.III/WP.142. Acesso em: 04 Set. 2021.

USMCA. Chapter 31: Dispute Settlement. Section A: Dispute Settlement. Disponível em: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31%20Dispute%20Settlement.pdf. Acesso em: 04 Fev. 2022.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

COMETTI, Anna Karoliny Fonseca; MOSCHEN, Valesca Raizer Borges. The Singapore Convention in the framework of the investor-state dispute settlement system. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 85-104, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.5.

DOI: 10.52028/rbadr.v4i8.6

Scope of counterbalancing public policy and execution of foreign arbitral awards in India

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Abstract: Public policy is an essential consideration in international arbitration, as well as domestic arbitration. In contrast to the latter, the former is becoming an increasingly restricted approach internationally, particularly in the context of enforcement of foreign arbitral awards. International arbitral tribunals should be cognizant of the problem, even if it is difficult while pronounce the judgement, because different jurisdictions may prioritize different aspects of public policy for a variety of reasons. This study will examine the many ways in which domestic courts have used the public policy concept in evaluating this exemption for the protection of state sovereignty in cases when a foreign award is incompatible with the law of the enforcing nation. Lastly, the author believes that the New York Convention of 1958's pro-enforcement bias can be strengthened by this paper's transnational perspective, which urges public policy to be justifiably compatible with the global public policy of a large community of nations. This perspective can also serve as a safety valve to ensure the effective enforcement of meritorious arbitral grants.

Keywords: Arbitration. Foreign Arbitral Awards. Public Policy.

1 Introduction

Arbitration for the purpose of resolving disputes based on the previous alignment of the parties' wills is well recognised and has a long history. The

parties' faith in this method of conflict resolution has allowed it to endure for so long. They have consistently turned to arbitration to settle their disagreements. Modern times have given rise to the normative regulation of conflict resolution via international business arbitration. Arbitration, as a non-conventional means of conflict resolution, is increasingly accepted and used on a global scale.[1] Since the commencement of Arbitration Laws in India in 1940, it has been at the forefront of legal development. The current arbitration legislation in India is an amalgamation of many proclamations and ordinances enacted by the government in response to the country's periodic economic changes. The Act of 1996 governs most aspects of Indian arbitration law. A statute enacted to harmonies the various jurisdictions' legislation governing the conduct of and the enforcement of arbitration both at home and abroad. Some substantial changes were made in 2015 and 2019 in an effort to make international commercial arbitration the dominant technique for resolving business disputes and to make India a hub for such arbitration. A significant number of similar adjustments have been enacted in the past, with the most recent ones being proposed in 2019.

The concept of arbitration in modern financial dealings is constantly developing. The legislation gives the parties the option to participate in business agreements with the knowledge that, in the event of a disagreement, they may save the time and expense of going to court by referring the matter to arbitration. An arbitral decision cannot be challenged in court. However, an arbitral ruling may be cancelled only in cases where the underlying arbitration agreement is unlawful; a party lacks the legal ability to enter into a contract, the arbitrator's independence and impartiality are in question, the process was unjust, etc. International arbitration is based on the principle of party independence. However, it does have certain restrictions. Arbitrability and *"Doctine of Public Policy"* are two of the most important things that can limit the freedom of a party. Throughout this article, the authors seek to clarify the scope of Public Policy in India and the extent to which it may impede the execution of foreign arbitral judgements in a variety of contexts.[2]

2 Doctrine of Public Policy: Meaning and Interpretation

Since public policy may be a reason for refusing to recognise and enforce not only foreign court judgements but also foreign arbitral awards, it is an important topic of discussion in the area of international commercial arbitration. The New

1 Wulff, Erik, & Kiran Lingam, "Franchising In India: A Brave New Frontier: Economic Policy Reform Paves the Way", 29 (4) Franch. Law J. 248, 249-50 (2010).

2 Nazzini, Renato, "Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context", 66 (3), Am. J. Comp. L., 603, 612-14 (2018).

York Convention of 1958 allows for the rejection of foreign awards for reasons of public policy. Everything that must be safeguarded by the state and its legal system is included in this definition of public policy.[3] All citizens are entitled to be shielded from the potentially detrimental consequences of foreign legislation by their own country's public policy ideas, objectives, values, and regulations. As a result, the public policy serves as a check on the power of any state to implement its laws.

2.1 Meaning and Scope

Public policy, according to Percy H. Winfield, "before the advent of the equitable system in common law and was in use even then, whether intentionally or not".[4] When issuing fresh writs, courts once gave thought to the public good.[5] The Dyer's Case of 1414[6] can be often credited to be one of the first case to use the term "encounter common ley, which refers to anything harmful to a community or the Commonwealth and serves as the foundation of the idea of public policy".[7]

Most countries have long recognised "order public" limitations to the enforcement of foreign judgement.[8] In addition, private international law treaties and local laws sometimes recognise public policy as an exception. Thus, the incorporation of public policy into international arbitration does not represent a novel concept, but rather an ancient concept that has been adapted to the setting of international conflict resolution. Considerations of public policy have never really left the sphere of private international law. The notion of a public policy exemption grew increasingly prevalent in international law in the twentieth century, despite the fact that it was not included in the Hague Conferences on Private International Law in 1893. It was adopted by all subsequent international and regional agreements, such as the Brussel Convention, the Rome Convention, the UNCITRAL Model Law on Procurement of Goods, Construction, and Services, etc.[9]

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3 New York Convention 1958, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York", June 10, 1958; entered into force, June 7, 1959 United Nations, Treaty Series, vol. 330, 38, No. 4739 (1959). available at: https://www.euro-arbitration.org/resources/en/nyc_convention_en.pdf.

4 Percy H. Winfield, "Public policy in the English Common Law", 42 Harv. L. Rev. 76 (1928): "One is the unconscious or half-conscious use of it which probably pervaded the whole legal system when the law had to be made in some way or other, and when there was not much statute law and practically no case law at all to summon to the judges' assistance. The other is the conscious application of public policy to the solution of legal problems, whether bore the name by which it is now known or -was partly concealed under some other designation which, however, really expressed the same thing".

5 Percy H. Winfield, "Public policy in the English Common Law", 42 Harv. L. Rev. 76 (1928).

6 Dyer's Case Y.B. 2 Hen. 5, fol. 5, pl. 26 (1414).

7 W.S.W. Knight, "Public Policy in English Law", 38 L.Q.R. 207 (1922).

8 Garry B. Born, International Commercial Arbitration, commentary and material, 223 (Kluwer Law International and Transnational Publishers, Inc., The Hague, Netherlands, 1st ed, 2001).

9 Farshad Ghodoosi, International Dispute Resolution and the Public Policy Exception 205-06 (Routledge, London & New York, 1st ed, 2017).

In Article V of the New York Convention 1958,[10] "public policy" relates directly to the state's public policy when implementation of the verdict is sought. It is also important to note that courts need to consider whether implementing an arbitration award would violate public policy. However, the New York Convention of 1958 does not in any way define public policy. Rather than having a single, universally accepted definition, the idea of public policy has evolved via a process of the localised, evolving agreement. Dynamic in nature, the understanding of public policy has developed through phases. The House of Lords explained the public policy as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good".[11] It can be considered as a "moral, social or economic principle so sacrosanct... as to require its maintenance at all costs and without exception".[12]

Because of the lack of clarity and expansive interpretation of the term "public policy" in the New York Convention, parties in a number of countries have been able to use this ground for denying and setting aside a foreign award.

2.2 International Public Policy vis-à-vis Domestic Public Policy: Study of the Comparative Jurisprudence

International jurists are almost unanimous in their belief that the term "international public policy," as used in Article V (2) of the New York Convention, has a more limited scope than "domestic public policy". Therefore, "public policy" in domestic issues is distinct from "public policy" in foreign issues. Legislation and judicial decisions frequently cite international public policy in the context of enforcing an arbitral result. The question of what comprises international public policy, however, is one for a national court to resolve.

The violation of public policy is a notion that courts have expressed in a variety of ways, some exclusive to civil law states and others to common law ones. In case of the former, the interpretation of public policy is often, but not always, articulated in terms of the unnamed underlying beliefs or values upon which society is founded. But under common law regimes, the term usually refers to more specific but still relatively broad ideals like justice, fairness, and morality.

Courts in certain countries, including the UK, have been hesitant to provide a clear definition of public policy, instead using general principles, stating that: "[c]

[10] Article V of the New York Convention 1958, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York", June 10, 1958; entered into force, June 7 1959 United Nations, Treaty Series, vol. 330, 38, No. 4739 (1959). available at: https://www.euro-arbitration.org/resources/en/nyc_convention_en.pdf.

[11] Egerton v. Brownlow, 4 HLC 1 (1853).

[12] Chesire & North, Private International Law, 123 (Butterworths,13th ed.1999).

onsiderations of public policy can never be exhaustively defined, but they should be approached with extreme caution ... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised".[13] Public policy, on the other hand, has been given a somewhat broader definition in India, and even an Indian court may choose not to follow a foreign arbitral ruling on the grounds of public policy if it would be in conflict with: "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality".[14]

Domestic public policy refers to the rules of law and morality that are established by a state's constitution or other sources of law. Transgression of these norms is unacceptable even in international affairs, yet public policy somewhere at an international scale is a representation of the justice-seeking sentiment of a community. Few nations have made clear commitments to the idea of international public policy in connection to enforcement cases. Public policy's underlying philosophies are often those of the nation where enforcement is being wanted. Article V(2)(b) of the New York Convention of 1958 makes this point clear when discussing situations in which the award's acceptance or enforcement would be "against the national policy of that country".[15] Some nations, such as France and Switzerland, draw a line separating domestic and foreign public policy and include arbitral verdicts as a component of international public policy.[16]

The public policy exception has been used by domestic courts to prevent the implementation of foreign arbitration awards, as shown in the case of "*Hardy Exploration & Production (India), Inc. v. the Government of India"*.[17] For instance, in this case, the United States strictly adheres to the public policy notion to preserve foreign sovereignty, which prohibits the particular execution of an international arbitral decision in any nation that does not acknowledge U.S. arbitration, hence the US District Court in the District of Columbia declined to implement the ruling.[18]

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13 Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v R'as al-Khaimah National Oil Company 1 AC 295 (1990).

14 Renusagar Power Electric Company v. General Electric Company, AIR 1994 SC 860.

15 "Article V(2)(b) of the New York Convention 1958, Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, June 10, 1958; entered into force, June 7 1959 United Nations, Treaty Series, vol. 330, 38, No. 4739 (1959)". Available at: https://www.euroarbitration.org/resources/en/nyc_convention_en.pdf.

16 Renusagar Power Electric Company v. General Electric Company, AIR 1994 SC 860.

17 Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Nat. Gas, 314 F. Supp. 3d 95 (D.D.C. 2018).

18 "The parties were in dispute regarding the seat of arbitration. Their agreement stated that the place of arbitration was Malaysia, which contended that the place of arbitration meant the place of the hearings. Thus, they had different views on the competent authority referred to in Art. V(1)(e) of the Convention. India initiated annulment proceedings and Hardy sought enforcement of the award in Delhi. The High

Although the court acknowledged that Hardy had one legitimate claim, it said that it would not execute an award that required particular performance in a nation beyond the United States, namely India. The court's goal was to find a middle ground between the United States public policy of recognising the sovereignty of a foreign state and the real international public policy concerns surrounding the implementation of a judgement from an arbitrator. When deciding the scope of what constitutes a violation of public policy, the court relied on statutes and national judgements that explicitly prohibit certain acts of performance directed against a different country. In light of this stipulation, the court came to the conclusion that it was against the public interest of the United States to enforce a specific performance award in a state that is not its own. The court also stated that it would be a violation of the principles of soft international law if a court in the United States were to impose a specific performance by a foreign state on the territory of that state, and that the United States never had surrendered its sovereign immunity with regard to specific performance in commercial matters.

2.3 Global Perspectives on Substantive and Procedural Public Policy

The courts in which recognition and execution of an arbitral judgement are sought apply Article V(2) of the New York Convention, which mandates consideration of both the substantive consequences of the decision and the process leading up to the award.[19] Mandatory and basic laws, public order as well as morality, and the national interest all make up a country's substantive public policy. It addresses inconsistencies between the subject matter of the award and the state's basic norms and values that will be used to uphold the award. For a state to recognise law as basic to its domestic control, the state must determine that the disagreement could not have been resolved under any other law. For the sake of a basic rule, the limited scope of public policy for international conflicts is therefore, irrelevant.

Numerous international legal rulings have barred the use of awards because they go against the morals of the relevant state. This benchmark is very

Court of Delhi held that the contract did not define the place of arbitration clearly and interpreted the seat of arbitration to be outside India and decided that the court did not have jurisdiction. India appealed this decision before the Supreme Court of India. While these proceedings were pending, Hardy sought enforcement before the U.S. courts and the U.S. Court rendered its decision on refusal of enforcement before the Indian courts. After the U.S's decision, the Supreme Court of India decided that the jurisdiction to hear the annulment lawsuit of the award lies with the Courts of India and the order of the High Court of Delhi was set aside".

[19] "New York Convention 1958, Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, June 10, 1958; entered into force, June 7 1959 United Nations, Treaty Series, vol. 330, 38, No. 4739 (1959)". Available at: https://www.euro-arbitration.org/resources/en/nyc_convention_en.pdf.

context-dependent. Therefore it fluctuates considerably from one state to another. For example, in USA *Productions et al v Women Travel*,[20] due to a breach of contract dispute, the China International Economic and Trade Arbitration Commission issued an award that was not recognised by Chinese courts. The Chinese government's failure to enforce this stems from the fact that allowing the band to play would have been seen as anti-nationalistic and offensive to the Chinese people. To determine whether or not to enforce foreign judgments, courts often weigh the notion of national interest. Again in *United World Ltd Inc v Krasny Yakor*,[21] the Russian Federal Court refused to uphold an arbitral ruling because it feared the insolvency of Krasny Yakor, a state-owned corporation that produced items of national security, would have a chilling effect on the country's social and economic stability. Although parties sometimes contend that a state's international relations should play a role in the implementation of arbitral rulings, this argument is rarely upheld. In the case of *Dalmia Dairy Industries Ltd v National Bank of Pakistan*,[22] the English court did not buy the claim that the citizens of the two nations in question were at war, hence the award was enforced.

The shortcomings in the laws that regulate arbitration are addressed by procedural public policy, which encompasses a wide range of topics such as corruption and fraud due process, res judicata, and dissolution at the site of arbitration. The court also considered a breach of public policy when they realised that the fundamental right of being heard was violated. When a tribunal provided a remedy that was not sought by the parties, for instance, the Canadian courts declined to recognise and enforce the award on the grounds that it was in violation of the *"principle of audiatur et altera pars".* Applications to reject recognition and enforcement on the grounds of procedural public policy must meet a high hurdle to be granted when based on substantive public policy. In *Osuuskunta METEX Andelslag v Tiirkiye Electrik Kurumu Genel Miidirliigii General Directorate*,[23] the Turkish Supreme Court refused to recognise the validity of a Swiss law-governed arbitration ruling on the grounds that it ran afoul of Turkish public policy by failing to adhere to the exacting standards set out by Turkish law. The international community as a whole has panned this decision for many reasons, including the fact that the procedural legislation chosen by the parties ultimately had no bearing on the result of the case.

[20] Productions et al. v. Women Travel, Supreme People's Court of the P R of China, Jing Ta No. 35 (1997).
[21] United World v. Krasny Yakor, Federal Arbitrazh Court of the Volgo -Vyatsky Region, Russia, A43-10716/02-27-10 (2003).
[22] Dalmia Dairy Industries Ltd v. National Bank of Pakistan, 2 Lloyd's Rep 223 (1978).
[23] Osuuskunta METEX Andelslag v. Tiirkiye Electrik Kurumu Genel Miidirliigii General Directorate, Decision of the 15th Civil Chamber, No. 16-17-1052 (1976).

3 Scope of Section 34 of the Arbitration and Conciliation Act, 1996 (India): Setting aside an Arbitral Award

In ancient and mediaeval India, it was common to practice having a neutral third party arbitrate a dispute. If any party to a legal disagreement is dissatisfied with the outcome, he or she may file an appeal to the Law Court and, if necessary, with the King. The Regulations drafted by that the East India Company gave the courts the authority to submit cases to arbitration, marking the beginning of the current law of arbitration.[24]

The English Arbitration Act of 1889 served as the model for the first Indian Arbitration Act of 1899. After the Indian Arbitration Act of 1940, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) served as the basis for the Arbitration and Conciliation Act of 1996 (the "Act"), which was passed by Parliament. Section 34 of the 1996 Act makes reference to both Section 30 of the Arbitration Act of 1940 and Article 34 of the UNCITRAL (United Nations Commission on International Trade Law) Model Law on the subject of annulling an arbitral judgement.

3.1 Overview of the Statutory Provision

The grounds for appealing against an arbitral ruling issued according to Section 31 of the Arbitration and Conciliation Act of 1996 are laid forth in Section 34. The goal of a set aside is to alter the reward in whole or in part. A challenge to an award under Section 34 is possible, but only within a certain time frame; in this case, three months after receiving the award (this time frame may be extended by an additional 30 days). In "*Municipal Corp. of Greater Mumbai v. Prestress Products"* (2003),[25] the court ruled that the 1996 Act was established with the deliberate intention of restricting judicial intervention, but Section 34 can be found to be otherwise.[26]

The Court may vacate an arbitral award for a variety of reasons, including the parties' incapacity to arbitrate, the agreement's invalidity, the lack of notice to the other party, and the dispute's expansion into a subject outside the scope of the arbitration clause, as listed in Section 34(2)(a) of the Arbitration and Conciliation Act, 1996. Any agreement made between persons who are below the age of majority or minors is null and void. Any award rendered under such circumstances

[24] Sindhu, Jahnavi, "Public Policy And Indian Arbitration: Can The Judiciary And The Legislature Rein In The 'Unruly Horse?", 58 (4) JILI, 421, 430-35 (2016).
[25] Municipal Corp. of Greater Mumbai v. Prestress Products, (3) BomCR 117 (2003).
[26] Municipal Corp. of Greater Mumbai v. Prestress Products, (3) BomCR 117 (2003).

may be set aside by the court, and the agreement itself will be null and invalid.[27] For instance, A lady afflicted with schizophrenia, a mental condition, may ask for an award to be withheld on her behalf. The reasons for the incompetent party's incapacity, however, will be erased if the incompetent party wants a guardian for arbitral proceedings in accordance with Section 9 of the arbitration act.[28]

Similarly, a contract is not legally binding until all of its necessary conditions are satisfied. In the event that the contract is invalid, the arbitration clause will be nullified as well, and the arbitral ruling might be challenged.[29] In *Adarsh Kumar Khera v. Kewal Kishan Khera* (2007),[30] since the arbitral award was reached without the parties being given an opportunity to be heard, it was declared null and invalid, and the parties sought to have it reversed. Also, if the party who filed the application for arbitration did not get timely notice of the arbitrator's appointment or the arbitral processes, or if he was prevented from doing so for any other reason, the award rendered by the arbitrator will be null and void.[31] If the arbitral award addresses a matter not covered by the arbitration agreement or if it includes rulings on matters not covered by the arbitration agreement, it will be susceptible to appeal. In addition, only the part of the arbitral award, including decisions on issues not referred to arbitration, may be set aside if it can be shown that the arbitrator erred in making the determination.[32] In *India Yamaha Motor Pvt. Ltd. v. Divya Ashish Jamwal* (2019).[33] The arbitral judgement was overturned because it violated the terms of the contract, did not consider pertinent information on file, and was predicated on conjecture. Further, in "*Rulia Mal Amarchand v. Hindustan Petroleum Corporation Ltd.* (2019),[34] it was decided that the arbitrator ought to have kept his decision-making to the issues and settlement that were submitted for arbitration".

Other than the reasons listed in Section 34(2)(b) of the Arbitration and Conciliation Act of 1996, the court may reverse an arbitral judgement if it determines that the subject matter is covered by another act or legislation and does not comply with Indian public policy. The Court inferred in *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*,[35] 2003, that The Court was seen as an appellate/revision court with wide powers in the event of an application under Section 34 to vacate an award. It was also said that "public policy" refers to anything that is for the benefit

[27] §34(2)(a)(i) of the Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[28] §9 of the Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[29] §34(2)(a)(ii) of the Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[30] Adarsh Kumar Khera v. Kewal Kishan Khera, Delhi High Court Case No. O.M.P. 643 (2007).
[31] §34(2)(a)(iii) of the Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[32] §34(2)(a)(iv) of the Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[33] India Yamaha Motor Pvt. Ltd. v. Divya Ashish Jamwal, Delhi High Court, O.M.P. 1107/2012.
[34] Rulia Mal Amarchand v. Hindustan Petroleum Corporation Ltd. Delhi High Court, O.M.P. 505/2006.
[35] Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., AIR 2003 SC 2629.

and advantage of the general population. However, there is no way to claim that the judgement serves the public interest, given its obvious violation of the law. The justice system is likely to be impacted by such an outcome or judgement.

3.2 Distinction between Domestic and Foreign Awards

In the Section 34 of the Arbitration and Conciliation Act, 1996, the reasons for setting aside a domestic arbitral judgement are outlined, while in Section 48, grounds for setting aside an international arbitral award are outlined. Sections 34 and 48 of the Act are identical in wording, scope, and intent. The Indian Apex Court, in "*Renusagar Power Co v General Electric*,[36] stated that a distinction must be drawn while applying the said rule of public policy between a matter governed by domestic law, and a matter involving conflict of laws. The application of this doctrine in the field of conflict of laws is more limited, and the courts are slower to involve public policy in the cases involving a foreign element than when a purely municipal legal issue is involved".[37]

In "*Oil and Natural Gas Ltd v Saw Pipes Ltd*,[38] For reasons of public policy, the Supreme Court has further clarified the boundary between domestic and foreign arbitrations". Following the distinction established by Renusagar, the Court introduced another basis on which enforcement may be refused: the ground of patent illegality, much to the dismay of the international community. As a result of this ruling, courts may now look at the facts of a case before deciding whether or not to enforce a judgement if it finds that the award is fundamentally at odds with Indian law. However, only domestic arbitrations were eligible for this extension's benefits. This verdict brought various criticisms, and hence it was amended in "*Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc"*.[39] Subsequently, the Amendment Act was passed, and Section 34 was revised such that it no longer applied to foreign business arbitrations. It has also been made clear that, in the event of a Section 48 application, the court will not examine the merits of the case beyond the issue of patent illegality. In "*Associate Builders v. Delhi Development Authority"*,[40] the Supreme Court has ruled that domestic arbitration verdicts may only be overturned in extreme circumstances, such as where they are capricious, unreasonable, or otherwise violate the court's sense of morality.

[36] Renusagar Power Co v General Electric,1994 AIR SC 860 at para 51, 1994 SCC Supl (1) 644.
[37] Renusagar Power Co v General Electric,1994 AIR SC 860 at para 51, 1994 SCC Supl (1) 644.
[38] Oil and Natural Gas Ltd v Saw Pipes Ltd AIR 2003 SC 2629, (2003) 3 SCR 691.
[39] Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc., Civ App 3678 of 2007.
[40] Associate Builders v. Delhi Development Authority 4 Arb LR 307 (SC) (2014): 3 SCC 49 (2015).

In light of this, the current legal framework significantly restricts the influence of public policy on domestic and foreign arbitrations, bringing them into line with globally recognised norms.

4 Disjunct between Theory and Practice: Public Policy and Indian Arbitration through Judicial Interpretations

Public policy in India originally included just the country's core policy, its interests, and issues of morality and justice, but this definition was later broadened. The issues for India began with the conflict of *Renusagar Power Co. Ltd v. General Electric Co*.[41] According to the Supreme Court's decision in "*Renusagar Power Co. Ltd. v. General Electric Company*, a foreign award's implementation might be blocked if it's deemed against public policy if that enforcement is against:

- fundamental policy of Indian law, i.e., if foreign arbitral award involves a violation of Indian law or non-compliance with the court's order. However, the bar of limitation will not operate as a bar of public policy.
- Justice or morality".[42]

Since it lacks a precise definition, Indian interest automatically connotes a broad concept. In the instance of "*COSID Inc v. Steel Authority of India"*,[43] the award was revoked on the grounds that there was an emergency scarcity of coils in India at the time, and the government had restricted their export. The clarification to Section 48 of the 1996 Arbitration and Conciliation Act makes this clear.

A basic element of due process, which is a matter of public policy, is that all parties be given a fair and impartial hearing. According to this rule, all interested parties must have been given a fair chance to participate. However, if a party is advised of the arbitration but then refuses to participate or does nothing, that party will be seen as if he knowingly waived his right to participate. This was upheld in the case of "*European Grain & Shipping Ltd. (U.K.) v. Seth Oil Mills Ltd"*.[44] by the High Court of Bombay, where the respondent claimed that the arbitrator did not take into account the export ban on the items at issue, the judgment would be in contradiction to the public policy. This defence was shot down by the high court, which reasoned that the defendant should have brought up the issue before the arbitrator and prevented them from doing so by not showing up to the hearing.[45]

[41] Renusagar Power Co. Ltd v. General Electric Co., Supp. 1 SCC 644 (1994).
[42] Renusagar Power Co. Ltd v. General Electric Co., Supp. 1 SCC 644 (1994).
[43] Cosid Inc v. Steel Authority of India AIR (1986) Del 8.
[44] European Grain & Shipping Ltd. (U.K.) v. Seth Oil Mills Ltd AIR 1983 Bom 36.
[45] European Grain & Shipping Ltd. (U.K.) v. Seth Oil Mills Ltd AIR 1983 Bom 36.

In another case of, "*Hindustan Zinc Ltd. v. Friends Coal Carbonisation"*,[46] the court reiterated the importance of public policy, stating that any award that ran counter to the law, the Arbitration and Conciliation Act of 1996, or the conditions of the contract would be invalid and against India's national policy, and if it affected the parties' rights, the court could intervene under s. 34 (2) of the 1996 Act. In the case of "*Cruz City 1 Mauritius Holdings v. Unitech Limited",*[47] the Delhi High Court suggested a balancing test for public policy grounds to prohibit the implementation of a foreign arbitral judgement. The Cruz City Court reviewed whether declining to implement a foreign award that violates public policy may violate "public policy" further. The Court further stated that although the power to prevent the implementation of an arbitral judgement is restricted, courts might accept the contentions provided adequate reasons are established.[48] Again, in the case of "*Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL",*[49] However, the Supreme Court found that the ground of fraud, bribery, the essential policy of Indian law, basic notions of justice, and morality cannot be used as an excuse for refusing to follow a foreign ruling.

In the UK case of "*Minmetals Germany Gmbh v. Ferco Steel Ltd.,*[50] it has been decided that *considerations of public policy involve investigation not only of the core procedural defect relied upon by way of objection to enforcement but of all surrounding circumstances which are material to the English Court's decision whether, as a matter of policy, enforcement should be refused. Such circumstances may give rise to policy considerations which so strongly favour enforcement as to outweigh policy considerations to the contrary*".[51]

In the issue of "*Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan",*[52] according to the United Kingdom's highest court, there is no basis for a court to use its discretion to enforce an arbitral judgement in the lack of a valid arbitration agreement, even if reasons for rejection of enforcement are made clear. In "*Yukos Oil Co v. Dardana Ltd.,* the Court of Appeal has *held that the word may in Article V of the New York Convention suggests that even if one or more grounds are made out, the right to rely on them had been lost, by for example another agreement or estoppel*".[53]

[46] Hindustan Zinc Ltd. v. Friends Coal Carbonisation, Case No. Appeal (civil) 3134 of 2002.
[47] Cruz City 1 Mauritius Holdings v. Unitech Limited, SCC Online SC 3619 (2018).
[48] Cruz City 1 Mauritius Holdings v. Unitech Limited, SCC Online SC 3619 (2018).
[49] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL, SCC OnLine SC 177 (2020).
[50] Minmetals Germany Gmbh v. Ferco Steel Ltd., 1 All E.R. (Comm.) (1999).
[51] Minmetals Germany Gmbh v. Ferco Steel Ltd., 1 All E.R. (Comm.) (1999).
[52] Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan, EWCA Civ 543 (2002).
[53] Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan, EWCA Civ 543 (2002).

The concept of violation of "fundamental policy of Indian law" is usually considered beyond mere statutory contradictions. In "*Renusagar*, the Court stated that *Article V(2)(b) of the New York Convention left out the reference to principles of the law of the country in which it is sought to have relied upon*[54] while reinstating the Geneva Convention of 1927". It was decided that breaking the law is insufficient to trigger the public policy exception and that more misconduct is required. This is so because the phrases "and the law of India" that follow such a statement cannot cover all that is meant by "public policy." Once again, the nature of the transaction determines what is contrary to public policy. Courts may elaborate on and use these principles as they see fit because they have been crystallised under several headings. The executive branch cannot create new directions in public policy at will via subordinate legislation.

5 Recent Developments of Arbitration Laws in India

The 246th report from the Law Commission looked at how the courts have broadened the definition of public policy. Multiple sections of the 1996 Act, including Section 34, were targeted for revision in the study. The 2015 revision is based on this suggestion. According to the commission's recommendations, the attitude expressed in the Renusagar verdict should be maintained and implemented in the event of any judgments rendered in international arbitration. Since the "interest of India" might be interpreted in several ways, this law limited the scope of public policy, particularly in the context of international arbitration awards. It is important to keep the "patent illegality" premise but to give it a narrower interpretation than the one used in the Saw Pipes case.[55]

In response to this report's recommendations, India's arbitration system was updated with the passing of the Arbitration and Conciliation Act 2015 (Amendment). Therefore, the ordinance restricted judicial overreach by allowing the nullification of an international award on the grounds of public policy if the award is contaminated by corruption or fraud or if it does not adhere to the core policy of Indian law, or if it is contrary to the essential principle of morality and equality. Only domestic awards may be revoked for patent violations under Section 34(2A).

The President signed the 2019 Amendment to the Arbitration and Conciliation Act on August 9, 2019. Based on the Shrikrishna Committee Report, Section 87 of the Act put an end to the debate over whether or not the Arbitration and Conciliation Act of 2015 should apply retroactively by specifying that it applies only to court

[54] Renusagar Power Electric Company v. General Electric Company, AIR 1994 SC 860.

[55] Sindhu, Jahnavi, "Public Policy And Indian Arbitration: Can The Judiciary And The Legislature Rein In The 'Unruly Horse?", 58 (4) JILI, 421, 435-37 (2016).

proceedings involving arbitration that began after the Act was introduced, rather than to arbitration proceedings that began before it. In "*Hindustan Construction Company Limited v. Union of India*" (2019), the court ruled that the Arbitration and Conciliation Act 2015 applies to all court actions, whether they are new or ongoing and whether they occur before, on, or after the Act's implementation. It was argued that enacting Section 87 would run counter to the goals of the 2015 amendment by lengthening the time it takes to complete arbitration processes and increasing the amount of court intervention in them. In *NAFED v. Alimenta*, for example, the Supreme Court didn't issue its ruling until 2020, over three decades after the judgement was issued.

6 Transnational Public Policy: Need of the hour

The current topic seeks to establish such ideas that constitute an international/universal agreement and acceptable standards that would supersede national public policy at the international/universal level. A harmonious interpretation of regional and international norms is essential for the successful acceptance and enforcement of arbitral agreements as well as awards. This is only conceivable if the arbitration agreement has the force of law and an award is enforceable under the laws of the relevant jurisdictions. This would be a huge boost for the growth of international business arbitration as a method of settling legal conflicts. One may go to France as an example since the New French Code of Civil Procedure has two distinct categories of public policy-one rooted in internal and domestic policy and the other, *"ordre public,"* for international arbitrations.

The enforcement of awards requires more standardised legal frameworks across jurisdictions. The concept of creating standardised arbitration rules has evolved and improved greatly. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by over 123 nations. In addition, several countries have taken into account the UNCITRAL Model Rules (1985) on International Commercial Arbitration, whose purpose was to help nations adopt uniform laws on international arbitration when passing their own domestic arbitration statutes.[56] However, a more practical and pleasant condition has yet to be attained, and this may be done by putting more effort into the regulations governing the arbitration process. Due to concerted efforts, standardised arbitration procedures now exist. When arbitration rules are unified in this way, they may be harmonised as much as possible. However, progress is painfully sluggish. Not because of any flaw in the laws themselves but because of the nature

[56] Poon, Nicholas, "Striking A Balance Between Public Policy And Arbitration Policy In International Commercial Arbitration: Aju V. Ajt", 12, Singap. J. Leg. Stud., 185, 188-90 (2012).

of the international system itself.[57] When everyone is operating from the same set of foundational concepts, only then can we see the benefits of a unified legal framework.

A "Transnational Public Policy" is not the same as an international public policy. The former is nationalistic and arbitrary, whereas the latter is universal. A transnational public policy is a set of guiding principles that reflect a global agreement on fundamental values and established norms of behaviour. Fundamental laws of global justice, jus cogens in public international law, and the basic moral standards acknowledged by what are called civilised countries are all believed to make up this idea. For the objectives of harmonising and standardising the arbitration process, this interpretation appears to make the greatest sense. The term "public policy" refers to a set of guiding principles for governing the behaviour of individuals and businesses for the common benefit. It is in the global community's best interest that the domestic or state concept of the phrase "public policy" be expanded and embraced. There is a growing movement toward "transnational public policy," and states would be well to align their domestic laws with this trend by recognising as "public policy" only those reasons that do not hamper the expansion of international commerce and commercial arbitration.[58]

If arbitrators determine that strict adherence to the terms of a certain legislation would lead to an unfair decision, they are empowered under the concept of amiable compositeur to reject such rules. It is consequently suggested that arbitrators be given the authority to determine as a pacific compositeur. If arbitrators are given wide latitude, they might disregard regulations that seem too restrictive or unjust. Amicable compositeur gives arbitrators greater leeway to make decisions that are more in accordance with international public policy. Unless the arbitrator has the *ex acquito et bono* authority to determine in justice and moral conscience, which would allow him or her to disregard the application of the rules of law, the rules of law must be followed. The arbitrator, who is nonetheless constrained by the terms of the agreement and by national public policy, needs more authority. Limitations on this are possible only in exceptional cases.

The lack of consensus among the arbitrators and judges on the issue of arbitrability is reflected in this. Only if the UNCITRAL Model Rules explicitly list the types of disputes that cannot be resolved by arbitration will the idea of transnational public policy be fully operational and effective. Different countries have different legislation in place that permit challenges to arbitral awards. More importantly, a petition to have an award nullified must comply with the laws of the

[57] Advani, Hiroo H., Public Policy, 21 (2), Nlsir, 55, 59-60 (2009).

[58] Nazzini, Renat, "Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context", 66 (3), Am. J. Comp. L., 603, 620-24 (2018).

jurisdiction in which it was filed.[59] This would allow disputes to be settled more quickly and lessen the likelihood that more cases would be brought to national courts. However, before giving arbitrators more power in this area, it is important to assess their level of expertise.

7 Conclusion

It's important to proceed carefully when dealing with local opposition to the execution of international awards. Since India is a party to the New York Convention of 1958, it is important to consider whether or not the enforcement of a foreign award would run counter to Indian law. India has declared a sovereign commitment to honouring foreign awards, with the exception of the restrictions set out in Article V of the New York Convention.

Under the auspices of UNCITRAL, a governing body, such as a recognised institution of arbitrators, is advocated for. Standardised course topics, training standards, a code of conduct, etc., would also be established, as well as the minimum credentials for arbitrators, membership/fellowship rules, and more. Now more than ever, professionalism must be the standard. Thus this is really crucial. Training programmes for arbitrators are now organised by a variety of arbitral organisations, although they do not always align with the requirements of modern-day international commercial arbitration. This proposed body would be in charge of developing and researching standardised educational resources for this area of expertise. This will comply with transnational public policy and better enable unification in arbitral rulings. The sole basis for annulling an international arbitral judgement should be a change in what is now called "transnational public policy," and this is something that Indian law has to be brought in line with. As previously noted, consistent criteria for putting aside and refusing to enforce international awards would be introduced by transnational public policy, whose reach would be limited in comparison to the evaluation of domestic public policies.

India must work to improve confidence in arbitration. To foster an arbitration-friendly environment, it is necessary to maintain some oversight over the implementation of the arbitration ruling; however, this oversight should be restricted, and the arbitration processes should be as impartial as feasible. The court must choose where to draw the line and strike a fair compromise between limiting its own involvement and ensuring that justice is done.

[59] Kolkey, Daniel M, "Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations", 22 (3), The International Lawyer, 693, 702-04, (1988).

References

Advani, Hiroo H., Public Policy, 21 (2), NIsir, 55, 59-60 (2009).

Chesire & North, Private International Law, 123 (Butterworths,13th ed.1999).

Farshad Ghodoosi, International Dispute Resolution and the Public Policy Exception 205-06 (Routledge, London & New York, 1st ed, 2017).

Garry B. Born, International Commercial Arbitration, commentary and material, 223 (Kluwer Law International and Transnational Publishers, Inc., The Hague, Netherlands, 1st ed, 2001).

Kolkey, Daniel M, "*Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations"*, 22 (3), The International Lawyer, 693, 702-04, (1988).

Nazzini, Renato, "*Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context"*, 66 (3), Am. J. Comp. L., 603, 612-14 (2018).

New York Convention 1958, "*Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York"*, June 10, 1958; entered into force, June 7, 1959 United Nations, Treaty Series, vol. 330, 38, No. 4739 (1959).

Percy H. Winfield, "*Public policy in the English Common Law",* 42 Harv. L. Rev. 76 (1928)

Poon, Nicholas*, "Striking A Balance Between Public Policy And Arbitration Policy In International Commercial Arbitration: Aju V. Ajt"*, 12, Singap. J. Leg. Stud*.,* 185, 188-90 (2012).

Sindhu, Jahnavi, "*Public Policy And Indian Arbitration: Can The Judiciary And The Legislature Rein In The 'Unruly Horse*?", 58 (4) Jili, 421, 430-35 (2016).

W.S.W. Knight, "*Public Policy in English Law"*, 38 L.Q.R. 207 (1922).

Wulff, Erik, & Kiran Lingam, "*Franchising In India: A Brave New Frontier: Economic Policy Reform Paves the Way",* 29 (4) Franch. Law J. 248, 249-50 (2010).

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

GHOSE, Anuttama; ALI, SM Aamir; MOHANTY, Aparajita. Scope of counterbalancing public policy and execution of foreign arbitral awards in India. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 105-121, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.6.

DOI: 10.52028/rbadr.v4i8.7

A victim-sensitive approach towards victim – offender mediation in crimes: an analysis

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Abstract: Victim-offender mediation has experienced significant recent growth. Such mediation is a by-product of restorative justice theory, which downplays the need of punishing perpetrators severely in favour of assisting victims in obtaining justice and closure. The UN Declaration on Basic Principles of Justice for the Victims of Crime and Abuse of Power, adopted in 1985, calls for the use of informal procedures, such as mediation, arbitration, and the adoption of indigenous practices, to settle disputes and offer reparations to crime victims. The results of using a victim-sensitive approach to mediation are examined in this research. It intends to highlight the expense of setting up and operating restorative justice programmes in relation with criminal justice, as well as the major ethical and professional concerns involved. While addressing a number of crucial challenges for criminal justice, the paper also places these findings within the expanding international academic and policy debates concerning restorative justice.

Keywords: Victim. Sensitive. Mediation. Mediation in crime.

Objectives

The objective of the paper are as follows:

- Restorative justice for adult offenders may involve the community;
- What are the benefits of conferencing and mediation as restorative justice practices for adults in various jurisdictions?
- What is a better practical approach to VOM for the better implementation of restorative justice?

Summary: Restorative justice is a victim-centered approach to criminal justice that allows those most harmed by a criminal act to participate actively in repairing the harm that was done. Victim-offender mediation is a good step in the right direction since it enables the integration of ADR techniques into the criminal justice system.

The use of victim-offender mediation is growing fast. 75% of the mediation programmes had their origins in the 1980s and 1990s. Restorative justice principles are fundamental concepts within Christianity and Judaic faiths. These communities also began to actively implement and promote restorative practices. "The National Survey of Victim-Offender Mediation Programs" in the United States provides details on the features of the many victim-offender mediation programmes. It also compiles a comprehensive list of all victim offender mediation programmes that have been established in the nation along with contact details like addresses and phone numbers. The Restorative Justice (RJ) Unit of the Canadian Correctional Service (CSC) provides a secure and beneficial mechanism for victims and offenders to interact. With a focus on ensuring that offenders comprehend the human costs associated with their crimes, RO is a CSC-funded effort. Victim support services may offer victim/offender mediation as needed. Free, impartial, and private mediation will take place. A person who has been hurt in an incident (the complainant) and the person who caused it (the defendant) meet face-to-face during justice mediation. Victim-offender mediation (VOM) programmes in Germany are most frequently used in the criminal court system. The Victorian programme is restricted to situations where adults admit to committing property crimes. Since 1991, the juvenile criminal code specifically refers to TOA/VOMP as a court sanction. The French law formalised criminal mediation in 1993, and the Act of March 9, 2004 revised it further. The mediator (who may be a judge, police officer, prosecutor's representative, or another person) works to ensure that the victim will be compensated for their losses and that the offence will no longer cause a nuisance. Mediation is not governed by law in India, but covered by a number of other statutes. The purpose of the bill is to encourage, facilitate, and advance institutional mediation. It also suggests requiring mediation before court proceedings. In some circumstances, immunity is granted to prevent revelation of the mediation process's contents. The Mediation Council of India is established under the Bill, which also includes provisions for communal mediation. If there is a mediation agreement exist between the parties, the Bill mandates pre-litigation mediation. A Mediation Settlement Agreement (MSA) will be enforceable in court and can be registered within 90 days. It would be foolish to rule out the use of mediation in all criminal issues, despite the fact that it is generally viewed as an inappropriate remedy in criminal cases. Records show that mediation has been effective in cases involving adolescent delinquency and less serious offences. Even in India, judges have recommended mediation in cases of check bounce and divorce conflicts including criminal ones. Sherrif Elnegahya argues that a court only permits legal remedies, such as apologies, and that it has no place for extra-legal remedies. Legal systems can, however, get over these restrictions by practicing creative justice. The main manifestation of this type of justice is called mediation. The "Guidelines for Victim-Sensitive Victim

Offender Mediation: Restorative Justice Through Dialogue" is published by the U.S. Department of Justice. The first of six publications aims to help administrators improve their restorative justice programmes. It offers advice on how to facilitate fair and impartial mediation, which will protect everyone's safety and honour. Victim-offender mediation is not a replacement for punishment in circumstances of violent crime. It provides a way to recover and a sense of closure that cannot be attained by punitive measures alone. The procedure can be used successfully in cases involving social justice and less serious criminal offences. Victim-offender mediation has many advantages over going to court. It gives victims a voice and elevates the sense of justice that one might not experience in a trial. The juvenile justice act would be strengthened if mediation were included in cases involving young offenders. Every victim is not required to take part in victim-offender mediation, family group conferencing, or any other restorative justice intervention. Each victim must decide whether or not to participate on a personal level. Victims should have the freedom to choose the session's venue and start time, as well as the option to withdraw at any time.

Introduction

Restorative justice is a victim-centered approach to criminal justice that allows those most harmed by a criminal act which includes the victim, their families, and community to participate actively in repairing the harm that was done. Victim-offender reconciliation, also known as victim offender mediation, is a type of restorative justice that focuses on bringing victims and offenders together and integrating them into the criminal justice system. Most people mistakenly believe that it merely involves victim and offender speaking face to face. However, it goes much beyond that. For those involved in or impacted by horrific criminal offences, there is the Victim Offender Mediation Program (VOMP). After release from prison, the "mediator" supports and fosters a therapeutic conversation between the parties rather than getting involved and mediating. They give both the victim and the perpetrator the ability to address the problems, repercussions, and worries related to a crime. They answer any queries or worries about the offender's future release back into society. In order to hold the offender responsible for his actions, victims are given the opportunity to confront their attacker in a controlled and safe environment. Victim-offender mediation is a good step in the right direction since it enables the integration of ADR techniques into the criminal justice system. Preliminary discussions normally follow the parties' voluntary acceptance of the mediation, which occurs at the outset. The victim would be permitted to question the criminal at this point. The perpetrator may admit to the offence and, in most situations, express sorrow, remorse, and acceptance of responsibility.

Main text

Historical Development of Victim Offender Mediation

The use of victim-offender mediation is growing quickly as a result of the expansion of both restitution and the victims movement: approximately 75% of the mediation programmes currently in existence had their origins in this decade. This amazing development has been noticeable around the world and across a range of socioeconomic and cultural circumstances. The history of victim offender mediation, also known as criminal court mediation by some, dates back many years to the province of Ontario in Canada.[1] A few miles north of Kitchener, Ontario, in Elmira, an experiment that would eventually lead to the global development of a new justice reform, began in May 1974.Since that time onwards various similar programs have been initiated across Canada and globally. Some basic principles of restorative justice, such as compassion and reparation, which are fundamental concepts within Christianity and Judaic faiths and, as such, these communities also began to actively implement and promote restorative practices.[2] More than twenty other Canadian jurisdictions now operate victim offender mediation and reconciliation programmes, many of which are run as "alternative measures" in accordance with the "Canadian Young Offenders Act of 1984". Similar initiatives quickly developed in the United States after that. In 1978, "the Mennonite Central Committee", probation officers, and a local judge in Elkhart, Indiana, started taking cases, which marked the beginning of VORP in the United States. In addition to the twenty six programmes in Canada, there were roughly 150 victim offender mediation or reconciliation programmes operating in the United States by the middle of the 1990s, and word of these programmes and efforts to replicate them started to spread internationally.

Best practices of VOM Programme in different jurisdiction

United States

Only a small number of victims from a few different areas took part in the early victim-offender mediation (VOM) programmes in the US when they started in the late 1970s.[3] Today, VOM programmes serve thousands of crime victims across

1 Justice.gc.ca. 2022. *3. EMPIRICAL RESEARCH RESULTS – The Effects of Restorative Justice Programming: A Review of the Empirical*. [online] Available at: https://justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/p3.html [Accessed 7 October 2022].

2 (3. EMPIRICAL RESEARCH RESULTS - The Effects of Restorative Justice Programming: A Review of the Empirical, 2022).

3 Ncjrs.gov. 2022. *National Survey of Victim-Offender Mediation Programs in the United States*. [online] Available at: https://www.ncjrs.gov/ovc_archives/reports/national_survey/natsurv3.html [Accessed 7 October 2022].

over 300 cities worldwide.[4] "The Center for Restorative Justice & Peacemaking (formerly the Center for Restorative Justice& Mediation), School of Social Work, University of Minnesota", received a grant from the "Office for Victims of Crime (OVC)" within the Office of Justice Programs of the "U.S. Department of Justice" (DOJ) in 1996 to assess the extent of this service's use and to advance victim-sensitive mediation techniques.[5] A significant programmatic intervention in the US that fully embraces the principles of restorative justice is victim-offender mediation. "The National Survey of Victim-Offender Mediation Programs" in the United States provides details on the features of the many victim-offender mediation programmes that are in existence across the country as well as the main challenges they face on a daily basis. Additionally, the Directory of Victim-Offender Mediation Programs in the United States compiles a comprehensive list of all victim offender mediation programmes that have been established in the nation along with contact details like addresses and phone numbers. The Directory's main function is to make it simple for people to get in touch with a certain application. Programs for victim-offender mediation usually train the local volunteers to act as mediators. The average training time for staff or volunteer mediators is around 31 hours, while some of the survey's participating organisations indicated much longer training times of up to 89 hours.[6]

Canada

The Restorative Justice (RJ) Unit of the Canadian Correctional Service offers a secure and beneficial mechanism for victims and offenders to interact and discuss the harms brought on by major crimes.[7] The Restorative Opportunities (RO) programme allows for this across Canada. The bulk of requests were initially made by institutional employees who identified possible appropriate offenders.[8] However, the number of recommendations that victims have received for this programme has significantly increased. With a focus on ensuring that offenders comprehend the human costs associated with their crimes, address the harms, and, as agreed upon by both the victim and the offender, restore some of the damage, RO is a

[4] United States Courts. 2022. *The Impact of Victim-Offender Mediation–Two Decades of Research*. [online] Available at: https://www.uscourts.gov/federal-probation-journal/2001/12/impact-victim-offender-mediation-two-decades-research [Accessed 7 October 2022].

[5] Ncjrs.gov. 2022. [online] Available at: https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176350.pdf [Accessed 7 October 2022].

[6] Ncjrs.gov. 2022. *National Survey of Victim-Offender Mediation Programs in the United States*. [online] Available at: https://www.ncjrs.gov/ovc_archives/reports/national_survey/natsurv5.html [Accessed 7 October 2022].

[7] Csc-scc.gc.ca. 2022. *Restorative Opportunities - Victim-Offender Mediation Services*. [online] Available at: https://www.csc-scc.gc.ca/restorative-justice/003005-1001-eng.shtml [Accessed 7 October 2022].

[8] 2022. [online] Available at: https://journals.sagepub.com/doi/10.1177/002087289904200209 [Accessed 7 October 2022].

CSC-funded effort. Having the inquiries and needs of victims attended to by those who are involved directly is an important step in giving victims with options for assistance.[9] Each request for assistance is carefully examined to evaluate whether the intervention is necessary and whether the participants are prepared to continue communicating. If the other party is unavailable, reluctant to join, or if either side's motivation is deemed improper for the programme, some of these requests may be filtered out. Others will be managed through indirect communication, including letter and/or videotape exchanges and shuttle communication. Finally, some will be postponed to give more time for planning.[10]

Australia

New South Wales: The Victim-Offender Conferences, which take place when an adult offender is sentenced, are one of the restorative processes that the Restorative Justice Unit specialises in facilitating.[11] A victim-offender conference occur will if the perpetrator acknowledges guilt for the offence and both the victims and the perpetrator consent to attend.

Tasmania: Victim support services may offer victim/offender mediation as needed. Requests for victim-offender mediation may come from the victim of the crime, the victim's family, or the offender. Ensure that the offender and victim are prepared and able to participate in mediation.[12] Learn what each party expects from mediation. Determine whether each party's expectations are reasonable and likely to be met. Ascertain, to the extent possible, that the process will be advantageous to all parties. Ascertain that no one's safety is jeopardised.

Western Australia: Between victims of crime and criminals, the Victim-Offender Mediation Unit (VMU) offers a mediation service. Both adult and juvenile criminals, as well as the victims of their crimes, may use this programme. Free, impartial, and private mediation will take place.[13]

Queensland: A person who has been hurt in an incident (the complainant) and the person who caused it meet face-to-face during justice mediation (the defendant). It is free, confidential, and optional. When a victim, victim's family, or

[9] Justice.gc.ca. 2022. [online] Available at: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/rr00_16.pdf [Accessed 7 October 2022].

[10] Csc-scc.gc.ca. 2022. *Restorative Opportunities – Victim-Offender Mediation Services*. [online] Available at: https://www.csc-scc.gc.ca/restorative-justice/003005-1001-eng.shtml [Accessed 7 October 2022].

[11] 2022. [online] Available at: https://www.jstor.org/stable/1147608#metadata_info_tab_contents [Accessed 7 October 2022].

[12] Justice.tas.gov.au. 2022. *Victims rights | Victims Support Services*. [online] Available at: https://www.justice.tas.gov.au/victims/victims-rights [Accessed 7 October 2022].

[13] Victim services for victims and offenders, Government of Western Australia, https://www.wa.gov.au/service/community-services/counselling-services/victim-services-victims-and-offenders (last visited Oct 7, 2022).

offender requests to meet the other party after the court process is over, the Justice Mediation Program will accept the referral.[14] Typically, these demands relate to heinous crimes like manslaughter and murder. They call for a different procedure and can occur at any point following sentencing. The senior Justice Mediation Program staff typically handles the case management and conducts these mediations. They do not happen very often and usually involve offenders who are in prison or on parole.

Victoria: The Victorian programme is restricted to situations in which adults admit to committing property crimes, and mediation is not available for some violent crimes including sexual offences and domestic violence. The programme is a pre-sentence option rather than a replacement for judicial proceedings.[15]

Germany

In contrast to other nations, particularly common law jurisdictions, victim-offender mediation (VOM) programmes in Germany are most frequently used in the criminal court system. However, a number of provisions in the German (Juvenile) Criminal Code enable victim-offender mediation to be taken into account during the judicial decision-making process. Since 1991, the juvenile criminal code specifically refers to TOA/VOMP as a court sanction.[16] If the young person makes a sincere effort at victim-offender reconciliation, the district attorney, who serves as the public prosecutor, may also choose not to initiate a formal process. Even though the common law systems offer much more options, the legality principle in German law (section 152 StPO/German Criminal Procedure Code) concerning to adult offenders does not authorization for extensive use of discretionary power within law enforcement. However, there are some extraordinary situation for mandatory prosecution that expressly refer to VOM.

France

Contrary to American efforts, penal (or victim-offender) and community mediation are relatively new occurrences in France, with the first projects starting in the middle of the 1980s.[17] A few French organisations started to try mediation in criminal cases in the middle of the 1980s with the help of a few magistrates,

[14] *Victim Services for victims and offenders*, Western Australian Government www.wa.gov.au/service/community-services/counselling-services/victim-services-victims-and-offenders. [Accessed 7 October 2022].

[15] citeseerx.ist.psu.edu/viewdoc/download. [Accessed 7 October 2022].

[16] *410 Gone*, classic.austlii.edu.au/au/journals/BondLawRw/2001/16.html.

[17] *Penal and Community Mediation: The Case of France*, SpringerLink link.springer.com/chapter/10.1007/978-94-015-8064-9_11.

taking inspiration from North American initiatives.[18] The law formalised penal mediation on January 4, 1993, and the Act of March 9, 2004 revised it. The mediator (who may be a judge, a police officer, the prosecutor's representative, or another person) works to bring the parties together in order to ensure that the victim will be compensated for their losses, that the offence will no longer cause a nuisance, and that the offender will be reclassified. The mediator (who may be a judge, a police officer, the prosecutor's representative, or another person) works to bring the parties together in order to ensure that the victim will be compensated for their losses, that the offence will no longer cause a nuisance, and that the offender will be reclassified.

Prior to any judicial procedures, a penal mediation may only be started by the prosecutor. As a "delegate of the prosecutor," the mediator is able to establish and sign "official minutes" with the parties, which is known as a "requisition" in the French model provided by the Ministry of Justice.

Only the prosecutor has the authority to begin a criminal mediation before any judicial processes. The mediator has the authority to create and sign "official minutes" with the parties as a "delegate of the prosecutor," which in the French model provided by the Ministry of Justice is known as a "requisition". The official minutes have the same legal weight as an official decision or ruling and are binding. It must be made clear that this only applies to minor offences.[19] The mediator meets with the offender and victim, who are both welcome to request legal representation if they so choose. The parties will attempt to settle their dispute amicably with the assistance of the prison mediator. If a settlement is achieved, the mediator creates a written agreement that both the offender and the victim sign.[20] The mediator checks that the conditions of the agreement are being followed and gives the prosecutor a report on the mediation's results.

Position in India

Despite being effective in other nations, mediation has not been able to advance much in India, mostly because people are not aware of mediation and its advantages. I on December 20, 2021, the "Mediation Bill, 2021" was introduced in the Rajya Sabha, and the Parliamentary Standing Committee was tasked with reviewing the Bill. The Rajya Sabha received the committee's report on 13th July, 2022.[21] In its report, the Committee makes significant recommendations

[18] *The Double Life of Victim-Offender Mediation in France*, ArbitrationLaw.com arbitrationlaw.com/library/double-life-victim-offender-mediation-france-wamr-2005-vol-16-no-7.

[19] http://en.wikimediation.org/index.php?title=Penal_mediation_in_France.

[20] *Penal mediation in France*, WikiMediation en.wikimediation.org/index.php.

[21] Vikram Karuna, *Explained | The Mediation Bill, 2021*, The Hindu (Oct. 3, 2022), www.thehindu.com/news/national/explained-the-mediation-bill-2021/article65967986.ece.

for amending the Mediation Bill in order to institutionalise mediation and create the Mediation Council of India. Although mediation is not specifically governed by law in India, it is covered by a number of other statutes, including the Arbitration and Conciliation Act (1996), Code of Civil Procedure (1908), the Companies Act (2013), the Consumer Protection Act (2019) the Commercial Courts Act (2015), and. The Supreme Court of India's Project Committee on Mediation and Conciliation describes mediation as a tried-and-true alternative to traditional conflict resolution methods. It is appropriate to adopt legislation governing both domestic and international mediation because India is a member to the "Singapore Convention on Mediation" (officially known as the "United Nations Convention on International Settlement Agreements Resulting from Mediation". The purpose of the bill is to encourage, facilitate, and advance institutional mediation as a means of resolving disputes, both business-related and not. The Bill also suggests requiring mediation before court proceedings. It also protects the rights of litigants to seek immediate relief from competent adjudicatory forums or courts. In some circumstances, immunity is granted to prevent revelation of the mediation process's contents. A Mediation Settlement Agreement (MSA), the result of the mediation process, will be enforceable in court and can be registered with the State or district or taluk legal authority within the period of 90 days to ensure genuine records of the settlement.

The Mediation Council of India is established under the Bill, which also includes provisions for communal mediation. If there is a mediation agreement exist between the parties, the Bill mandates pre-litigation mediation for the parties prior to initiating any lawsuit or court process. Without a valid excuse, parties that skip pre-litigation mediation may be charged. But according to Article 21 of the Constitution, having access to justice is a fundamental right that cannot be curtailed or constrained. Making mediation anything other than voluntary would be a denial of justice. There does seem to have been a lack of resourcefulness on the government side, as well as the legal community, to raise knowledge of mediation across the nation. Even though judges in India have been quick to point out that using mediation more frequently can help cut down on case backlogs and delays, Indian lawyers have not been able to respond to mediation quickly enough. Additionally, this part of reaching out to the public is hardly ever taken care of by the current court-assisted mediation centres. The renowned Malimath Committee Report,[22] which will have implications on solving and reducing the more number of disputes affecting the ordinary man, addressed key elements must be kept in mind while creating a wide variety of diverse justice delivery systems. Additionally,

[22] www.mha.gov.in/sites/default/files/criminal_justice_system.pdf.

the Law Commission's 129th Report proposed a few fresh approaches that would make it easier to quickly resolve matters in cities. These are listed below:[23]

- Creating the Nagar Nyayalaya in the same way as the Gram Nyayalaya, with a professional judge and two lay judges, and with same authority, jurisdiction, and procedures. However, if mediation is unsuccessful, the Nagar Nyayalaya will first try mediation before starting legal action;
- Setting up Neighborhood Justice Centers to involve local residents in dispute resolution;
- Conciliation court system, currently in use in Himachal Pradesh;

  Both the adoption of the Arbitration and Conciliation Act in 1996 and the addition of section 89 to the Civil Procedure Code[24] (hereafter CPC) in 1999 were significant turning points in the development of India's legal system. Although the idea of mediation was accepted in 1947, it became more well known after the revisions. They contributed to the expansion of mediation practise along with other legal advancements. To promote and institutionalise it, however, judges and attorneys reacted with protracted inaction. Only when the Supreme Court established a agenda for model norms, standards, and the creation of centres for mediation in the subsequent case of "*Salem Advocate Bar Association v. Union of India*"[25] did the practise of mediation begin to acquire popularity. Before 2015, certain courts would order parties for attending mediation sessions, but the Apex Court ruled in "*Afcons Infrastructure v. Cherian Varkey Construction*"[26] that mediation in criminal cases was inappropriate. Even though they involve criminal components, some cases— particularly those involving family disputes— that can be resolved by mediation are still referred to it. The question of whether mediation is appropriate in a criminal setting is complicated by the fact that Indian Law currently contains laws governing compounding of offences. The judge may, if necessary, submit the matter to the court's in-house mediation centre under Section 89 of the Code of Civil Procedure. However, this is only relevant in civil situations and is completely voluntary. Plea bargaining was also introduced in the Malimath committee report, the 142nd[27] and 154th[28] law commission reports, and other publications to support the incorporation of ADR into criminal law. In "*Mohd. Mushtaq Ahmad*

[23] lawcommissionofindia.nic.in/101-169/report129.pdf.
[24] *Indiankanoon.Org*, indiankanoon.org/doc/174517104/.
[25] *Indiankanoon.Org*, indiankanoon.org/doc/342197/.
[26] *Indiankanoon.Org*, indiankanoon.org/doc/1875345/.
[27] lawcommissionofindia.nic.in/101-169/Report142.pdf.
[28] *Parliament Digital Library: 154th Report of Law Commission*, eparlib.nic.in/handle/123456789/35432.

v. State",[29] the wife filed for divorce and a FIR under Section 498A IPC against the husband after disagreements developed between the two of them following the birth of a girl child. The Karnataka High Court Under Section 89 CPC, directed the parties to mediate. In that case the wife decided to withdraw the FIR after the dispute was harmoniously settled via mediation. As per the court's judgement, "The court may cancel the criminal proceedings or the FIR or complaint in appropriate instances in order to fulfil the goals of justice." The facts in "*Gurudath K. v. State of Karnataka"*[30] are the same as those in the previous case. "Even if the offences are non-compoundable, if they pertain to marriage conflicts and the Court is convinced that the parties have settled the same amicably...," the court ruled in this case. The ability to revoke a FIR or criminal complaint in relation to such offences would not be prohibited by Section 320 of the Criminal Procedure Code. As a result, the court permitted the offences to be compounded after determining that the wife was not the subject of any threats or pressure. Although offences punishable under Section 498-A IPC are not compoundable, the court held in "*K. Srinivas Rao v. D.A. Deepa"*[31] that in suitable cases, if the parties are willing to mediate and if it seems to the criminal court that there are high probabilities of settlement, the court must direct the parties to use the opportunity of settlement through mediation. In that situation the Judges must make sure that this exercise does not result in the erring spouse exploiting the mediation procedure to avoid the law's grasp. If there is a settlement, the parties will avoid the trials and tribulations of a criminal prosecution, which will ease the court's workload and serve the greater good. The Supreme Court made it clear in the case of "*Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd that"*[32] "even when a case is referred to a mediator, the court retains its control and jurisdiction over the matter, and the mediation settlement will have to be placed before the court for recording the settlement and disposal." This demonstrates the Court's attempts to prevent mediation from being conducted arbitrarily. The potential for mediation can be assessed once the case has advanced to the stage of trial, reliant on whether the offence is compoundable or not. In section

[29] *Indiankanoon.Org*, indiankanoon.org/doc/48924752/.
[30] *Indiankanoon.Org*, indiankanoon.org/doc/169708272/.
[31] *Indiankanoon.Org*, indiankanoon.org/doc/14713882/.
[32] *Indiankanoon.Org*, indiankanoon.org/doc/1875345/.

320 Cr.P.C. the Compoundable Criminal Offenses are listed while the remaining Offenses designates as Non-Compoundable .

The IPC contains compoundable offences against women in Sections 294, 499, 503, and 509. They permit a resolution that can be acquired through mediation. This has far-reaching effects since it would weaken the intent behind using punishment or fines to prevent crime. Due to their seriousness and the effects they have on society, non compoundable offences under the IPC cannot be resolved. It used to be possible to compound sexual harassment under IPC Section 354. Then, in 2009, an amendment prohibited settlement under the clause. Another legal system that allowed for mediation against non-compoundable offences emerged throughout the course of numerous instances. It should be mentioned that the Supreme Court has frequently permitted ADR in non-compoundable matters. In the case of "*B.S. Joshi and others v. State of Haryana and another"*,[33] the Apex Court observed that "*in view of the special facts and circumstances of the case, quashing criminal proceedings under exercise of powers under Sec 482 Cr.P.C. is allowed even where the offences were non- compoundable."* In "*K. Srinivas Rao v. D.A. Deepa"*,[34] the Supreme Court stated that in suitable situations, the criminal court should advise the parties to consider the prospect of settling through mediation while maintaining the rigour, effectiveness, and intent of the non-compoundable offence. Only if the High Court determines that the settlement is fair and genuine in all circumstances will it dismiss the criminal complaint. According to the court, such a course will be advantageous to those who sincerely desire to lay their problems to rest.In "*Gian Singh v. State of Punjab"*,[35] the Supreme Court has stated the essence of amicable resolution of disputes , by perceiving as under:- "*The High Court may quash the criminal proceedings if in its view, if it would be unfair or contrary to the interest of justice to continue with the criminal proceedings would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceedings."*

In the case of "*Parabatbhai Aahir and Parbatbhai Bhimsinhabhai Karmur and Ors Vs State of Gujarat and Anr"*,[36] The Apex Court ruled that the discretion granted by Section 482 should only be used carefully. The Court must give the offense's seriousness and nature significant consideration. Crimes that are heinous and

[33] *Indiankanoon.Org*, indiankanoon.org/doc/469138/.
[34] *Indiankanoon.Org*, indiankanoon.org/doc/14713882/.
[35] *Indiankanoon.Org*, indiankanoon.org/doc/69949024/.
[36] *Indiankanoon.Org*, indiankanoon.org/doc/7293093/.

serious and include mental depravity, or crimes like murder or rape, cannot be overturned since they are not private in nature and have a grave effect on society. Therefore, it is established that, in certain situations, criminal proceedings involving sexual harassment may be arbitrated in a court of law. Under section 482 of the CrPC, it is permissible at the discretion of the relevant High Court, and only in the event that each parties are equally eager to form an agreement and settle the conflict through mediation. Even while the Apex Court stated in "*Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co. Pvt. Ltd. and Ors"*.[37] that ADR is inappropriate for the trial of criminal offences, the opinion also emphasises that the classification is "illustrative and flexible."

Role of victim-offender mediation in the criminal context

When we look more closely at studies on restorative justice practises, we discover more or less thorough accounts of how programme goals are really implemented in each stage of the process such as preliminary discussions, access to cases, reparation measure, mediation process. It would be foolish to rule out the use of mediation in all criminal issues, despite the fact that it is generally viewed as an inappropriate remedy in criminal cases and that its practical use may reveal some shortcomings.[38] Records show that mediation has been effective in cases involving adolescent delinquency and less serious offences. Even in India, judges have recommended mediation in cases of check bounce and divorce conflicts including criminal cases. Two questions determine whether mediation is appropriate in criminal cases. First, the question of whether through mediation justice can bring in a criminal situation because the fundamental aim of dispute resolution is justice.[39] Second, is there solid proof that mediation in criminal cases is preferable to, or at least equally effective to, traditional adjudication? In order to answer the questions, scholars divided the methods of administering justice into 2 categories: justice which is based only on the law and justice based on the disputants' and the issue's perception of the law's applicability. Whereas the latter is mentioned to as the creative justice, the former is known as formal justice. The matter must be determined on the merits in accordance with formal justice. It defends the interests of the entire society, which is among other things, upholding uniformity in the

[37] *Indiankanoon.Org*, indiankanoon.org/doc/1875345/.

[38] Restorative Justice. 2022. *Victim-Offender Mediation and Violent Crimes: On the Way to Justice – Restorative Justice*. [online] Available at: https://restorativejustice.org/rj-archive/victim-offender-mediation-and-violent-crimes-on-the-way-to-justice/ [Accessed 7 October 2022].

[39] Cardozo Journal of Conflict Resolution. 2022. *Volume 18.3: Spring 2017 – Cardozo Journal of Conflict Resolution*. [online] Available at: https://www.cardozojcr.com/volume-183-spring-2017/ [Accessed 7 October 2022].

law and outlining shared morals. It has been noted, however, that the general population is more focused on receiving compensation for injustices and easing their injuries. Sherrif Elnegahya asserts that a court only permits legal remedies, such as apologies, and that it has no place for extra-legal remedies. Legal systems can, however, get over these restrictions by practising creative justice, which calls for the parties to a dispute to settle it via dialogue and in accordance with their own beliefs. The main manifestation of this type of justice is called mediation. A person usually expects to be treated fairly when they enter a conflict resolution setting. In addition to the process' transparency, it is crucial that the parties must recognised, heard, and not mistreated. The nature of mediation is such that these issues must be addressed in order to reach a mutually accepted solution, even if a lot of this depends on the mediator's expertise. Additionally, mediation encourages the concepts of restitution and forgiveness. As a result, when done properly, the approach allayes worries about due process and advances restorative justice. VOM can be used successfully in cases involving social justice and less serious criminal offences. For instance, a reckless driving-related accident that has a negative impact on the victims' lives In such a situation, the perpetrator would be able to explain why it occurred and would also have the chance to somewhat directly repay the victim. This will make it easier for the perpetrator to comprehend and feel sympathy for the victim. Second, the idea can be applied to the issue of prison overpopulation in India. Giving inmates access to a mediation procedure can have transformative effects. It would aid in the reduction of the term as well as the rehabilitation and eventual reintegration of the convicts into society. Third, domestic violence situations may benefit from victim-offender mediation. It's even simpler because everyone involved is a family. On the one hand, it would empower women who worry that going to court would ruin their families, and on the other, it would significantly reduce the number of false allegations filed by women because mediation makes it easier to catch legal abuses early on. Four, the juvenile justice act would be strengthened if mediation were included in cases involving young offenders. As a result, minor offenders will receive extra attention and won't run the possibility of being imprisoned. To help offenders understand the impact of their crime, victim-offender mediation can also be employed in non-compoundable offences in addition to the law. They could be forced to accept accountability for compensating the victim for their losses. The main manifestation of this type of justice is mediation. A person usually expects to be treated fairly when they enter a conflict resolution setting. In addition to the process' transparency, it is crucial that the parties are heard, recognised, and not mistreated. The process of mediation is that the issues must be addressed in order to reach a mutually accepted

solution, even if a lot of this depends on the mediator's expertise.[40] Additionally, mediation encourages the concepts of restitution and forgiveness. Additionally, there was a lower chance of recidivism for offenders. According to some theories, mediation may produce the same outcome as conventionaltrial process.[41] At least in cases of serious crimes, mediation provides the victims with a sense of closure and healing via discourse in addition to a greater sense of security. Mediation matters are private affairs, whereas court trials are public record. [42] The cost of mediation is also far lower than that of traditional litigation, which includes charges such as court costs, attorney fees, etc. More crucially, compared to litigation, it imposes a lower evidence burden on the complainant to support their claims. In contrast to courts, which can take months or even years to handle sexual harassment cases,[43] mediation promises a quicker conclusion, lessening the pain experienced by the victim. The fact that the parties decide the resolution of their issue through mutual consent is the primary justification for choosing mediation over other dispute resolution methods. They lack a final ruling that dissatisfies either one party or both parties. Because they created the solution themselves to best suit their interests, the parties are therefore more likely to admire the choice. Due to the individualised nature of sexual harassment at work, which a court cannot permit, the solution may take the shape of an apology, policy revisions, staff training, etc. The fact that mediation encourages communication between the parties involved is another significant advantage. They gain an understanding of one another's viewpoints and create a stance that is acceptable to both parties by talking to one another until they reach an agreement on the proposed solutions. In many victim-perpetrator mediations, sexual harassment victims discover that challenging their offender in a secure environment, with the help of mediator, which restores their sense of security that has been taken. Victims who take part are given the chance to speak up, confront the emotional damage brought on by the crime and its aftermath, and ask for restitution. It can be a very effective strategy to provide the victim closure when the perpetrator is immediately opposed with the results of his conduct and call upon to explain the reason for crime. By sincerely apologising to the victim and promising to change his ways, the harasser shows that he or she has a genuine understanding of the victim's situation and is making an effort to right the wrongs.

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[40] Tali Gal, *Repairing the Harm: Victims and Restorative Justice*, Semantic Scholar www.semanticscholar.org/paper/Repairing-the-Harm:-Victims-and-Restorative-Justice-Strang-Sherman/1ea2e2b9bad08ed8766ffac40f00913bfffa7e14.

[41] *Repairing the Harm: Victims and Restorative Justice*, Australian National University (College of Asia an researchprofiles.anu.edu.au/en/publications/repairing-the-harm-victims-and-restorative-justice.

[42] Taylor & Francis, *Victim-Offender Mediation: The Road To Repairing Hate Crime Injustice*, (Nov. 12, 2012), www.taylorfrancis.com/chapters/edit/10.4324/9780203446188-45/victim-offender-mediation-road-repairing-hate-crime-injustice-alyssa-shenk.

[43] Fordham Law Authors, *Error*, ir.lawnet.fordham.edu/cgi/viewcontent.cgi.

While victim-offender model is one of the effective for criminal mediation, has the potential to creatively address these issues by supporting the participants in developing their own resolutions and their own justice, it is not without drawbacks which includes the possibility that the victim may have to witness the crime when confronting the criminal or the possibility that the offender could thwart justice with a formal apology. Therefore, the application of VOM is still mostly limited to certain offences. This is not to justify that VOM must be fully abandoned; in fact, it shown to be effective in various areas. The idea of plea bargaining, which already exists in criminal law but has had a shaky reputation in India, might be improved instead as a superior strategy.[44] However, if mediation were used directly in this situation, it might endanger the system rather than strengthen it. As a result, the idea of mediation needs to be modified for plea negotiations. To put it another way, it is necessary to incorporate the fundamental tenets of mediation, including the inclusion of a third party, secrecy, voluntary involvement and dialogue facilitation. This would improve the mechanism in some ways while also expanding the use of mediation in the criminal justice system. The benefits of mediation between homicide victim's family members and their perpetrator were created to give victims a chance to meet with their offenders in a controlled setting. Through the victim-offender mediation, victims could speak with their offender face-to-face and explain how the incident had affected their life. The victims' dread and anxiety decreased thanks to the treatment. Compared to those of victims in cases like theirs who are handled through the system, there were higher levels of satisfaction. Most frequently, in criminal justice matters, mediation serves as a means of avoidance of prosecution. Therefore, the offender may profit by avoiding prosecution in the criminal justice system if the offender and victim agree to finish the mediation and if the offender fulfils any obligations set forth in the mediation agreement. Additionally, probation for criminals may include a mediation requirement.[45] Although they discussed the incident and how it affected the victim, as well as the offender's confession of his motivations for committing the crime, this may be to the victim's disadvantage. Few individuals would still oppose the release of their offender from prison. The neighbourhood context has an impact on VOM programme procedures, practises, and programme design and viability. Many interviewees mentioned the vindictive, "conservative" sentiments prevalent in their local communities. They lamented having to deal with apathetic judges, attorneys, and victim services staff.[46] Programs may reduce mediation training and even limit the process when

[44] Tali Gal, *Restorative Criminal Justice*, Academia.edu (Dec. 15, 2015), www.academia.edu/19680116/Restorative_Criminal_Justice.

[45] *The Advantages of Mediation Cases over Traditional Lawsuits*, FindLaw (Apr. 4, 2016), www.findlaw.com/adr/mediation/the-advantages-of-mediation-cases-over-traditional-lawsuits.html.

[46] www.jstor.org/stable/26209973.

volunteer mediators lack the necessary level of dedication. Rural areas with a strong sense of community may benefit from programmes that might assist create and accomplish the mediation session's objectives. Issues of confidentiality can be particularly crucial and difficult in a place where "everyone runs into everyone" constantly. VOM programmes operate rather independently of one another, and mediators frequently settle cases with little interaction. The interviewees attributed this isolation to either a lack of resources or geographic isolation. Prior to the mediation session, the excellent VOM programme offers the mediator an upfront brainstorming session with staff. Programs like VOM are being requested to resolve offences that are more serious and complex. Cases frequently involve more violent crimes that have been perpetrated by individuals with a history of convictions.[47] Some programme directors contend that because victims of property crimes have experienced little to no personal suffering, it doesn't seem necessary to interview them. The VOM programme team is adamant that mediation has good effects on participants and their communities. Victim-offender mediation is making its way into several States' legal codes. Many initiatives are practically conducted on a minimal budget. There is little doubt that the excitement and commitment of programme staff and mediators have contributed to the increased interest in restorative justice practises. In order to support their children and later motivate them to follow the agreement, several mediation programmes work to persuade the parents of young offenders to attend the mediation session. Other programmes discourage parents from being there, believing that they might be invasive and domineering and lessen the experience for the young person. In order to maintain the intimacy of the face-to-face conversation, several organisations try to restrict the number of participants in mediation sessions. Others ask the parties to pick who gets to speak first, giving each party an equal chance to speak. The approach and attitude of the mediator – who listens calmly, doesn't push or press, and gives the conversation enough time to flow naturally – are the most crucial components of victim sensitivity. Maintaining objectivity and dealing with challenging individuals are crucial skills for trainees to learn. Empathy-building for the offender and properly working with children are crucial issues as well. The importance of post-mediation follow-up as a topic for in-depth and inventive VOM programming is growing. Several programmes are experimenting in various ways with the follow-up phase. Several months following mediation, some are using volunteers to do in-person interviews with the parties. Others are requesting that mediators debrief staff members, volunteers, and other mediators during routine debriefing sessions. Programs for victim-offender mediation (VOM) are sometimes hindered by a lack of

[47] *Articles Manupatra*, articles.manupatra.com/article-details/Applicability-of-ADR-in-Criminal-cases.

financing, referrals, and assistance from the public and the legal system. A community-wide shift toward a more rehabilitative view of criminal behaviour may result from such an investment. The issues raised by interviewees may point to areas where victim-offender mediation needs to develop (VOM).

Guiding principles for Victim-Sensitive approach towards VOM

The "Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice" awarded the Center for Restorative Justice & Peacemaking the task of creating the document. Six documents in total, four of which are about victim-offender mediation, a significant programmatic intervention that completely embodies the principles of restorative justice, address a variety of crucial topics linked to restorative justice. The "Guidelines for Victim-Sensitive Victim Offender Mediation: Restorative Justice Through Dialogue",[48] the first of these six publications, helps administrators create or improve their restorative justice programmes. It offers mediators helpful advice on how to facilitate fair and impartial mediation, which will protect everyone's safety and honour. Some of the important points of the guidelines are given below:

1. **Safety of the victim:** Protecting the victim's safety is a crucial principle for VOM programmes. The mediator shall take all reasonable precautions to protect the victim. As the process progresses, the mediator must keep a positive rapport with the victim, observe verbal and non-verbal cues, and get their input. The mediator must be ready to take immediate action, offer options, end a mediation session, and provide an escort for the victim exiting mediation if they feel unsafe. The victim should be urged to bring one or two supporters to the mediation in order to secure their safety. The mediation should also take place in a location that the victim deems safe. Another mediator for the session may be requested by the mediator.
2. **Screening of Cases:** Every mediation programme must have its criteria for selection, such as the type of offence, the offender's age (youthful or adult), whether it is the first offence or a pattern of offences. In addition to programme requirements, staff, mediators, or both, should use judgement as each case is formed and at each stage of the procedure, determining if the case is appropriate for mediation and should move forward.

[48] www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176346.pdf.

3. **Meeting with the Offender:** A mediator typically talks with the criminal first before speaking with the victim. This can be communicated later to the victim and a meeting set up if the perpetrator agrees to take part in mediation. The victim may feel revictimized if the mediator first meets with the victim, obtains his or her permission to participate in mediation, and then learns that the offender will not participate – having created hopes for some resolution to the crime, only to be denied that opportunity.
4. **Offender's Choice to Participate:** Offenders must actively engage in all phases of the mediation process on their own volition. Offenders must be aware that they may decline to participate, despite pressure from the legal system. Victims may find mediation unpleasant and even damaging if perpetrators are coerced into it. The victim may view the offender's hesitation or sincerity as an additional transgression.
5. **Victim's Choices:** A victim of crime frequently feels defenceless and unprotected after the crime. The victim's interactions with the criminal or juvenile justice systems, which put the offender in the spotlight, are added to this. A victim of a crime frequently displays a loss of control over his or her life after the event, which can exacerbate fears and anxiety. A sense of power may result from the victim having alternatives and choices during the mediation process. Healing is aided by empowerment. The victim must always be given the freedom to decline mediation and refuse to take part, as well as the right to have their choice upheld. The choice of support people to go to the mediation session with the victim is a crucial decision. A convenient time for the victim should be chosen for the mediation session. During the initial narrative phase of the mediation session, the victim should have the option of speaking first or speaking last. The parties are typically sitting across from one another, allowing them to have direct eye contact as their conversation progresses. One of the mediator's most important responsibilities is to pay attention to the victim, listening intently, calmly, and sympathetically out of a sincere want to learn about the victim's experience. The victim's option to take part in mediation extends to their right to terminate it at any time.
6. **Mediator's Obligations:** The mediator must provide the victim with complete and accurate information about the programme itself, including its aims, history, the demographic it serves, and any costs for potential participants, both verbally and in writing, during the in-person premediation session with the victim.

7. **Mediator's Role for the Preparation the Victim:** When the victim agrees to proceed with mediation, the mediator must let the victim know what to anticipate. This could be carried out at the initial meeting or at later meetings. The victim should be given a list of the rights that are granted to victims in that State. The mediation process might not live up to the expectations of the victims (e.g., reconciliation with the offender, complete healing or peace of mind, rehabilitation of the offender, or total repair of the damage done).
8. **Support to the Offender:** An offender has the option to bring a friend or family member with them to the mediation session. Support people can heighten the gravity of the mediation process by being there.
9. **Obligation of Mediator During Premediation Session:** Including the Offender In the first encounter with the offender, the mediator tries to build trust and a connection. The mediator must listen to the offender's experiences in order to complete these tasks, as well as provide information about the mediation process, address any offender inquiries, and encourage the offender to consider mediation as a possible alternative. As stated in principle number 6, the mediator, acting as an attentive listener, learns about the offender's experiences and emotions in relation to the crime, then offers information and addresses the offender's queries. The offender needs to be informed about the mediation programme, the mediator, the mediation process, how it relates to the legal system, the offender's rights, and the resources that are accessible.
10. **Mediator's Roles for Preparing the Offender:** The mediator must get the offender ready for the session once they have consented to take part in mediation. Before the mediation conference is scheduled, the offender must feel ready to move forward. He or she needs time to process the incident and their feelings in relation to it, as well as time to plan exactly what they want to say to the victim.
11. **Use of Victim-Sensitive Language:** The language used by mediators must be carefully chosen. Certain words and phrases have the ability to express expectation or indicate judgement.
12. **Use of Humanistic Model of Mediation:** A humanistic strategy that is "dialoguedriven" rather than "settlementdriven" governs the mediation itself. Time must be set out during the mediation session for conversation between the victim and the offender as well as for personal accounts. One must respect silence.

13. **Followup After the Mediation Session:** The mediator must make good on promises made and respond to inquiries made during the mediation session. The settlement that results from the mediation session must be closely observed. The mediator should follow up with the offender on a regular basis to confirm what was agreed upon at the mediation session and to offer assistance with any issues that would prevent the offender from carrying out the agreement.
14. **Training for Victim Sensitivity:** A mediator's initial training and ongoing education should cover topics like referral resources, acceptable communication techniques, victim and offender rights, and principles for victim-sensitive mediation. Victim advocates and actual victims must speak to the trainees.

Final considerations

Victim-offender mediation is not a replacement for punishment in circumstances of violent crime. It does, however, provide a way to recover and a sense of closure that cannot be attained by punitive measures alone. Victims and survivors of crimes with extreme violence, facing their crimes, such as murders and sexual assaults, is offenders in secure and supervised environments, with the mediator's help, restores the sense of security and control that has been stolen from them. Although victim-offender mediation may not be suited for all victims of violent crimes, it has consistently shown to be helpful in situations like these when it has been used. The procedure can be used successfully in cases involving social justice and less serious criminal offences. In such a situation, the perpetrator would be able to explain why it occurred and would also have the chance to somewhat directly repay the victim. This will make it easier for the perpetrator to comprehend and feel sympathy for the victim. Second, the idea can be applied to the issue of prison overpopulation in India. Giving inmates access to a mediation procedure can have transformative effects. It would aid in the reduction of the term as well as the rehabilitation and eventual reintegration of the convicts into society. Third, domestic violence situations may benefit from victim-offender mediation. It's even simpler because everyone involved is a family. On the one hand, it would empower women who worry that going to court would ruin their families, and on the other, it would significantly reduce the number of false allegations filed by women because mediation makes it easier to catch legal abuses early on. Four, the juvenile justice act would be strengthened if mediation were included in cases involving young offenders. As a result, minor offenders will receive extra attention and won't run the possibility of being imprisoned. To help offenders understand the impact of their crime, victim-offender mediation can also be employed in non-compoundable

offences in addition to the law. They could be forced to accept accountability for compensating the victim for their losses. Though putting the procedure into practise has many advantages, there are issues that restrict victim-offender mediation's application. First, those who have been the victims of horrible crimes may utilise it as a delay technique, and occasionally an offender may be pressured into participating in mediation. Denial of a fair trial in such a situation constitutes a blatant breach of Article 6(1) of the European Convention on Human Rights. Second, the party providing agreement to any type of ADR must do so. Given that a youngster cannot offer consent under the Indian contract statute, the guardians of juvenile offenders would need to approve the use of mediation in these circumstances. A guardian may get intimidated by such complexity. Third, because the loss might not always be quantifiable, a financial agreement cannot always be struck. Four, there is always a chance that fraud, coercion, and undue influence will occur. The victim is given more influence throughout the victim-offender mediation process while the offender's dignity is upheld. It gives the victim a voice and elevates the sense of justice that one might not experience in a trial. Additionally, it offers the criminal a chance to make amends by making up for lost time instead of going to jail. If India decides to use the process in the future, awareness-raising efforts, a good follow-up and evaluation process, as well as explicit legislation that permits victim-offender mediation and applies to cases, should be put in place. Mediators should also receive proper training to deal with the sensitivity levels in such proceedings. It would take the Indian judiciary 320 years to resolve the millions of unresolved cases, according to Justice V.V. Rao. It would not be inaccurate to presume that other conflict resolution forums, such as mediation, might be a more practical choice for parties to seek relief given the state of the Indian courts today. Every victim is not required to take part in victim-offender mediation, family group conferencing, or any other restorative justice intervention, according to the Office for Victims of Crime. Each victim must decide whether or not to participate on a personal level. However, we fervently urge that all restorative justice initiatives pay close attention to the needs and worries of victims who want to meet with their perpetrators. Victims should not be coerced into participating; participation must be entirely voluntary. Victims should have the freedom to choose the session's venue, start time, and format, as well as the option to withdraw at any time. As this note proposes, the victim-offender mediation was regarded as having a strong emotional component due to which it is considered that mediation is effective when there is a modest level of conflict.

References

Justice.gc.ca. 2022. *3. EMPIRICAL RESEARCH RESULTS – The Effects of Restorative Justice Programming: A Review of the Empirical*. [online] Available at: https://justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/p3.html [Accessed 7 October 2022].

(3. EMPIRICAL RESEARCH RESULTS —The Effects of Restorative Justice Programming: A Review of the Empirical, 2022)

Ncjrs.gov. 2022. *National Survey of Victim-Offender Mediation Programs in the United States*. [online] Available at: https://www.ncjrs.gov/ovc_archives/reports/national_survey/natsurv3.html [Accessed 7 October 2022].

United States Courts. 2022. *The Impact of Victim-Offender Mediation – Two Decades of Research*. [online] Available at: https://www.uscourts.gov/federal-probation-journal/2001/12/impact-victim-offender-mediation-two-decades-research [Accessed 7 October 2022].

Ncjrs.gov. 2022. [online] Available at: https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176350.pdf [Accessed 7 October 2022].

Ncjrs.gov. 2022. *National Survey of Victim-Offender Mediation Programs in the United States*. [online] Available at: https://www.ncjrs.gov/ovc_archives/reports/national_survey/natsurv5.html [Accessed 7 October 2022].

Csc-scc.gc.ca. 2022. *Restorative Opportunities – Victim-Offender Mediation Services*. [online] Available at: https://www.csc-scc.gc.ca/restorative-justice/003005-1001-eng.shtml [Accessed 7 October 2022].

2022. [online] Available at: https://journals.sagepub.com/doi/10.1177/002087289904200209 [Accessed 7 October 2022].

Justice.gc.ca. 2022. [online] Available at: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/rr00_16.pdf [Accessed 7 October 2022].

Csc-scc.gc.ca. 2022. *Restorative Opportunities – Victim-Offender Mediation Services*. [online] Available at: https://www.csc-scc.gc.ca/restorative-justice/003005-1001-eng.shtml [Accessed 7 October 2022].

2022. [online] Available at: https://www.jstor.org/stable/1147608#metadata_info_tab_contents [Accessed 7 October 2022].

Justice.tas.gov.au. 2022. *Victims rights | Victims Support Services*. [online] Available at: https://www.justice.tas.gov.au/victims/victims-rights [Accessed 7 October 2022].

Victim services for victims and offenders, Government of Western Australia, https://www.wa.gov.au/service/community-services/counselling-services/victim-services-victims-and-offenders (last visited Oct 7, 2022).

Victim Services for victims and offenders, Western Australian Government www.wa.gov.au/service/community-services/counselling-services/victim-services-victims-and-offenders. [Accessed 7 October 2022].

citeseerx.ist.psu.edu/viewdoc/download. [Accessed 7 October 2022].

410 Gone, classic.austlii.edu.au/au/journals/BondLawRw/2001/16.html.

Penal and Community Mediation: The Case of France, SpringerLink link.springer.com/chapter/10.1007/978-94-015-8064-9_11.

The Double Life of Victim-Offender Mediation in France, ArbitrationLaw.com arbitrationlaw.com/library/double-life-victim-offender-mediation-france-wamr-2005-vol-16-no-7. http://en.wikimediation.org/index.php?title=Penal_mediation_in_France.

Penal mediation in France, WikiMediation en.wikimediation.org/index.php.

Vikram Karuna, Explained | The Mediation Bill, 2021, The Hindu (Oct. 3, 2022), www.thehindu.com/news/national/explained-the-mediation-bill-2021/article65967986.ece.

www.mha.gov.in/sites/default/files/criminal_justice_system.pdf.

lawcommissionofindia.nic.in/101-169/report129.pdf.

lawcommissionofindia.nic.in/101-169/Report142.pdf.

Parliament Digital Library: 154th Report of Law Commission, eparlib.nic.in/handle/123456789/35432.

Restorative Justice. 2022. *Victim-Offender Mediation and Violent Crimes: On the Way to Justice – Restorative Justice*. [online] Available at: https://restorativejustice.org/rj-archive/victim-offender-mediation-and-violent-crimes-on-the-way-to-justice/ [Accessed 7 October 2022].

Cardozo Journal of Conflict Resolution. 2022. *Volume 18.3: Spring 2017 – Cardozo Journal of Conflict Resolution*. [online] Available at: https://www.cardozojcr.com/volume-183-spring-2017/ [Accessed 7 October 2022].

Tali Gal, Repairing the Harm: Victims and Restorative Justice, Semantic Scholar www.semanticscholar.org/paper/Repairing-the-Harm:-Victims-and-Restorative-Justice-Strang-Sherman/1ea2e2b9bad08ed8766ffac40f00913bfffa7e14.

Repairing the Harm: Victims and Restorative Justice, Australian National University (College of Asia an researchprofiles.anu.edu.au/en/publications/repairing-the-harm-victims-and-restorative-justice.

Taylor & Francis, Victim-Offender Mediation: The Road To Repairing Hate Crime Injustice, (Nov. 12, 2012), www.taylorfrancis.com/chapters/edit/10.4324/9780203446188-45/victim-offender-mediation-road-repairing-hate-crime-injustice-alyssa-shenk.

Fordham Law Authors, Error, ir.lawnet.fordham.edu/cgi/viewcontent.cgi.

The Advantages of Mediation Cases over Traditional Lawsuits, FindLaw (Apr. 4, 2016), www.findlaw.com/adr/mediation/the-advantages-of-mediation-cases-over-traditional-lawsuits.html.

www.jstor.org/stable/26209973.

Articles Manupatra, articles.manupatra.com/article-details/Applicability-of-ADR-in-Criminal-cases.

www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176346.pdf.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

SAHOO, Golda. A victim-sensitive approach towards victim – offender mediation in crimes: an analysis. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 123-146, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.7.

DOI: 10.52028/rbadr.v4i8.8

Audiências de conciliação e mediação por videoconferência no Estado de São Paulo: benefícios e desvantagens segundo relatos empíricos dos conciliadores e mediadores judiciais

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Resumo: A presente pesquisa empírica, de cunho qualitativo, tem por objetivo coletar relatos da experiência profissional de conciliadores e mediadores judiciais que conduziram audiências de conciliação e mediação a distância, por videoconferência, no âmbito do Tribunal de Justiça do Estado de São Paulo, notadamente a partir do advento da pandemia de covid-19, a fim de que seja feita análise teórica e prática sobre eventuais benefícios e possíveis desvantagens na realização do ato pela modalidade virtual. Para alcançar o objetivo proposto, foram obtidos dados a partir da disponibilização de formulário *on-line* consistente em questionário semiestruturado composto por 8 questões abertas, enviado, mediante *link*, para os CEJUSCs do Estado de São Paulo e repassados para os respectivos conciliadores e mediadores. A pesquisa permaneceu aberta para respostas no período entre 6 e 24 de junho de 2022, tendo obtido o número total de 50 respondentes. E como resultado da pesquisa evidenciou-se que a ampla maioria dos conciliadores e mediadores que responderam ao formulário avalia as audiências virtuais de modo bastante satisfatório e, apesar de algumas desvantagens apontadas, entende que a prática tenderá a continuar mesmo após o período pandêmico.

Palavras-chave: Videoconferência. Audiências de conciliação e mediação. Audiências a distância. *Online Dispute Resolution (ODR)*. Acesso à justiça eletrônica.

1 Introdução

Com o advento da pandemia do novo coronavírus (covid-19), principalmente a partir de março de 2020, o Brasil e o mundo passaram por significativas transformações. Como forma de se evitar o rápido contágio do vírus e o colapso da rede pública de saúde, as autoridades sanitárias brasileiras, na trilha da Organização Mundial da Saúde (OMS), indicaram a necessidade de observância rigorosa de isolamento/distanciamento social, como medida eficaz para conter a aglomeração de pessoas. Como consequência, houve o fechamento de prédios, lojas, estabelecimentos, etc., bem como a suspensão da prestação de serviços, nos setores público e privado, no molde tradicional, isto é, físico/presencial. Nesse contexto, a execução de atividades a distância, com o auxílio da tecnologia, via rede mundial de computadores, em meio digital, foi a principal alternativa encontrada para a manutenção da prestação dos serviços em tempos de estado de calamidade pública.

O Poder Judiciário, no contexto da pandemia da covid-19, investiu no uso das novas tecnologias da informação e comunicação (TICs) e da inteligência artificial para assegurar a continuidade da prestação jurisdicional à população, sem colocar em risco a vida, saúde e integridade física e psicológica dos magistrados, advogados, promotores, defensores, funcionários públicos, colaboradores e demais usuários do sistema de Justiça. A partir de então, verificou-se notório crescimento do emprego do trabalho remoto ou teletrabalho (popularmente conhecido como *home office*) no âmbito do Poder Judiciário, bem como expressivo aumento do número de audiências realizadas por videoconferência.

As audiências virtuais se popularizaram durante o período pandêmico e foram inseridas na rotina forense dos tribunais brasileiros. Agora, num momento de transição para um cenário pós-pandemia, já se problematiza o uso das audiências remotas de modo permanente, como regra geral, isto é, independente do contexto excepcional pandêmico. Isso porque, em certa medida, a experiência de expansão das audiências virtuais mostrou-se exitosa, com aumento da produtividade e ganho de agilidade, celeridade e comodidade.

Por outro lado, a difusão das audiências virtuais também evidenciou determinadas dificuldades, obstáculos e riscos na sua realização, a exemplo dos eventuais problemas técnicos vinculados à conexão da internet (quedas ou oscilações da conexão, som abafado ou inaudível, defeito na câmera, etc.) ou mesmo a desigualdade digital, que impede a efetiva participação de muitas pessoas em audiências realizadas em meio virtual.

Diante desse cenário, esta pesquisa se debruça sobre a realização das audiências ou sessões de conciliação ou mediação por videoconferência, com enfoque empírico no modo como foram (e estão sendo) concebidas e executadas no Estado de São Paulo.

Com efeito, as sessões de conciliação e mediação, seja em âmbito processual ou mesmo pré-processual, judicial ou extrajudicial, também passaram a ser realizadas em meio eletrônico durante a pandemia da covid-19. A novel prática trouxe consigo muitas vantagens e benefícios, mas, de outra banda, também apresentou pontos de preocupação que merecem a devida atenção por parte dos pesquisadores. É o caso, por exemplo, dos efeitos do contato mediado pela tela do computador no estabelecimento da comunicação entre as partes em conflito, inclusive para a recuperação do diálogo propositivo e para a restauração do vínculo de afetividade. Ou, ainda, possível mácula à confidencialidade do ato pela interferência escusa e clandestina de terceira pessoa. São pontos que devem ser levados em conta para o aperfeiçoamento das sessões de conciliação e mediação virtuais.

Esta pesquisa se propõe a trazer considerações empíricas, extraídas da prática, sobre as audiências de conciliação e mediação por videoconferência, especificamente no Estado de São Paulo. O objetivo é, pois, coletar relatos da experiência profissional de conciliadores e mediadores judiciais que atuaram em sessões de conciliação e mediação a distância, por videoconferência, junto ao Tribunal de Justiça do Estado de São Paulo (doravante TJSP). Em outras palavras, o presente estudo tem por escopo dar voz aos profissionais que conduzem diretamente as audiências de conciliação e mediação virtuais, para identificar, à luz de suas falas, eventuais benefícios e possíveis desvantagens na realização do ato pela modalidade virtual.

A questão que norteia esta pesquisa é, pois, a seguinte: "quais os benefícios e as desvantagens das audiências de conciliação e mediação por videoconferência na visão dos conciliadores e mediadores judiciais que atuam na Justiça do Estado de São Paulo?".

O estudo se justifica ante o crescente protagonismo que os métodos adequados de tratamento dos conflitos de interesses, por autocomposição, têm adquirido no âmbito do Poder Judiciário nacional, sobretudo após a edição da Resolução nº 125/2010, do Conselho Nacional de Justiça (doravante CNJ), e a vigência do Código de Processo Civil, de 2015, que concedeu destaque às soluções consensuais das controvérsias. Diante das transformações sociais verificadas a partir do advento da pandemia do novo coronavírus, é relevante examinar o modo como, em termos práticos, a conciliação e a mediação estão sendo realizadas no contexto pandêmico e como poderão ser realizadas no pós-pandemia.

Quanto à metodologia, trata-se de pesquisa empírica, de natureza qualitativa. Para alcançar os objetivos propostos, coletaram-se relatos de conciliadores e mediadores atuantes junto aos Centros Judiciários de Solução de Conflitos e Cidadania (CEJUSCs) do TJSP, por meio de formulário eletrônico que continha questionário semiestruturado composto por oito questões abertas, que ficou

disponível em *site* de domínio público, na rede mundial de computadores, durante o período de 6 a 24 de junho de 2022, tendo sido obtido o número total de 50 (cinquenta) respondentes.

O presente artigo se compõe, basicamente, por três seções, além desta introdução e das considerações finais. A próxima seção detalha a metodologia empregada no estudo. Após, serão traçadas breves linhas teóricas sobre o uso da videoconferência na realização das audiências de conciliação e mediação, no Brasil e no mundo. Em sequência, serão registrados os principais achados da pesquisa empírica, com o encarte dos relatos dos conciliadores e mediadores judiciais paulistas que responderam ao formulário eletrônico, com posterior debate dos principais pontos selecionados, cotejando-se a teoria e a prática.

2 Método

Para a consecução dos objetivos, a pesquisa se apoia, num primeiro momento, em ampla revisão sistemática da literatura, nacional e estrangeira, especializada no estudo dos métodos consensuais de tratamento adequado dos conflitos de interesse, em especial conciliação e mediação, notadamente no paradigma do *Online Dispute Resolution* (*ODR*).

Em sequência, num segundo momento, serão aportados os relatos empíricos obtidos a partir das respostas dadas pelos conciliadores e mediadores judiciais paulistas. Assim, o estudo adquire notório cunho qualitativo e exploratório. Nesse tipo de pesquisa, para além do mero estudo teórico e documental, de forma mais abrangente, o pesquisador "vai a campo buscando 'captar' o fenômeno em estudo a partir da perspectiva das pessoas nele envolvidas, considerando todos os pontos de vista relevantes. Vários tipos de dados são coletados e analisados para que se entenda a dinâmica do fenômeno".[1] É justamente o que se pretendeu neste estudo: trazer luz à perspectiva dos conciliadores e mediadores diretamente envolvidos na realidade prática das sessões de conciliação e mediação virtual.

Para tanto, utilizou-se de instrumento de pesquisa consistente em questionário semiestruturado inserto em formulário eletrônico que ficou disponível na plataforma do *Google Forms*, em domínio público, no *link* https://forms.gle/GGCZ93r6tcnDcY5s7, no período entre 6 e 24 de junho de 2022. Logo ao ser acessado, o mencionado questionário apresentava, de início, o Termo de Consentimento Livre e Esclarecido, cuja assinalação era obrigatória para o avanço do formulário eletrônico. Em sequência, eram apresentadas oito questões abertas, com espaço disponível para livre e ampla manifestação discursiva.

[1] GODOY, Arilda Schmidt. Pesquisa qualitativa: tipos fundamentais. *RAE – Revista de Administração de Empresas*, São Paulo, v. 35, n. 3, p. 20-29, maio/jun. 1995, p. 21.

O *link* do formulário foi enviado, via plataforma digital *Microsoft Teams* (aliás, a mesma utilizada pelo TJSP para a troca de mensagens instantâneas entre os servidores e para a realização das audiências por videoconferência), a 15 chefes de CEJUSCs localizados no Estado de São Paulo, selecionados de acordo com a localização, a fim de contemplar diferentes regiões do território paulista. Foi solicitado o encaminhamento do *link* para os conciliadores e mediadores judiciais que atuam junto a estes CEJUSCs. Ao final, 50 (cinquenta) pessoas participaram espontaneamente da presente pesquisa.

Nos termos da Lei nº 13.709/2018, os dados foram anonimizados, de modo que não é possível identificar dados pessoais dos respondentes (gênero, idade, raça, etc.), o que certamente limitará o alcance da pesquisa, impedindo a aplicação de filtros parciais.

Ao encerramento do termo final, iniciou-se processo de triagem, organização e seleção das respostas obtidas, incluindo criteriosa revisão ortográfica e linguística, o que foi feito pelos pesquisadores e demandou cerca de dois meses. Os achados da pesquisa estão inseridos na seção 4, *infra*, e as perguntas disponíveis, para consulta, no Apêndice.

3 As audiências/sessões de conciliação e mediação por videoconferência

Na clássica e célebre obra "Acesso à Justiça", lançada em 1978, os pesquisadores Mauro Cappelletti e Bryant Garth identificaram uma série de barreiras que dificultam a universalização do acesso à Justiça. O estudo, derivado do denominado Projeto Florença, foi um marco para o movimento de reforma para o acesso ao Poder Judiciário. Na obra, Cappelletti e Garth apontaram três ondas renovatórias que contribuem para que a Justiça seja democrática e acessível a todos. Ao lado da primeira (assistência judiciária gratuita para os pobres) e da segunda (representação dos interesses difusos), a terceira onda cria balizas para pensar numa concepção mais ampla de acesso à Justiça. "Ela centra sua atenção no conjunto geral de instituições e mecanismos, pessoas e procedimentos utilizados para processar e mesmo prevenir disputas nas sociedades modernas".[2] Destarte, passou-se a se entender que acessar a Justiça é muito mais do que ter uma controvérsia resolvida pelo Estado-Juiz. A par da solução adjudicatória estatal, também é necessário garantir o pleno acesso aos chamados métodos adequados de tratamento dos conflitos.

[2] CAPPELLETTI, Mauro; GARTH Bryant. *Acesso à Justiça*. Trad. Ellen Gracie Northfleet. Porto Alegre: Sergio Antonio Fabris Editor, 1988. Reimpressão 2015, p. 67-68.

Com efeito, a partir da valorosa contribuição do professor Frank Sander, no final da década de 1970, criou-se a concepção de Justiça Multiportas (*Multidoor Courthouse*), a partir da qual o Poder Judiciário é visto "como um centro de resolução de disputas, proporcionando a escolha de diferentes processos para cada caso, baseando-se na premissa de que existem vantagens e desvantagens em cada procedimento",[3] a depender das características específicas de cada conflito. Nesse contexto, para além da resolução heterocompositiva judicial do conflito, também são fomentadas técnicas diferenciadas de tratamento do conflito: as *Alternative Dispute Resolutions* (*ADRs*). Dentre elas, destacou-se a conciliação e a mediação, modalidades de autocomposição bilateral facilitada pela atuação de um terceiro neutro, isento e imparcial ao conflito, que auxilia na promoção do diálogo entre as partes, proporcionando que o conflito seja resolvido de forma consensual.

No ponto, insta salientar que não há hierarquia entre os diferentes mecanismos vocacionados ao tratamento dos conflitos. Na verdade, a opção por cada método terá por parâmetro as características particulares de cada conflito. Portanto, será escolhido aquele mecanismo que se mostrar mais adequado ao caso concreto. Vale dizer, "o conhecimento do conflito e seu entorno – partes e ambiente social – permite o seu encaminhamento ao método mais adequado de resolução".[4] Por conseguinte, "há conflitos que demandam ambientes de heterocomposição (Judiciário, arbitragem) e outros que se alinham melhor a instrumentos de autocomposição (mediação, práticas colaborativas, conciliação, plataformas de resolução de conflitos on-line, etc.)".[5]

Enfim, no contexto da Justiça Multiportas, "novos serviços são ofertados pelo Poder Judiciário, não apenas a resolução judicial impositiva pela sentença, mas também formas consensuais de administração de conflitos, como a mediação e a conciliação".[6]

A principal distinção entre as duas modalidades se relaciona ao modo de atuação do facilitador do diálogo: o conciliador atua de forma mais ativa, podendo apresentar propostas de acordo; já o mediador atua de modo mais contido, sem sugerir soluções, mas proporcionando subsídios para que as partes envolvidas criem suas próprias alternativas.

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3 BRASIL. Conselho Nacional de Justiça. André Gomma de Azevedo (org.). *Manual de Mediação Judicial*. 6. ed. Brasília: 2016, p. 18.

4 CAIUBY, Celia; MAIA, Andrea. O afeto nos métodos de solução de controvérsias. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 2, n. 4, p. 45-56, jun./dez. 2020, p. 54.

5 CAIUBY, Celia; MAIA, Andrea. O afeto nos métodos de solução de controvérsias. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 2, n. 4, p. 45-56, jun./dez. 2020, p. 54.

6 MIRANDA NETTO, Fernando Gama de; PELAJO, Samantha. O futuro da justiça multiportas: mediação em risco? *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 1, n. 2, p. 121-138, jul./dez. 2019, p. 121.

No Brasil, a conciliação e a mediação foram inicialmente regulamentadas pela Resolução nº 125/2010, do CNJ, que dispôs sobre a Política Judiciária Nacional de tratamento adequado dos conflitos de interesses no âmbito do Poder Judiciário. O ato prevê que cabe aos órgãos judiciários, "antes da solução adjudicada mediante sentença, oferecer outros mecanismos de soluções de controvérsias, em especial os chamados meios consensuais, como a mediação e a conciliação".[7] Em seguida, o Código de Processo Civil disciplinou a atuação dos conciliadores e mediadores judiciais como auxiliares da Justiça, consignando que "a conciliação e a mediação são informadas pelos princípios da independência, da imparcialidade, da autonomia da vontade, da confidencialidade, da oralidade, da informalidade e da decisão informada".[8] Ainda, no mesmo ano, foi editada a Lei nº 13.140/2015, que versa sobre a mediação como meio de solução de controvérsias.

O artigo 46 da Lei nº 13.140/2015 dispõe que "a mediação poderá ser feita pela internet ou por outro meio de comunicação que permita a transação a distância, desde que as partes estejam de acordo".[9] O dispositivo é resultado do movimento progressivo de informatização do Poder Judiciário brasileiro, bem anterior à pandemia de covid-19. Com efeito, em 2006, por exemplo, foi publicada a Lei nº 11.419/2006, que dispôs sobre a informatização do processo judicial, autorizando o uso de meio eletrônico na tramitação de processos judiciais no Brasil. Ademais, o artigo 236, §3º, do Código de Processo Civil dispõe que "admite-se a prática de atos processuais por meio de videoconferência ou outro recurso tecnológico de transmissão de sons e imagens em tempo real".[10]

O processo de virtualização da Justiça brasileira é amplo e, como tal, também alcança os métodos consensuais de solução de controvérsias. Com efeito, "a utilização de meios eletrônicos de resolução de conflitos como plataformas públicas de conciliação e mediação *on-line* tem sido incentivada pelo Poder Judiciário brasileiro".[11] Por exemplo, a Resolução nº 358/2020, do CNJ, regulamenta a criação de soluções tecnológicas para a resolução de conflitos pelo Poder Judiciário por meio da conciliação e da mediação.

Na I Jornada de Prevenção e Solução Extrajudicial de Litígios, do CJF, realizada em 2016, foi aprovado o Enunciado nº 58, com o seguinte teor: "a conciliação/mediação, em meio eletrônico, poderá ser utilizada no procedimento comum e em

7 BRASIL. Conselho Nacional de Justiça. *Resolução nº 125, de 29 de novembro de 2010*. Brasília: 2010.
8 BRASIL. Congresso Nacional. *Lei nº 13.105, de 16 de março de 2015*. Brasília: 2015.
9 BRASIL. Congresso Nacional. *Lei nº 13.140, de 26 de junho de 2015*. Brasília: 2015.
10 BRASIL. Congresso Nacional. *Lei nº 13.105, de 16 de março de 2015*. Brasília: 2015.
11 TARTUCE, Fernanda; BRANDÃO, Débora. Mediação e conciliação on-line, vulnerabilidade cibernética e destaques do ato normativo nº 1/2020 do Nupemec/SP. *Cadernos Jurídicos*, São Paulo, ano 21, n. 55, p. 153-162, jul./set. 2020, p. 156.

outros ritos, em qualquer tempo e grau de jurisdição". Logo, na esteira do movimento de informatização do Poder Judiciário, na trilha da Lei nº 13.140/2015 e do Código de Processo Civil, o uso da videoconferência para realização de sessões de conciliação e mediação já era aventado.

Inclusive, a aplicação das novas tecnologias da informação e comunicação aos métodos de solução consensual dos conflitos deu azo ao desenvolvimento do paradigma da *Online Dispute Resolution* (*ODR*). A origem da ODR remonta ao início da década de 1990 e se vincula à previsão de que a internet, com o aumento e popularização de seu uso, não seria sempre um lugar harmonioso, se colocando também como palco de disputas (KATSH, 2014, p. 21). A partir de então, a ODR se consolidou como espécie do gênero ADR (*Alternative Dispute Resolution*), com o diferencial de aplicação de suas técnicas no ambiente virtual, por meio do uso dos recursos tecnológicos. Com efeito, "a principal característica que diferencia a ADR clássica da *on-line* é a localização dos procedimentos que ocorre no espaço virtual" (FERRAZ; SILVEIRA, 2019, p. 128). No Brasil, a partir de 2015 já se projetava o desenvolvimento da ODR (ZANFERDINI; OLIVEIRA, 2015).

Contudo, é estreme de dúvidas que foi a partir de março de 2020, com o advento da pandemia do novo coronavírus, que o emprego da videoconferência para a realização de audiências de conciliação e mediação se expandiu de forma considerável. Afinal, na impossibilidade de realização de atos presenciais, "a comunicação por meios eletrônicos precisou ser significativamente intensificada nos últimos tempos por força das restrições pandêmicas sobre os deslocamentos geográficos".[12] Como consequência, houve aumento expressivo do número de sessões de conciliação/mediação realizadas em ambiente digital, por meio do acesso a plataformas virtuais, disponíveis na internet.

No Estado de São Paulo, o Ato Normativo nº 01/2020, do Núcleo Permanente de Métodos Consensuais de Solução de Conflitos (NUPEMEC), autorizou a realização das sessões de conciliação e mediação nos Centros Judiciários de Solução de Conflitos e Cidadania (CEJUSCs) por meio de sistema de videoconferência.

4 Resultados e discussão

A fim de cotejar a teoria e a prática, com o objetivo de confirmar ou refutar o que foi exposto na seção anterior, acerca da viabilidade jurídica de realização de sessões de conciliação ou mediação por videoconferência, foram colhidos o relato empírico de cinquenta conciliadores e mediadores judiciais que atuam

[12] TARTUCE, Fernanda; BRANDÃO, Débora. Mediação e conciliação on-line, vulnerabilidade cibernética e destaques do ato normativo nº 1/2020 do Nupemec/SP. *Cadernos Jurídicos*, São Paulo, ano 21, n. 55, p. 153-162, jul./set. 2020, p. 153.

nos CEJUSCs de São Paulo e que já conduziram audiências virtuais. Cuida-se de relatos que correspondem às respostas envidadas em atenção ao formulário eletrônico hospedado na plataforma *Google Forms* (vide Apêndice), que foram sistematizadas e organizadas nas quatro subseções seguintes.

Diante da anonimização dos dados, não é possível identificar qualquer nota característica do(a) respondente: se do sexo masculino ou feminino; qual a sua idade; em que local exerce suas atividades profissionais; onde reside, etc. Apenas e tão somente para possibilitar ao leitor identificar as respostas dadas por uma mesma pessoa, optou-se pelo emprego da designação genérica "facilitador" (conciliador e/ou mediador), seguida do respectivo número, atribuído conforme a ordem de aparição (de 1 a 50).

4.1 O uso da videoconferência na visão dos conciliadores e mediadores judiciais

Em primeiro lugar, os conciliadores e mediadores judiciais atuantes no Estado de São Paulo foram instados a avaliar, de modo geral e à luz da experiência profissional, a realização de audiências de conciliação e mediação por videoconferência.

Foram obtidas muitas avaliações positivas sobre o emprego da videoconferência nas sessões de conciliação e mediação. "Acredito que o ambiente virtual é bem positivo. Gosto muito do maior controle que consigo ter em relação às partes, sendo o ambiente mais seguro. Além disso, é bem mais proveitoso no tocante ao tempo e disponibilidade. No ambiente virtual não gastamos com locomoção e conseguimos, assim, atuar em diversas comarcas mais distantes", declarou o facilitador 1. O ambiente virtual também foi tido como mais seguro pelo facilitador 2, que assim se manifestou: "de um modo geral, avalio como ótima, principalmente no quesito segurança. Por exemplo, em casos de conflitos de família, há muita discussão, e, por vezes, chega-se às vias de fato entre as partes, como presenciei em diversas audiências presenciais. A videoconferência inibe esta atitude pelas partes, tornando o diálogo uma ferramenta principal na solução do conflito". O facilitador 3, igualmente, destacou a melhoria na fluidez do diálogo: "acho que flui melhor que a presencial, pois as partes, tendo em vista o conflito que estão vivendo, não estão frente a frente e conseguimos resultados melhores no diálogo, com mais respeito no momento que expõem o conflito individualmente". Segundo o facilitador 4: "a prática da videoconferência mostrou-se bastante eficiente, especialmente nos casos em que as partes comparecem em estado de 'conflito'. O fato de não estarem fisicamente presentes ameniza o ambiente e a comunicação flui com mais facilidade".

Outro ponto que foi salientado pelos conciliadores e mediadores judiciais foi a maior praticidade e comodidade permitida pelas audiências virtuais, na medida em que tornam desnecessária a ida ao fórum e dispensam os gastos relativos a este deslocamento (*v.g.* transporte, alimentação, hospedagem, combustível, etc.), além de permitir que as pessoas participem do ato das respectivas casas ou local de trabalho, independentemente do lugar físico em que se encontrem. Com efeito, o facilitador 5 avalia a videoconferência de forma satisfatória, porque "possibilita que a parte participe da sessão de conciliação do conforto de sua residência, do local de serviço, ou até mesmo quando estiver viajando". Para o facilitador 6, as sessões virtuais são "bem mais práticas, e aparentemente as partes do processo aparecem na audiência, vez que no presencial vi uma grande falta das partes". Também, o facilitador 7 entende como "positivas porque facilitam a presença das partes".

Nas palavras do facilitador 8:

> Avalio de forma extremamente benéfica. Inclusive, em muitos casos, principalmente de família, as partes estão tão sensíveis, que sequer gostariam de encontrar a outra parte, e esse formato *on-line* possibilita ao mediador, ou até mesmo em outros casos em que atue o conciliador, a possibilidade de resgatar o diálogo com o comparecimento nesta audiência por videoconferência, evitando assim o não comparecimento de uma das partes se fosse presencial, o que demanda mais tempo no andamento do feito. Denoto nas audiências que tenho participado o engajamento dos mediadores e conciliadores no auxílio a parte que não detém muito conhecimento com o equipamento, demonstrando às partes que é uma forma viável e nova de realizar a audiência, e que tenho percebido uma resposta positiva das partes.

Ainda, para alguns mediadores e conciliadores judiciais, a videoconferência pode imprimir maior celeridade ao trâmite processual, pois as sessões virtuais, em seu modo de sentir, são mais ágeis e dinâmicas, e o índice de absenteísmo das partes é menor. Nesse sentido, o facilitador 9 avalia de forma positiva, "uma vez que economiza tempo das partes, dos conciliadores, bem como ajuda a dar agilidade para os processos, pois, aparentemente, as pautas *on-line* saem com mais rapidez do que pautas de audiências presenciais, o que contribui para um Poder Judiciário mais célere".

O facilitador 10 expressou em sua resposta que a insegurança inicial quanto à realização de audiências virtuais se desfez diante do êxito da experiência prática. Disse: "Trabalhei por 5 anos presencial e estou há 2 anos por videoconferência. A princípio achei que não daria muito certo, principalmente por dificuldades tecnológicas das partes. Hoje, vejo que a maioria das pessoas se esforça para a realização das audiências virtuais e, considerando que a maioria dos CEJUSCs

estão dispostos a facilitar a presença daqueles que estão tendo dificuldades, acho que veio para ficar". No mesmo sentido, segundo o relato do facilitador 11: "Em princípio, quando fui convidada para dar continuidade à realização das audiências *on-line*, fiquei muito temerosa e insegura. Porém, após atuar em algumas audiências, achei muito bom, pois, mesmo com as dificuldades tecnológicas que eventualmente surgem, as técnicas conciliatórias a serem aplicadas são as mesmas".

Para o facilitador 12, "há prós e contras. Favorável ao aspecto da participação, uma vez que os participantes não precisam se deslocar, o que evita gastos e outras questões como filhos, por exemplo. Quanto à questão da performance em si da sessão, o fato de ser presencial favorece em muito a comunicação e a possibilidade de negociação".

De fato, na visão de alguns conciliadores e mediadores que responderam ao instrumento de pesquisa, a sessão virtual não apresenta a mesma potencialidade daquela realizada nos moldes tradicionais, isto é, presencial/físico. Noutras palavras, a audiência por videoconferência seria um ato inferior à audiência presencial. Para o facilitador 13, "a tecnologia veio para ficar. Graças a ela, o Judiciário não parou seu atendimento àqueles necessitados. Creio que ficará e fará parte do Poder Judiciário. Mas presencial é melhor".

Na visão do facilitador 14, "na audiência por meio virtual perde-se o contato humanizado que o presencial promove". Segundo o facilitador 15, "as audiência por videoconferência trazem facilidades na participação das partes. No entanto, afastam a possibilidade da comunicação corporal e outros aspectos não verbais nas manifestações das partes e advogados". "A videoconferência foi importante num momento específico, a pandemia, porém as sessões realizadas presencialmente são mais produtivas, já que não há interferências, como oscilação de energia e sinal de internet", averbou o facilitador 16.

Foi possível observar, ainda, que, para alguns dos respondentes, o emprego da videoconferência pode ser recomendável para litígios de menor complexidade, sobretudo para aqueles que não envolvem conflitos na seara familiar, como é o caso daqueles que dizem respeito a disputas meramente econômicas. Nessa toada, segundo o facilitador 17, "Quando se trata de questões patrimoniais, penso ser satisfatórias; mas, para as causas de família, a sessão presencial é muito mais produtiva". Também, na visão do facilitador 18, "Quando o assunto é negocial, fica tranquilo; mas, na mediação senti prejuízo". E, para o facilitador 19, é audiência "satisfatória para a realização de acordos em casos não graves".

O facilitador 20, de forma sintética, assim resumiu o seu entendimento sobre o uso da videoconferência nas sessões de autocomposição: "é uma ferramenta que veio para ficar. Como tudo na vida, tem vantagens e desvantagens, mas no geral o saldo é positivo".

4.2 Pontos benéficos

Os conciliadores e mediadores judiciais que atuam nos CEJUSCs de São Paulo foram questionados acerca das vantagens e benefícios que visualizam com a realização de audiências de conciliação e mediação por videoconferência.

Nas palavras do facilitador 8:

> A grande vantagem é as partes não precisarem deslocar até o fórum. Não precisam ausentar dos seus compromissos, inclusive podendo participar do ambiente de trabalho, claro, desde que solicitado ao superior a possibilidade de uso de uma sala reservada. As partes otimizam tempo de deslocamento e espera, visto que, se estiverem comprometidas com seus compromissos, podem assim permanecer até o horário da audiência. Aliás, em muitos casos, principalmente de família, as genitoras não têm com quem deixar os filhos menores. Entendo que somente trouxe benefícios as partes. Eu tive a oportunidade de participar de uma audiência em que a parte requerida residia em Paris. A audiência fluiu normalmente, sem problemas técnicos ou de conexão, sem qualquer interrupção, tendo a mediadora aplicado corretamente as técnicas e ferramentas e, o mais importante, a audiência restou frutífera.

De fato, a resposta mais recorrente foi no sentido de que o ponto mais vantajoso das sessões por videoconferência é a facilidade franqueada para a cômoda participação das partes, que podem ingressar nas audiências virtuais em qualquer lugar que estejam, sem necessidade de se deslocarem até o fórum ou o prédio do CEJUSC, com a economia de tempo e de dinheiro, e sem a perda de tempo útil à espera do efetivo início da audiência.

Nesse sentido, para o escrevente 18, a principal vantagem da videoconferência é "poder se realizar de qualquer lugar, sem necessidade de se deslocar. Economia de tempo e dinheiro com transporte, combustível estacionamento, etc.". Para o facilitador 21, a sessão virtual "amplia a participação das pessoas, tanto dos mediandos quanto advogados. Pois, o custo da movimentação urbana (transporte) faz diferença para o comparecimento as sessões". A sessão virtual, na visão do facilitador 22, "evita o deslocamento das partes envolvidas até o fórum, em especial pessoas que estejam em locais muito distantes, possibilitando a participação delas sem o ônus do deslocamento; permite que as pessoas assistam à sessão/audiência num intervalo do trabalho; facilita a obtenção de documentos faltantes, quando estão realizando a sessão/audiência na própria residência". Nessa trilha, disse o facilitador 20: "como vantagens vejo a questão de se poder fazer a audiência de qualquer lugar do mundo e economia de tempo e dinheiro de não precisar se locomover".

Inclusive, a maior praticidade e comodidade oportunizada pela videoconferência é apontada como vantagem não apenas para as partes em conflito, mas também para os próprios conciliadores e mediadores, auxiliares da Justiça responsáveis pela condução dos trabalhos de facilitação da autocomposição. É o que se extrai da fala do facilitador 23, para quem o principal benefício da audiência virtual "é o acesso mais fácil quando se tem pessoas em comarcas diversas, permitindo às partes que participem de qualquer lugar, não precisando adiar seus próprios compromissos. E até mesmo possibilita aos próprios mediadores que consigam realizar audiências em várias comarcas, em locais diferentes". No mesmo sentido, segundo o facilitador 24, "O principal benefício é o ganho de tempo para todos os participantes, inclusive mediadores, uma vez que podem acessar o ambiente virtual da audiência de qualquer local com acesso à internet, não precisando se deslocar até o local físico onde está sediado o CEJUSC". Aliás, exemplificou o facilitador 10: "Eu moro em uma comarca e atuo em outras três sem sair da minha casa. Claro que tenho mais gastos com energia, internet, etc., mas ainda acho que vale muito".

Outro ponto benéfico apontado nas respostas obtidas diz respeito à segurança que o ato virtual oferece, principalmente porque evita que ocorram encontros indesejados. Além disso, foi destacado possível ganho para o estabelecimento de diálogo proveitoso entre as partes envolvidas. Nesse sentido, para o facilitador 3, a audiência a distância evita "o encontro físico com a outra parte, que muitas vezes não quer esse contato, ficando mais fácil para o conciliador/mediador essa aproximação através do diálogo e a aplicação das técnicas e ferramentas autocompositivas da conciliação/mediação". O facilitador 25, de igual forma, entende que a modalidade propicia maior "segurança aos participantes, em especial nos casos de família, nos quais, por vezes, pode haver constrangimentos pelo contato face a face". Na visão do facilitador 21, "as pessoas parecem mais à vontade nesse tipo de audiência". Para o facilitador 22, a videoconferência "tornou a comunicação entre as partes, o CEJUSC e os conciliadores/mediadores mais dinâmica". Nas palavras do facilitador 4, a sessão virtual facilita "a fluidez da comunicação e a maior organização no momento da apresentação da fala das partes (o uso do microfone fechado auxilia nisso)".

Os relatos dos respondentes também destacaram outros pontos benéficos do uso da videoconferência na mediação e conciliação, a exemplo da maior celeridade processual (facilitador 9: "rapidez e agilidade no andamento do processo"); ampliação da aderência das partes, com a consequente diminuição do índice de audiências frustradas diante do não comparecimento de alguma das partes (facilitador 25: "redução no número de audiências canceladas ou com ausência de partes"); e eliminação de barreiras físicas que dificultam a participação de pessoas com deficiência às audiências de autocomposição (facilitador 26: "acesso de pessoas com dificuldade de locomoção").

No entendimento do facilitador 5:

> A vantagem é a economia do tempo e economia do custo financeiro para os participantes. Pois, para a parte participar da sessão de conciliação por videoconferência não precisa suportar com despesa com transporte, estacionamento e/ou deslocamento de uma Comarca para outra, bastando ter um aparelho celular em mãos ou um computador para acesso, que muitas vezes é disponibilizado em sala própria nos CEJUSCs e fóruns. E o benefício é o maior índice de participação nas sessões de conciliação e mediação, evitando a ausência de uma das partes envolvidas, o que possibilita a realização da audiência por videoconferência e oportunidade de negociação para chegarem a um consenso com relação a questão abordada, de forma rápida e com menor custo possível.

O facilitador 28 assim sintetiza os pontos benéficos da sessão virtual:

> Facilidade do encontro no que diz respeito à locomoção de pessoas, sobremaneira das que residem em cidades diferentes; possibilidade de auxiliar na inserção de participantes com alguma dificuldade tecnológica sanável (nas sessões presenciais a ausência era um fato irremediável); acesso a estagiários de formação em mediação judicial de todas as regiões do país; acesso a estagiários de faculdade (em áreas como Direito, Psicologia, Sociologia e outros); o nível de concentração do profissional que gerencia o processo está em estado de alerta (positivo) durante todo o processo, o que elevou a qualidade do processo como um todo, destacando-se a clareza (e o *timing*) das falas, bem como a qualidade da escuta...

Em grande medida, os pontos positivos destacados pelos facilitadores do TJSP se convergem às vantagens da videoconferência identificadas pela doutrina especializada:

> A experiência demonstra a cada dia que o avanço tecnológico das teleaudiências acelera a dinâmica processual: (I) auxilia no descongestionamento dos processos digitais, (II) conecta e aproxima pessoas fisicamente distantes, (III) facilita o diálogo, (IV) favorece as partes, os Advogados, as testemunhas, (V) reduz consideravelmente os custos, inclusive com ambiente físico, já que não será necessário tanto espaço para as varas, (V) permite uma prestação jurisdicional mais rápida. Enfim, transforma a justiça, ajudando a conter a desacreditada imagem e a reclamação de ineficiência e morosidade na entrega da prestação jurisdicional.[13]

[13] MANFIO, Mônica Tucunduva Spera. Benefícios das audiências virtuais. *In*: TROSTER, Roberto Luis; ROSSI, Carolina Nabarro Munhoz; LAGRASTA, Valeria Ferioli (coord.). *O direito como instrumento de Política Econômica: propostas para um Brasil melhor*. São Paulo: 1. ed., CEDES, 2021, p. 521.

Contudo, a par dos benefícios e das vantagens decorrentes da videoconferência, também se vislumbram prejuízos e riscos, que serão examinados na próxima subseção.

4.3 Pontos desfavoráveis

Os conciliadores e mediadores paulistas também foram questionados a respeito de possíveis prejuízos e riscos por eles visualizados quando da realização de audiências de conciliação e mediação por videoconferência.

Para o facilitador 22 são "muitos" os pontos desfavoráveis que identifica nas sessões por videoconferência. Em suas palavras:

> Inicialmente, por diversas vezes se torna difícil manter o sigilo da sessão, pois não temos como controlar e visualizar se há outra(s) pessoa(s) na sala. Por diversas vezes, as pessoas são interrompidas durante a sessão por não estarem num local adequado; é comum irem para um local como vestiário ou banheiro ou sala de lanche. Além disso, perdemos o "olho no olho", a expressão corporal, que é um grande subsídio ao conciliador/mediador. Outra questão diz respeito à tecnologia em si: a plataforma *Teams* é muito pesada e trava em alguns aparelhos celulares ou computadores; muitas vezes os aparelhos usados não são muito bons e a imagem e o som não são tão precisos quanto seria o ideal. Temos ainda a questão da limitação de horário, pois quando estamos fazendo as sessões/audiências presenciais, havendo um acordo, principalmente nas causas mais complexas de família, que muitas vezes envolvem divórcio, partilha de bens, guarda, convivência e alimentos dos filhos menores, torna-se possível estender um pouco mais a sessão; observo que estando vários conciliadores trabalhando no fórum, um auxilia o outro na manutenção da ordem e horário das sessões.

Uma das potenciais desvantagens do uso da videoconferência para as sessões de mediação e conciliação com maior recorrência nas respostas obtidas é a perda qualitativa da comunicação mais próxima entre o facilitador e as partes e mesmo das partes entre si, operando-se um maior distanciamento ou desumanização do ato. Vale dizer, por meio da intermediação da tela do computador ou do *smartphone* perder-se-ia o "olho no olho" e a percepção integral da comunicação não verbal, como a postura corporal, o tom da voz, os gestos, o ranger dos dentes, a aflição no olhar, etc. Ocorre que não se pode perder de vista que "a comunicação não verbal deve ser motivo de atenção do mediador, uma vez que há

diversos estudos demonstrando que o corpo 'fala' por meio de postura, tom de voz, cruzamento de mãos, braços e pernas, por exemplo".[14]

Inclusive, foram coletadas respostas no sentido de que a virtualização da sessão compromete o eficaz restabelecimento do diálogo em demandas de maior complexidade.

Para o facilitador 29, "o prejuízo das audiências de conciliação e mediação por videoconferência, a meu ver, é que as partes se apresentam com menos envolvimento... Verificado principalmente nas audiências de família. As partes são furtadas do chamado 'olho no olho'. Perde-se a falta da essência do acolhimento aos envolvidos". Lembra o facilitador 23 que "o contato mais presente pode mudar a cabeça de alguma das partes que eventualmente esteja mais rígida", acrescentando que "o ambiente remoto não nos permite ter o contato mais sensibilizado". O facilitador 28 arremata: "não tem aquele contato visual, aperto de mão, olho no olho, penso que falta um pouco do calor humano". No entender do facilitador 30, "o contato humano 'olho no olho' também perece, o que prejudica o estabelecimento da empatia e confiança". Ou, nas palavras do facilitador 31: "Nos casos de família, falta o olho no olho, pois muitas vezes as partes estão dispersas". Ainda, segundo o facilitador 32: "o principal prejuízo é a falta do calor humano com que são feitas as presenciais, com risco de, ainda que reste frutífera, não se alcançar um dos principais objetivos da mediação/conciliação, que é a pacificação".

Esse suposto efeito prejudicial da videoconferência para a efetiva comunicação entre as partes já é, de longa data, aventado pela doutrina nacional. Deveras, para alguns pesquisadores o contato mediado pela "tela fria" do computador (ou do *smartphone*) dificulta o estabelecimento de um verdadeiro diálogo entre os interlocutores. Com efeito, entendem que num encontro de pessoa a pessoa há uma profícua troca de sensações, valores e emoções, enfim, há efusiva comunicação não verbal, isto é, para muito além do que meras palavras, o que não se consegue, com o mesmo grau de depuração e vivacidade, num encontro de tela a tela. Afinal, "os gestos, a entonação da voz, a postura do corpo, a emoção do olhar, dizem, por vezes, mais que as palavras".[15] Aliás, para o facilitador 15, a desvantagem da audiência virtual é justamente a "impossibilidade de avaliar aspectos da comunicação não verbal dos participantes".

[14] TARTUCE, Fernanda; BRANDÃO, Débora. Mediação e conciliação on-line, vulnerabilidade cibernética e destaques do ato normativo nº 1/2020 do Nupemec/SP. *Cadernos Jurídicos*, São Paulo, ano 21, n. 5, p. 153-162, jul./set. 2020, p. 159.

[15] OLIVEIRA, Ana Sofia Schmidt de. Interrogatório on-line. *Boletim IBCCRIM*, São Paulo, vol. 42, p. 01, jun. 1996.

Inclusive, há quem entenda ser "inegável que os níveis de indiferença em relação ao outro aumentam muito quando existe uma distância física (virtualidade) entre os atores do ritual judiciário".[16]

Não se desconhece, contudo, que, em sentido oposto, para os entusiastas da videoconferência, a presença virtual em tudo se equipara à presença física, conquanto seja direta, atual e simultânea, mormente se considerado o aperfeiçoamento da tecnologia nos últimos anos, que trouxe à baila meios de comunicação de impressionante qualidade de imagem e som. Para esses autores, inclusive, a inexplicável imprescindibilidade dos "olhos nos olhos" é denominada de *síndrome de Maria Bethânia*, "em virtude da conhecida canção que interpreta *olhos nos olhos, quero ver o que você diz*...".[17]

Em se tratando de conciliação e mediação, contudo, é preciso ter em conta que, como dito alhures, "os sentimentos revelam-se a todo instante na mediação, seja por meio de algo que foi dito ou ainda por gestos, posturas, comportamentos, expressões faciais ou tom de voz".[18] Ora, o objetivo precípuo do agir dos conciliadores e mediadores judiciais no contexto das sessões é justamente facilitar o restabelecimento da comunicação entre as partes (comumente estremecida, fragilizada ou mesmo rompida pelo conflito existente ou pelos efeitos dele decorrentes). Com efeito, no processo de conciliação e mediação, o facilitador "espera e permite que as partes expressem suas emoções, estando preparado para lidar com essas expressões à medida que o conflito se desenrola".[19] Isso é feito com o eficaz emprego de técnicas que auxiliam os envolvidos a compreender as questões e os interesses em conflito, para que, por meio de um diálogo propositivo, possam identificar ou desenvolver, por si próprios, possíveis soluções consensuais à controvérsia, que gerem benefícios para ambos. Logo, para além da simples obtenção de acordos e transações, a finalidade de uma sessão de conciliação e mediação é mais "artesanal", à medida que mira o enfrentamento da lide sociológica, isto é, de todos os múltiplos e complexos fatores que desencadearam o conflito: de fato, o seu fim último é o diálogo.

É fundamental, portanto, eliminar qualquer tipo de ruído de comunicação, a fim de que as partes possam se entender e, verdadeiramente, possam dialogar.

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[16] LOPES JR., Aury. O interrogatório on-line no processo penal: entre a assepsia judiciária e o sexo virtual. *Boletim IBCCRIM*, São Paulo, vol. 13, n. 154, p. 06, set. 2005.

[17] PINTO, Ronaldo Batista. Interrogatório On-Line ou Virtual – Constitucionalismo do Ato e Vantagens em sua Aplicação. *Revista IOB de Direito Penal e Processual Penal*, Porto Alegre, vol. 1, n. 1, p. 14, abr./maio 2020.

[18] BRASIL. Conselho Nacional de Justiça. André Gomma de Azevedo (org.). *Manual de Mediação Judicial*. 6. ed. Brasília, 2016, p. 208.

[19] TARTUCE, Fernanda. *Mediação nos conflitos civis*. 2. ed. rev., atual. e ampl. Rio de Janeiro: Forense; São Paulo: Método, 2015, p. 218.

Nessa linha de raciocínio, é oportuno perquirir se o ambiente virtual permite que a comunicação que ocorre em meio eletrônico seja, de fato, eficiente. Vale dizer, é importante verificar se a sessão por videoconferência é espaço fértil para um real diálogo.

Aqui, dois pontos merecem especial atenção. Em primeiro lugar, perquirir se a modalidade virtual dificulta a compreensão do que é dito pela outra parte (o que se liga a eventuais problemas de conexão e tecnologia, como quedas e/ou oscilações constantes da internet, congelamento da tela ou falhas no áudio, o que será examinado mais à frente). Em sequência, avaliar se os conciliadores e mediadores judiciais conseguem empregar, com êxito, as técnicas disponíveis e apropriadas ao tratamento adequado do conflito.

Por isso, os conciliadores e mediadores dos CEJUSCs do Estado de São Paulo foram questionados se já observaram dificuldades das partes e/ou de seus advogados para a compreensão da fala dos participantes por decorrência do uso da videoconferência, e, em caso afirmativo, se acreditam que tal dificuldade possa ter contribuído negativamente para o estabelecimento do diálogo entre as partes e a celebração de eventual acordo.

21 facilitadores responderam que, em sua experiência prática, não observaram esse tipo de dificuldade. Inclusive, justificou o facilitador 5: "a falha na comunicação e a falha do diálogo entre os seres humanos é comum, mas não em decorrência do uso da videoconferência, mas sim pela falha na interpretação de texto. Eu sinto e acredito que os participantes se sintam mais confortáveis em expor seu ponto de vista acerca do conflito por videoconferência do que na forma presencial".

Por outro lado, 29 facilitadores manifestaram já ter presenciado situação na qual houve obstáculo à compreensão da fala dos participantes em razão da videoconferência. "Sim, várias vezes, e a expectativa é que o trabalho fora perdido", disse o facilitador 19. Para o facilitador 33, "as dificuldades com a compreensão da fala das partes são notórias em alguns casos em que a conexão com internet e o local em que a parte se encontra não são favoráveis, e isso contribui negativamente para o diálogo e acordo". O facilitador 23 exemplifica situações nas quais observou tais dificuldades: "Microfones com ruídos; audiências híbridas, quando a parte que está presente no CEJUSC não fica muito próxima ao microfone e fica muito difícil a compreensão". "Nesses casos, o conciliador/mediador necessita muito cuidado para que a composição seja realizada com maior segurança", obtemperou o facilitador 17. O facilitador 16 declarou: "observei várias sessões com esse problema". Segundo o relato do facilitador 22, "já houve dificuldade de compreensão das falas por questões técnicas, o que levou a frequentes repetições e certamente prejudicou um pouco a comunicação das partes e, consequentemente, o acordo".

Entretanto, é verdade que a maioria dos respondentes se manifestou no sentido de que a falha de compreensão restou superada, sem que tenha havido efetivo prejuízo para a condução do ato, o salutar diálogo entre as partes e eventual celebração de acordos.

"Sim, já houve situações de dificuldade de compreensão, mas com a habilidade do mediador/conciliador a situação foi resolvida sem prejuízos as partes", declarou o facilitador 34. "Sim, mas a situação foi contornada e não afetou o diálogo e a celebração do acordo", disse o facilitador 20. "Sim, já aconteceu, mas não prejudicou o diálogo e tampouco a construção do acordo", arrematou o facilitador 28.

Em caso de falhas de comunicação decorrentes de problemas técnicos como sinal oscilante da internet ou som inaudível, uma das estratégias que podem ser utilizadas pelos conciliadores/mediadores judiciais é o recurso do *chat* disponível na plataforma digital. Foi o que declinou o facilitador 35: "Às vezes, quando a conexão da parte está ruim e sua fala prejudicada, picada, fragmentada, valho-me do *chat* do *Teams* para manifestação das questões relevantes e sobre as quais não pode haver dúvidas. Com isso, há um melhor aproveitamento do ato, sem qualquer prejuízo para a celebração de eventual acordo".

Os conciliadores e mediadores paulistas também foram chamados a avaliar se, na audiência por videoconferência, já tiveram dificuldade de empregar, de forma exitosa, técnicas e ferramentas autocompositivas pertinentes ao tratamento adequado do conflito.

37 respondentes manifestaram não ter sentido qualquer dificuldade no emprego das técnicas de autocomposição dos conflitos. "Não tive nenhum problema. Acolhimento, *cáucus*, escuta ativa... no geral é como se estivéssemos todos juntos em uma mesma sala", declarou o facilitador 10. Disse o facilitador 4: "todas as técnicas necessárias para o bom desenvolvimento das audiências sempre foram aplicadas adequadamente e com sucesso".

13 respondentes relataram algum tipo de dificuldade na aplicação das técnicas. "Sim, o *rapport* fica um pouco difícil de ser aplicado porque muitas das vezes não conseguimos passar a sensação de um ambiente acolhedor", manifestou o facilitador 23. "Sim, devido à ansiedade que se forma por medo de problemas técnicos", declarou o facilitador 19. "Sim. Já saí de audiência com a sensação de que se a sessão tivesse sido presencial, e não virtual, o resultado seria mais positivo", asseverou o facilitador 29.

6 facilitadores mencionaram em suas respostas a técnica conhecida por *cáucus* ou *caucusing*. Em se tratando de mediação, *cáucus* se refere à possibilidade do mediador realizar reuniões privadas com cada uma das partes. Conforme ensina a doutrina de escol:

> A palavra cáucus é derivada da palavra indiana *Algonquian* (líder tribal), sendo sua transcrição original derivada da língua de Algonquian – *cawcawwassoughes* – significando discussões intermináveis e repetitivas! O *caucusing* pode ser estruturado de várias formas. [...] Um breve cáucus inicial pode reduzir níveis elevados de tensão e fornecer garantias para cada participante sobre o humor do outro e sua disposição para discutir assuntos calmamente e de forma construtiva. Isto possibilita a construção de uma ponte mais sólida para ambos os participantes para enfrentar o encontro cara a cara. [...] *Caucusing* deve ser usado com cuidado, geralmente leva mais tempo, mas permite que mais mediações sejam "realizadas".[20]

A 6ª edição do *Manual de Mediação Judicial*, do CNJ, publicada em 2016, admite a realização de sessões individuais:

> [...] as sessões privadas ou individuais são um recurso que o mediador deve empregar, sobretudo, no caso de as partes não estarem se comunicando de modo eficiente. As sessões individuais são utilizadas em diversas hipóteses, tais como um elevado grau de animosidade entre as partes, uma dificuldade de uma ou outra parte de se comunicar ou expressar adequadamente seus interesses e as questões presentes no conflito, a percepção de que existem particularidades importantes do conflito que somente serão obtidas por meio de uma comunicação reservada, a necessidade de uma conversa com as partes acerca das suas expectativas quanto ao resultado de uma sentença judicial. Enfim, há diversas causas nas quais as sessões individuais se fazem recomendáveis.[21]

Segundo o facilitador 35, "Na mediação *on-line* eu tive e tenho a oportunidade de aplicar técnicas as mais variadas, inclusive o *cáucus*, com adesão de todos os participantes, sendo bastante elogiada por isso". Nas palavras do facilitador 28: "é perfeitamente possível a aplicação das técnicas, inclusive *cáucus*, um participante espera no *lobby*, depois volta, o outro vai para o *lobby*, funciona muito bem". Em sentido diverso, o facilitador 24 declarou que não teve dificuldades com as técnicas utilizadas, porém admitiu que "se fosse me valer de *cáucus* em alguma sessão virtual teria problemas, pois encontraria dificuldade em conseguir me reunir privativamente com um dos mediandos". De igual modo, o facilitador 32 também ressaltou "dificuldade na realização do *cáucus*".

Compulsando as respostas obtidas, se observa que, para alguns respondentes, outra dificuldade decorrente da realização da sessão em meio eletrônico

[20] PARKINSON, Lisa. *Mediação familiar*. Belo Horizonte: Del Rey, 2016, p. 142-143.

[21] BRASIL. Conselho Nacional de Justiça. André Gomma de Azevedo (org.). *Manual de Mediação Judicial*. 6. ed. Brasília, 2016, p. 187.

é a perda de efetivo engajamento e participação ativa da parte no processo de mediação ou conciliação. Em boa medida isso se deve à constatação de que, malgrado confira maior comodidade, a possibilidade de a parte participar da sessão de qualquer lugar, inclusive de sua casa, pode, noutro sentido, dar ensejo a uma sensação acentuada de desleixo e descompromisso, olvidando-se da seriedade do ato. Nesse sentido, para o facilitador 20 um dos prejuízos da audiência virtual é "a questão de algumas pessoas com algumas posturas indesejáveis, como comer e fazer outra atividade durante a redação e leitura do termo". Por seu turno, o facilitador 18 apontou como desvantagem da sessão virtual o fato de a audiência ser realizada em local inadequado e exemplificou: "eu tive um caso que ele dirigia caminhão. Precisei interromper por segurança. Outro estava na portaria do prédio, era controlador de acesso, parava o tempo todo para abrir a porta e receber o correio".

Como consequência, participando de suas respectivas casas, o comprometimento com a solenidade é desafiado por diversas fontes de distração, incluindo a presença de terceiras pessoas, alheias à sessão. Isso é evidenciado na fala do facilitador 26, para quem "o risco, em alguns casos, seria não atingir que a parte se empenhe no entendimento, por influência de pessoa de seu convívio, uma vez que, mesmo garantindo que as partes participem sozinhas e com fone, estarão mais próximas aos seus".

A interferência indevida (e, não raras vezes, clandestina) de terceiras pessoas foi motivo de indisfarçável preocupação dos mediadores e conciliadores que se manifestaram por meio do formulário eletrônico.

É que uma das principais garantias do processo de conciliação e mediação é o princípio da confidencialidade e o consequente dever de sigilo, estampado no *caput* do artigo 166 do Código de Processo Civil e no inciso VII do art. 2º da Lei nº 13.140/2015. Conforme previsão contida na Resolução nº 125/2010, do CNJ, a confidencialidade é um princípio fundamental que rege a atuação dos conciliadores e mediadores judiciais e, por ela, é imposto o "dever de manter sigilo sobre todas as informações obtidas na sessão".[22] Nos termos do §1º do artigo 166 do CPC, a confidencialidade se estende "a todas as informações produzidas no curso do procedimento".[23] Aliás, segundo o teor do artigo 14 da Lei nº 13.140/2015, "no início da primeira reunião de mediação, e sempre que julgar necessário, o mediador deverá alertar as partes acerca das regras de confidencialidade aplicáveis ao procedimento".[24] E o *caput* do artigo 30 da referida lei assim estabelece: "Toda e qualquer informação relativa ao procedimento de mediação

[22] BRASIL. Conselho Nacional de Justiça. *Resolução nº 125, de 29 de novembro de 2010*. Brasília: 2010.
[23] BRASIL. Congresso Nacional. *Lei nº 13.105, de 16 de março de 2015*. Brasília: 2015.
[24] BRASIL. Congresso Nacional. *Lei nº 13.140, de 26 de junho de 2015*. Brasília: 2015.

será confidencial em relação a terceiros".[25] E o §1º do dispositivo esclarece que o dever de confidencialidade se aplica não apenas ao mediador, mas também "às partes, a seus prepostos, advogados, assessores técnicos e a outras pessoas de sua confiança que tenham, direta ou indiretamente, participado do procedimento de mediação".[26] Logo, "a confidencialidade é a garantia de que o conteúdo da negociação não será divulgado para estranhos ao procedimento e não será utilizado para fim diverso".[27] Consequentemente, conforme aduz o inciso II do §2º do artigo 22 da Lei nº 13.140/2015, a sessão de mediação (e, também, de conciliação) deve se realizar em "local adequado a uma reunião que possa envolver informações confidenciais", a salvo da interferência escusa de pessoas alheias à causa, que não as partes exclusivamente envolvidas no conflito ou outras cuja participação tenha sido por elas expressamente autorizada, a fim de contribuir nas tratativas consensuais.[28]

É indene de dúvidas que o princípio da confidencialidade se aplica às sessões de mediação e conciliação virtuais. A propósito, não é outro o entendimento constante do Enunciado nº 53, da II Jornada de Prevenção e Solução Extrajudicial de Litígios, do CJF: "Os princípios da confidencialidade e da boa-fé devem ser observados na mediação *on-line*. Caso o mediador, em algum momento, perceba a violação a tais postulados, poderá suspender a sessão ou sugerir que tal ato seja realizado na modalidade presencial".

Ocorre que, na prática, diante dos relatos colhidos, é possível asseverar que a audiência por videoconferência amplia os desafios de se garantir o lídimo respeito ao sigilo e à confidencialidade da conciliação e da mediação. Nas palavras do facilitador 29, a sessão virtual "às vezes fere o princípio do sigilo, pois se realiza em ambiente familiar, no qual alguns membros da família encontram-se presentes também no mesmo ambiente". O facilitador 10 apontou como risco da audiência remota a condição do mediador ou conciliador "não ter controle de todo o espaço em que essas pessoas se encontram e serem influenciados por terceiros". O facilitador 18 elencou como desvantagem da modalidade a "possibilidade de ter terceiros no mesmo ambiente". Segundo relato do facilitador 30, "o sigilo nem sempre é preservado através da internet, o que pode gerar insegurança".

[25] BRASIL. Congresso Nacional. *Lei nº 13.140, de 26 de junho de 2015*. Brasília: 2015.
[26] BRASIL. Congresso Nacional. *Lei nº 13.140, de 26 de junho de 2015*. Brasília: 2015.
[27] JESUS, Antonio Marcos da Silva de. A confidencialidade na mediação de conflitos coletivos no âmbito do Ministério Público: uma abordagem analítico-comportamental do Direito. *Revista de Informação Legislativa*, Brasília, v. 57, n. 227, p. 105-130, 2020, p. 109.
[28] Nos termos do Enunciado nº 113, da II Jornada de Prevenção e Solução Extrajudicial de Litígios, do CJF, "O mediador pode consultar os envolvidos sobre a conveniência da participação de outras pessoas potencialmente afetadas pelo resultado final da mediação".

Para entender melhor a questão, os mediadores e conciliadores de São Paulo foram interpelados acerca das práticas que adotam para a garantia da privacidade do ato.

O facilitador 1 assim declarou: "deixo claro que a audiência não poderá ser gravada ou filmada, sob pena de medidas legais. Em relação ao ambiente, peço que todos estejam sozinhos e digo que interferências não serão permitidas. Claro que é impossível fiscalizar isso na hora, mas ficando em alerta as partes ficam com maior receio".

O facilitador 37 adota o seguinte procedimento: "na Declaração de Abertura, eu conscientizo as partes sobre a não necessidade de gravação do ato. Após, eu explico sobre a confidencialidade e sobre a obrigação de sigilo para todos aqueles que participam da audiência. Além disso, peço para que estejam em ambiente reservado e, nas sessões que envolvem assuntos de família, ressalto a importância de não deixarem crianças no mesmo ambiente, de modo a não ouvirem e nem "participarem" da audiência".

Segundo o relato do facilitador 5: "antes de iniciar a sessão para exposições de sentimentos e para negociações, eu faço a abertura da audiência com explicações de como serão desenvolvidos os trabalhos, fazendo um combinado e comprometimento com as partes, bem como ao final de toda abertura deixo claro que a sessão é sigilosa, ficando as partes esclarecidas com relação à confidencialidade do ato".

O facilitador 35 explicou o procedimento que adota ao se deparar com a presença de terceira pessoa, estranha à causa, na audiência: "Sempre inicio as sessões trazendo essa matéria e erigindo o sigilo do ato como uma questão fundamental. Contudo, percebendo que há outras pessoas no ambiente virtual, e não havendo possibilidade de privacidade pela parte, saliento que ela (a parte) se responsabiliza por eventual vazamento do que ali manifestado e, havendo expressa concordância das partes, a sessão prossegue".

O facilitador 10 manifestou adotar uma das técnicas sugeridas para controle da confidencialidade do ato: a solicitação à parte para que, com a câmera de seu *smartphone*, faça uma captação panorâmica do cômodo em que se encontra, para se detectar eventual presença estranha no ambiente. Disse: "não conseguimos 100% de garantia que haja essa privacidade, mas sempre peço para que não tenha mais ninguém na sala, peço para que não grave porque é proibido e muitas vezes peço para que façam um giro com a câmera para que eu possa ver se, de fato, estão só. Por fim, lembro sempre que quando emitem o seu DE ACORDO estão concordando também com as regras do procedimento".

Outro procedimento que pode ser adotado é a interrupção da sessão, que será retomada quando restabelecida a privacidade do ato. Nesse sentido, diz o

facilitador 22: "Essa é a questão mais nevrálgica a se observar. Eu interrompo a sessão, reitero que não pode haver mais ninguém na sala e até já solicitei que virasse o aparelho celular".

Como dito alhures, a confidencialidade é um princípio fundamental que rege a atuação dos conciliadores e mediadores judiciais e que também se aplica às sessões que se realizam em ambiente virtual. Por isso, é imprescindível que também os facilitadores observem o dever de sigilo na hipótese em que conduzam as audiências de sua residência. Segundo o facilitador 9: "faço sempre as audiências, em uma sala sozinha e de portas fechadas, sem a companhia de ninguém, para que terceiros não ouçam a sessão. Esclareço as partes, na abertura, que nada do que for dito na sessão poderá sair de lá, uma vez que o ato goza de sigilo, e que a sessão não pode ser *printada*, nem gravada, sob pena de quem assim o fizer responder civil e criminalmente pelos seus atos". Segundo o facilitador 29: "Com relação a minha pessoa, procuro estar num ambiente só eu, no escritório em casa. Com relação aos participantes, eu oriento que eles deverão estar num ambiente mais privativo, sem outras pessoas ao redor".

Outra desvantagem das sessões de conciliação e mediação virtuais que foi amplamente referida nas respostas ao formulário eletrônico diz respeito aos problemas de ordem técnica, sobretudo vinculados à conexão e qualidade da internet, bem como ao uso dos aparatos tecnológicos. Trata-se de ponto de fundamental importância quando se fala em métodos de tratamento adequado de conflitos. É que um dos objetivos precípuos da conciliação e mediação é justamente o restabelecimento da comunicação entre as partes em conflito. "Um primeiro objetivo importante na mediação é permitir que as pessoas envolvidas no conflito possam voltar a entabular uma comunicação eficiente, habilitando-se a discutir elementos da controvérsia e eventualmente encontrar saída para o impasse".[29] Evidentemente, para que o objetivo do processo de conciliação e mediação seja alcançado, é essencial que haja uma adequada comunicação na própria sessão, notadamente entre as próprias partes e entre estas e o facilitador do diálogo. Inclusive, "a forma de comunicação utilizada na mediação influencia diretamente o resultado do processo autocompositivo".[30]

Em outras palavras, é preciso que o conciliador e o mediador judicial possam se comunicar com as partes de tal forma que sejam ouvidos, se façam ouvir e possam ouvi-las. Além disso, a sessão é justamente, por excelência, o momento em que é oportunizada a fala a cada uma das partes, competindo à outra exercer

[29] TARTUCE, Fernanda. *Mediação nos conflitos civis*. 2. ed., rev. atual. e ampl. Rio de Janeiro: Forense; São Paulo: Método, 2015, p. 217.

[30] BRASIL. Conselho Nacional de Justiça. André Gomma de Azevedo (org.). *Manual de Mediação Judicial*. 6. ed. Brasília, 2016, p. 95.

a escuta ativa. Vale dizer, uma das principais potencialidades da sessão de conciliação e mediação, fundamental para o processo de transformação do conflito, é o fato de que nela cada uma das partes tem o direito de falar (em seu momento) sobre os fatos, manifestando as suas opiniões, desejos, temores e receios e expondo o seu ponto de vista, e, assim, trazendo uma nova perspectiva do conflito para a outra parte, o que facilita, inclusive, o exercício de empatia mútua. Logo, é essencial que cada um possa ouvir (diga-se, ouvir bem, com qualidade) o que o outro tem a dizer. É preciso, pois, que a comunicação ocorra de forma fluida no curso da sessão.

No caso de uma audiência de conciliação ou mediação realizada por videoconferência, as falhas técnicas (cortes de internet, som abafado, áudio desconectado, câmera desfocada, microfone ruidoso, congelamento da tela, queda de energia, etc.) funcionam como disfunções do *meio* no qual se transmite a mensagem, o *meio eletrônico*. Nessa linha de raciocínio, tais falhas, se não tratadas eficientemente, podem prejudicar o processo de comunicação entre os participantes do ato. Afinal, é uma condição elementar (premissa, diríamos) da sessão virtual a conexão com a internet. Ora, o ato se desenrola em meio digital e depende da tecnologia. Logo, uma deficiência na ferramenta tecnológica necessariamente impactará o *meio* no qual há o fluxo da comunicação. Destarte, em extrema medida, um defeito de natureza técnica (*v.g.* áudio "picotado") pode contribuir para que ocorra um "ruído de comunicação", com um entendimento incorreto da fala da outra parte, prejudicando o eventual êxito e bom sucesso do processo de autocomposição.

Quando instados acerca dos prejuízos e riscos visualizados com a realização de audiências de conciliação e mediação por videoconferência, os facilitadores abordaram, em múltiplas respostas, as falhas técnicas relacionadas à conexão da internet.

"O risco que ainda se faz presente é a dificuldade de não participação na sessão em razão de intercorrências com conexão da internet e dificuldade de algumas pessoas em fazer acessar o ambiente virtual com uso do aplicativo de acesso, que no caso do TJSP é o *Microsoft Teams*", declarou o facilitador 24. "O único risco que visualizo é a conexão, porque, às vezes, ocorrem problemas na plataforma e/ou problema de conexão de internet, o que pode causar a morosidade na audiência", disse o facilitador 2. E o facilitador 16 lembrou que "algumas pessoas não têm acesso a um equipamento de boa qualidade e a um bom sinal de internet". O facilitador 18 faz menção a problema com a conexão e dificuldade de acesso à sala virtual. O facilitador 25 apontou como desvantagem do ato em meio eletrônico as "eventuais dificuldades de acesso por limitações tecnológicas".

A fim de aprofundar a recorrência e as consequências de tais falhas técnicas, os conciliadores e mediadores dos CEJUSCs de São Paulo foram questionados se já presidiram ou participaram de alguma audiência por videoconferência que tenha apresentado algum problema/erro técnico (por exemplo, queda ou oscilação da conexão ou sinal de internet, ruídos ao fundo, som baixo e/ou incompreensível, constantes paralisações ou interrupções do áudio e/ou do som), e, em caso positivo, se tal fato levou ao encerramento antecipado e/ou redesignação do ato.

Apenas dois facilitadores disseram nunca ter presenciado esse tipo de ocorrência. 48 facilitadores responderam positivamente. O que variou, na verdade, foi a frequência. "Esses fatos acontecem com razoável frequência, porém solucionáveis em sua maioria", disse o facilitador 12. No mesmo sentido, o facilitador 17 declarou que "isso ocorre com frequência, mas, nas oportunidades que participei, conseguimos resolver o problema". "Sim, em algumas", disse o facilitador 1. Por outro lado, o facilitador 26 assim respondeu: "Sim, em raras ocasiões".

Além disso, também se verificou certa variação nas respostas quanto aos efeitos das falhas técnicas. Segundo alguns relatos, com um pouco de paciência e de criatividade, os problemas foram logo resolvidos e o ato prosseguiu seu regular andamento. Contudo, também foram mencionados casos em que, diante da gravidade da intercorrência técnica, o ato precisou ser interrompido, com a redesignação da audiência.

A propósito, as partes não podem ser prejudicadas pelas inconsistências típicas dos atos virtuais. Inclusive, a elas deve ser assegurado o direito de redesignação do ato, ou mesmo de sua realização na modalidade presencial. Não é outra a conclusão que consta do Enunciado nº 64 da II Jornada de Prevenção e Solução Extrajudicial de Litígios do CJF: "A parte que sofrer com falhas de conexão da internet ou dificuldade de acesso à plataforma que impeça a sua participação ou a continuidade de sua participação nas sessões e audiências virtuais não poderá ser prejudicada e poderá solicitar a remarcação da sessão ou sua realização por outro meio".

No âmbito do TJSP, o artigo 13 do Ato Normativo do NUPEMEC nº 01/2020 estabelece que:

> Caso algum dos participantes enfrente problema de conexão durante a sessão virtual ou com relação à exibição da câmera, serão realizadas 3 (três) tentativas para solução do problema. Em caso de insucesso, a sessão poderá ser redesignada mediante concordância da parte contrária, observando-se que não será permitida a utilização apenas do áudio na sessão.[31]

[31] SÃO PAULO (ESTADO). Tribunal de Justiça do Estado de São Paulo. Núcleo Permanente de Métodos Consensuais de Solução de Conflitos. *Ato Normativo do NUPEMEC nº 01/2020*. Autoriza a realização

Aliás, o facilitador 28 fez menção, em sua fala, ao protocolo de se proceder às três tentativas de reconexão. Deveras, descreveu assim o procedimento por ele adotado:

> A possibilidade de tentar reconexões por mais três vezes facilita a recuperação das pessoas para a sessão, a compreensão (e correção) do que pode estar acontecendo (internet, equipamento, utilização do equipamento, habilidade para navegação...). Entretanto, quando irremediável, a situação é certificada nos autos e há a redesignação para o mais breve possível (o que também aflorou como "mais fácil e breve" por conta da possibilidade de várias salas em funcionamento num mesmo momento). A questão do "ruído de fundo" é amenizada pelo *Microsoft Teams*, com o uso da ferramenta de filtragem nele disponível e, ademais, numa segunda rede de proteção está a possibilidade de fechamento de som pelo anfitrião em momentos estratégicos, o que, claro, é feito com delicadeza.

O facilitador 5 disse que já participou de audiências virtuais em que incidiram falhas de conexão, mas ponderou que "em nenhuma houve necessidade de encerramento antecipado, pois muitas vezes orientamos a parte a sair e entrar novamente na sala virtual, possibilitando que a plataforma corrija o problema técnico verificado. Quando o problema técnico persiste, já houve necessidade de redesignação do ato, sendo as partes sempre consultadas sobre a concordância ou não da respectiva redesignação".

Segundo relato do facilitador 10: "já, mas posso dizer que foram bem poucas. Na maioria das vezes conseguimos resolver sem maiores problemas. Eu acho que nestes dois anos foi só uma que não consegui terminar por problemas técnicos. Já fiz com uma parte dentro de um carro, já fiz direto de presídio, já fiz uma com a parte em outro país, não vejo grandes problemas não, só ajustes que se fazem necessários".

O facilitador 4 declarou que já teve esse tipo de experiência, "mas nunca precisei encerrar a sessão por esse motivo. Todos os envolvidos sempre demonstraram muito interesse em continuar, até que o sinal fosse restabelecido ou no caso de ambiente ruidoso, buscaram um novo local para o acesso e a audiência continuou".

Lado outro, o facilitador 30 declarou: "já presenciei diversos problemas técnicos. Ocorre que a maior parte das sessões apenas demanda um pouco de paciência para o restabelecimento. Porém, há casos que necessitam de redesignação". No mesmo sentido, o facilitador 37 assim respondeu: "Sim, participei. Tais fatos

das sessões de conciliação e mediação nos Centros Judiciários de Solução de Conflitos e Cidadania (CEJUSCs) por meio do sistema de videoconferência. São Paulo: 2020.

levaram ao encerramento antecipado e/ou redesignação do ato, a depender da situação concreta". Ainda, segundo o facilitador 38: "Sim, muitas vezes. Sempre que necessário, encerro o ato, consto em ata e deixo claro que, se as partes desejarem, podem solicitar que a audiência seja redesignada".

Insta salientar que, para além de problemas de conexão e qualidade da internet das partes envolvidas no conflito, também houve registro de respostas que deram conta de problemas técnicos dos próprios conciliadores e mediadores judiciais. Nesse sentido, o facilitador 11 disse: "uma vez fiquei sem internet em casa e não houve a possibilidade de realizar a audiência". Também o facilitador 29 lembrou que, em determinada ocasião, "estava com a audiência se encerrando, com o termo quase concluso, contudo, a minha conexão com a internet caiu".

A ampla maioria das respostas obtidas, contudo, converge no sentido de que foram poucas as situações concretas em que se fez necessário o encerramento antecipado e/ou a redesignação do ato. Com efeito, na maioria das vezes, o problema técnico acabou sendo resolvido (*v.g.* a conexão foi restabelecida ou a parte logrou êxito em reingressar) e a audiência chegou ao seu término sem maiores percalços. Certamente, foram exigidas dos facilitadores paciência e tranquilidade. "Sim, mas tive paciência e aguardamos a melhora. Nunca perdi a audiência por esta razão", declarou o facilitador 39. No mesmo sentido, disse o facilitador 25: "participei sim, mas, com tolerância e reconexões dos participantes podemos chegar ao final, apenas com demora e atraso, mas sem maiores prejuízos".

Além disso, em algumas oportunidades os problemas foram resolvidos a partir da criatividade das partes ou do conciliador/mediador, seja pelo uso de fones auriculares, pela migração da internet (*wi-fi* para pacote de dados 3G ou 4G, ou vice-versa), troca para outro aparelho celular, reingresso na sala virtual, etc. "Nós implementamos alternativas para melhorar, como sair e entrar novamente, uso de fones, etc.", disse o facilitador 40. "Já presenciei sessão em que uma parte perdeu conexão por conta de ficar sem bateria, mas foi possível reestabelecer contato a partir de outro celular", declarou o facilitador 41. O facilitador 6 se recordou de "uma queda de internet vez que a pessoa estava pelo *wi-fi*, no mesmo momento ela passou para os dados móveis do aparelho celular e a audiência continuou normalmente". Já o facilitador 11 lembrou que "uma vez que deu tudo certo até a hora em que o SAJ falhou no momento da emissão da ata. Expliquei para as partes e voltamos todos ao ambiente virtual, 30 minutos depois, e deu tudo certo. Enfim, nem sempre tudo corre tão certinho". "Eu peço para a parte ajustar seu equipamento. Caso isso não seja possível, peço que saia da sessão e ingresse novamente na plataforma, usando o mesmo *link* de acesso. As pessoas que estão na sala ficam aguardando até o seu retorno. Já houve sessão em que tal procedimento teve que ser realizado mais de uma vez. Porém, nunca precisei

encerrar antecipadamente e tampouco redesignar alguma audiência por questões técnicas, apenas foi necessário sair e reingressar na sala", disse o facilitador 22.

Um dos efeitos das falhas técnicas mencionados por alguns dos respondentes foi o prolongamento do ato, causando demoras e atrasos, inclusive com prejuízo para a pauta, isto é, para o horário das audiências subsequentes. "Não houve a interrupção, mas pelo fato de ficarmos esperando até a parte conseguir o acesso, tivemos um atraso relativo nas audiências posteriores, causando certa chateação para quem estava esperando no *lobby*", manifestou o facilitador 23. Na mesma toada, segundo o facilitador 2, "não foi necessária a interrupção da audiência, apenas demorou um pouco mais". "A sessão se prolongou devido aos ajustes necessários, até que tudo estivesse na condição ideal à sua realização", declarou o facilitador 21.

A propósito, a respeito do tempo de duração da audiência, foram obtidas algumas respostas no sentido de que uma das desvantagens da sessão por videoconferência é que, geralmente, costuma ser mais demorada do que as audiências tradicionais, presenciais. Para o facilitador 25, as virtuais "demandam mais tempo para acolhimento e instrução aos participantes, tanto na abertura quanto no encerramento, com assinatura eletrônica". Aliás, segundo o facilitador 35, o risco das audiências virtuais é "a questão do tempo. Uma sessão de mediação em processo com tempo certo pra finalizar, às vezes prejudica o bom andamento dos trabalhos. Contudo, sempre que isso acontece e acontece sempre, faço consignar o avanço nas tratativas e as chances de se obter o consenso".

Na hipótese da ocorrência de problemas técnicos (*v.g.* quedas da conexão), o tempo disponível para a realização do ato pode se afigurar ainda mais exíguo, o que tem o potencial condão de prejudicar até mesmo o trabalho dos conciliadores e mediadores. Inclusive, o facilitador 19 elencou como malefício das audiências virtuais o fato de que "por causa da instabilidade tecnológica não dispomos de tempo hábil e ambiente seguro para trabalhar a origem do conflito com foco na reparação da relação interpessoal/social e construção da paz social".

A questão do tempo dispensado para a realização da sessão virtual, em especial nas situações em que o ato se prolonga em decorrência de problemas de ordem técnica, também pode impactar a remuneração dos conciliadores e mediadores judiciais. É que o artigo 169 do Código de Processo Civil dispõe que, ressalvada a gratuidade processual, "o conciliador e o mediador receberão pelo seu trabalho remuneração prevista em tabela fixada pelo tribunal"[32] e o artigo 13 da Lei nº 13.140/2015 estabelece que "a remuneração devida aos mediadores

[32] BRASIL. Congresso Nacional. *Lei nº 13.105, de 16 de março de 2015*. Brasília: 2015.

judiciais será fixada pelos tribunais e custeada pelas partes".[33] Coube à Resolução nº 271/2018, do CNJ, fixar parâmetros de remuneração a ser paga aos conciliadores e mediadores judiciais. E, no âmbito do TJSP, a Resolução nº 809/2019 dispôs sobre o recebimento de remuneração pelos conciliadores e mediadores dos valores a serem pagos pelos serviços de mediação judicial. Ocorre que por essa regulamentação os conciliadores e mediadores judiciais são pagos por hora de trabalho ("valor da hora"), variável de acordo com o patamar (básico, intermediário ou avançado) e o valor estimado da causa (iniciando em "até R$ 50.000" e finalizando em "acima de R$ 10.000.000,00"). Inclusive, "ao final da mediação, o mediador deverá encaminhar às partes, juntamente com recibo ou nota fiscal de serviços, relatório das horas mediadas, contendo data, local e duração das sessões de mediação".[34] Nesse cenário, com o advento das sessões virtuais, a dúvida que surge diz respeito ao pagamento de horas excedentes necessárias em razão do desdobramento da duração da audiência em decorrência de falhas de natureza técnica.

O ponto foi notado pelo facilitador 9 nos seguintes termos:

> O único ponto negativo que vejo é o custo que o conciliador tem que arcar, para ter uma boa internet na sua casa, para poder realizar as audiências tranquilamente, haja vista que o fórum não disponibiliza espaço/ambiente de trabalho, para os conciliadores realizarem as sessões, com uma BOA internet, fornecida pelo Estado, para que a audiência corra tranquilamente. Esta questão é importantíssima, uma vez que os conciliadores, quando tem algum problema com a internet, se atrasa, por lentidão, sequer pode considerar o tempo de duração da sessão corretamente, porque a eventual lentidão da internet "do conciliador" é ressaltado como orientação inclusive para não cobrar segunda hora, do honorário do conciliador, porque é dito que o problema é na internet do conciliador...

A migração para a modalidade virtual também trouxe outra preocupação relativa à remuneração dos conciliadores e mediadores. É que "o pagamento ao mediador será efetuado, preferencialmente, no decorrer do procedimento",[35] conforme aduz o artigo 6º da Resolução nº 809/2019, do TJSP. Justamente por isso, era comum que a parte que não antecipou o depósito do valor dos honorários fizesse o seu pagamento diretamente ao conciliador/mediador (algumas vezes, inclusive em espécie) no próprio ato da audiência. Porém, esse contato imediato

[33] BRASIL. Congresso Nacional. *Lei nº 13.140, de 26 de junho de 2015*. Brasília: 2015.
[34] SÃO PAULO (ESTADO). Tribunal de Justiça do Estado de São Paulo. Órgão Especial. *Resolução nº 809/2019*. São Paulo, SP: 2019.
[35] SÃO PAULO (ESTADO). Tribunal de Justiça do Estado de São Paulo. Órgão Especial. *Resolução nº 809/2019*. São Paulo, SP: 2019.

entre a parte e o facilitador não ocorre nas sessões virtuais, de sorte que o pagamento *a posteriori* fica dependente de depósito em conta ou via PIX. Daí a preocupação do facilitador 3: "o maior prejuízo, a meu ver, é o NÃO recebimento pelo conciliador/mediador de seus honorários, pois, apesar da parte devedora sair devidamente intimada do valor a ser pago/depositado e do prazo para fazê-lo, constando no Termo da Audiência e aceito pelas partes, não o fazem e nem se preocupam com isso".

Por fim, outro ponto desfavorável das audiências de conciliação e mediação por videoconferência que foi amplamente citado nas respostas dadas ao formulário eletrônico refere-se ao risco de a Justiça tornar-se inacessível aos denominados "excluídos digitais". Foi justamente o risco aventado pelo facilitador 38: "segregar aqueles que não têm acesso à internet e eletrônicos, bem como aqueles que têm dificuldade de compreensão (idosos)".

Segundo o artigo 1º, inciso I, da Recomendação nº 101/2021, do CNJ, por excluído digital entende-se a "parte que não detém acesso à internet e a outros meios de comunicação digitais e/ou que não tenha possibilidade ou conhecimento para utilizá-los, inclusive com tecnologia assistiva".[36] Como se observa da definição transcrita, é reputada "excluído digital" não apenas aquela pessoa que não tem acesso à internet, por exemplo, pelo alto custo financeiro para a sua aquisição ou pela indisponibilidade do serviço de provedor de internet na região em que reside. Com efeito, também o será aquela pessoa que não tem conhecimento técnico (habilidade) para fazer uso eficiente das novas TICs. É o caso, por exemplo, do idoso, que, por falta de interesse, não sabe como manusear um *smartphone* ou como acessar um *link* de internet ou que sequer tem um computador em sua casa, ainda que tivesse condições econômicas para adquiri-lo. Nesse sentido, pode-se concluir que a exclusão digital é "um estado no qual um indivíduo é privado da utilização das tecnologias de informação, seja pela insuficiência de meios de acesso, seja pela carência de conhecimento ou por falta de interesse".[37] Consequentemente, o fenômeno da exclusão digital pode provocar muitas dificuldades que "poderão se impor não só à pessoa desprovida de computador e aparatos adjacentes, mas também a quem, apesar de dispor desses equipamentos, revela dificuldade de os manipular".[38]

O contingente de pessoas que se qualificam como "excluídos digitais" no Brasil ainda é bastante expressivo. Não é outra a conclusão que se extrai da

[36] BRASIL. Conselho Nacional de Justiça. *Recomendação nº 101, de 12 de julho de 2021*. Brasília: 2021.

[37] ALMEIDA, Lília Bilati de; PAULA, Luiza Gonçalves de. O retrato da exclusão digital na sociedade brasileira. *Revista de Gestão da Tecnologia e Sistemas de Informação*, vol. 2, n. 1, p. 55-67, 2005, p. 56.

[38] TARTUCE, Fernanda; BRANDÃO, Débora. Mediação e conciliação on-line, vulnerabilidade cibernética e destaques do ato normativo nº 1/2020 do Nupemec/SP. *Cadernos Jurídicos*, São Paulo, ano 21, n. 55, p. 153-162, jul./set. 2020, p. 155.

Pesquisa Nacional por Amostra de Domicílios Contínua – PNAD Contínua 2018, elaborada e divulgada pelo IBGE (Instituto Brasileiro de Geografia e Estatística). A pesquisa demonstrou que cerca de um quarto (25%) da população acima de 10 anos de idade não utilizou a internet no quarto trimestre de 2018, o que equivale a aproximadamente 47 milhões de brasileiros.[39]

O facilitador 3 visualizou riscos na realização da sessão por videoconferência "quando a parte não tem experiência com o aparelho utilizado para fazer a conexão e ingressar na audiência, sobretudo pela idade avançada". Por seu turno, o facilitador 4 destacou que "as partes, eventualmente, demonstram dificuldade em utilizar a tecnologia. Principalmente, para as pessoas com idade avançada".

É verdade, porém, que a presença de excluídos digitais não pode ser, por si só, um motivo para negar continuidade aos avanços e a todas as facilidades e transformações advindas da evolução da tecnologia. A bem dizer, o que se torna premente é a adoção de medidas inclusivas que possam permitir que tais pessoas também gozem dos benefícios proporcionados pela internet, incluindo as comodidades derivadas das audiências virtuais. No particular, duas medidas apresentam notória importância: a instalação, nos prédios dos fóruns e dos CEJUSCs, de salas equipadas com computadores, câmeras e microfones que possibilitem a participação dos excluídos digitais nas audiências remotas, inclusive com o apoio técnico de um servidor público para auxiliar a parte no adequado manuseio dos equipamentos;[40] e a designação de *audiências híbridas ou mistas*, de sorte que seja franqueado ao excluído digital o comparecimento ao CEJUSC para que possa participar da solenidade de conciliação ou mediação de modo presencial. Não se recomenda, pois, que a audiência seja realizada exclusivamente por videoconferência ("100% virtual"), resguardando-se a possibilidade de a parte participar do ato, querendo, presencialmente. Noutras palavras, "a incorporação da tecnologia, com todos seus benefícios, impõe a manutenção das vias tradicionais de acesso".[41] Nesse sentido é o teor do Enunciado nº 68 da II Jornada de Prevenção e Solução Extrajudicial de Litígios, do CJF: "Constatada a vulnerabilidade tecnológica do indivíduo para a participação em determinado ato processual, o magistrado pode facultar a realização do ato na sua forma híbrida ou presencial".

O facilitador 8 vislumbrou prejuízo quando "se tratar de um excluído digital, mas nesse caso poderia dirigir-se ao escritório do patrono, ou, caso não tenha

[39] BRASIL. Instituto Brasileiro de Geografia e Estatística (IBGE). Pesquisa Nacional por Amostra de Domicílios Contínua – PNAD Contínua 2018. Brasília: 2020, p. 09.

[40] A propósito, o CNJ, por meio da Recomendação nº 130, de 22 de junho de 2022, recomendou aos tribunais pátrios a instalação de Pontos de Inclusão Digital (PID), para maximizar o acesso à Justiça e resguardar os direitos dos excluídos digitais.

[41] SIQUEIRA, Dirceu Pereira; LARA, Fernanda Corrêa Pavesi; LIMA, Henriqueta Fernanda C. A. F. Acesso à Justiça em tempos de pandemia e os reflexos nos direitos da personalidade. *Revista da Faculdade de Direito da UERJ*, Rio de Janeiro, n. 38, p. 37, dez. 2020.

advogado constituído, pode comparecer no próprio CEJUSC, JEC ou Vara, que poderão permitir acesso desta parte a um computador para participação em audiência".

Nas palavras do facilitador 1: "Acredito que o único malefício seja em relação a não utilização dos meios virtuais por todos ainda. Afinal, quando falta acesso à internet fica muito difícil, ainda mais em uma situação de carência de recursos por boa parte da população brasileira. Por isso que acredito que o sistema híbrido seja o mais indicado".

À vista dos achados da presente pesquisa, se nota que o uso da videoconferência pode trazer consigo um conjunto de prejuízos e riscos, enfim, de pontos desfavoráveis: dificuldade na construção da empatia e no restabelecimento do diálogo entre as partes envolvidas no conflito (o "calor humano" e o "olho no olho"); eventual mácula à regra da confidencialidade e ao sigilo da sessão, com a interferência indevida de terceiras pessoas; problemas de ordem técnica (constantes quedas de internet ou energia, oscilação da rede, etc.); demora e atraso para o início e encerramento do ato; obstáculo para acessibilidade dos excluídos digitais, dentre outros. Porém, malgrado todas essas possíveis adversidades, o entendimento da ampla maioria dos conciliadores e mediadores que efetivamente atuam nos CEJUSCs do Estado de São Paulo, que responderam ao instrumento de pesquisa, é de entusiasmo positivo em relação às audiências virtuais.

O que prevaleceu é o entendimento de que, apesar das possíveis intercorrências, a boa atuação técnica do conciliador e do mediador judicial contribui para a satisfatória superação dos obstáculos e qualifica a sessão virtual como um procedimento vantajoso.

4.4 As sessões virtuais de conciliação e mediação no pós-pandemia

Não se olvida que a realização (ou, ao menos, a sua ampliação generalizada) de sessões de conciliação e mediação por videoconferência é novidade advinda ao tempo da pandemia de covid-19, como visto na seção 3, *supra*. Cuidou-se de alternativa lançada para assegurar a continuidade da atividade jurisdicional no período de anormalidade e calamidade pública. Nos dizeres do facilitador 42: "as necessidades impõem mudanças imediatas e adaptações tecnológicas permitindo que grandes evoluções aconteçam em um curto período de tempo, com a única finalidade de não cessar a prestação jurisdicional".

Ocorre que, diante do notório sucesso das sessões de conciliação e mediação em ambiente virtual, já há importantes vozes que sufragam ser oportuno e conveniente a sua manutenção mesmo para após o término do estado de

calamidade pública decorrente da pandemia do novo coronavírus, isto é, num contexto pós-pandemia. A propósito, há quem proponha a prática dos atos virtuais "com a utilização das audiências e sessões virtuais, como regra no ambiente jurídico, inclusive, após a pandemia da covid 19, já que todos os operadores envolvidos com a Justiça são beneficiados".[42]

A fim de trazer subsídios empíricos ao debate, os conciliadores e mediadores de São Paulo foram instados a se manifestar se entendem ser viável que as audiências de conciliação e mediação permaneçam sendo realizadas virtualmente mesmo após o encerramento da situação de calamidade pública decorrente da pandemia de covid-19.

Apenas 4 (quatro) respondentes declararam ser contrários à manutenção do uso da videoconferência para sessões de conciliação e mediação no contexto pós-pandemia. "Não vejo viabilidade pela dificuldade de muitos que não dominam a ferramenta", disse o facilitador 43. "Não é o meu desejo que permaneça assim. Creio que, passando essa fase de pandemia, as audiências presenciais devem ser retomadas, pois são mais interessantes, pelo fato de se estar na presença das partes e de oportunizar um diálogo mais caloroso", complementou o facilitador 13.

8 (oito) respondentes se posicionaram a favor das sessões virtuais, desde que para determinadas situações, destacando que em alguns casos a audiência presencial deve ser mais recomendável. Com efeito, assim declarou o facilitador 29: "Na minha opinião, vai depender... Se for audiência de mediação de família, acredito ser mais humanizada e eficaz a presencial. Sem contar que, em razão do princípio da confidencialidade e do dever de sigilo, atende mais aos requisitos da audiência a modalidade presencial, estando numa sala só as partes que estão envolvidas nos autos". Por sua vez, o facilitador 38 assim declarou: "acredito que sim, mas em algumas situações (sobretudo mediações familiares ou ações em que alguma parte seja idosa ou hipossuficiente) acredito que seja preferível que o ato seja realizado presencialmente". "Creio que somente as ações de família possam ser presenciais... as outras poderiam ser por videoconferência...", disse o facilitador 44. Na opinião do facilitador 19: "creio que para cada caso deve ser avaliado a complexidade e a necessidade da audiência presencial pelos sujeitos do processo". Para o facilitador 45: "Sim, a depender do caso. Se forem casos pontuais e de menor complexidade sou a favor".

A ampla maioria daqueles que responderam ao instrumento da pesquisa, a saber, 38 (trinta e oito) respondentes, manifestaram-se plenamente favoráveis à continuidade das audiências de conciliação e mediação na modalidade virtual,

[42] MANFIO, Mônica Tucunduva Spera. Benefícios das audiências virtuais. *In*: TROSTER, Roberto Luis; ROSSI, Carolina Nabarro Munhoz; LAGRASTA, Valeria Ferioli (coord.). *O direito como instrumento de Política Econômica*: propostas para um Brasil melhor. São Paulo: 1. ed. CEDES, 2021, p. 521.

sem ressalvas. Na visão do facilitador 35: "Não só entendo pela viabilidade, como defendo essa forma de otimizar os trabalhos e dar acesso a todos num ambiente seguro, informal, acolhedor e eficiente". "Sim entendo ser viável que as audiências de conciliação e mediação permaneçam sendo realizadas remotamente, por videoconferência", declinou o facilitador 8. O facilitador 20 entende "perfeitamente viável que as audiências continuem no formato remoto". Segundo o relato do facilitador 28: "Sim. Acredito e torço por isso. Podemos melhorar a cada dia".

Eis o depoimento do facilitador 5:

> Entendo viável que as audiências de conciliação e mediação permaneçam sendo realizadas remotamente, por videoconferência, mesmo após o encerramento da pandemia de Covid-19, mesmo porque vejo uma vantagem considerável de economia do tempo e do custo financeiro para os participantes, já que podem participar, dialogar e negociar dentro de um ambiente virtual, onde é possível chegar a um consenso com relação a questão abordada, sendo possível ainda a emissão de termo de acordo com a concordância das partes presentes envolvidas, ou em caso de conciliação infrutífera é possível a emissão de termo de conciliação infrutífera com ciente das partes, e, assim sendo, a forma de audiência de conciliação e mediação por videoconferência não causa nenhum prejuízo às partes, apenas é uma forma do Judiciário disponibilizar uma ferramenta a mais a ser utilizada pelos participantes para resolverem as questões abordadas de forma rápida, pacífica e segura, dentro de um ambiente jurisdicional.

De mais a mais, houve três menções à possibilidade de coexistirem as sessões no formato exclusivamente eletrônico ("100% virtual") e aquelas realizadas no modelo *híbrido ou misto*, no qual alguns participantes ingressam no ato remotamente, de suas respectivas casas e valendo-se de seus computadores pessoais ou *smartphones*, e outras podem tomar parte presencialmente, em sala instalada no prédio do fórum ou do CEJUSC (o que contribui para o acesso à Justiça dos excluídos digitais). Nesse sentido, respondeu o facilitador 6: "Sim, poderia ser mista. Assim, quando a parte não tiver acesso à internet, ela pode ir ao fórum, CEJUSC ou Juizado para realizar a audiência". No entendimento do facilitador 21: "Sim, acredito na sua permanência. Inclusive, com a oportunidade de ser híbrida e, assim, permitir para aqueles que desejam comparecer no CEJUSC para que a sua participação possa ser realizada na videoconferência". Ainda, o facilitador 25 assim se manifestou: "Sim, podendo ser híbrida para que as partes com dificuldades de acesso encontrem o ambiente do CEJUSC como uma forma de apoio para a sua participação".

De fato, ainda na hipótese de continuidade das audiências por videoconferência, para um cenário pós-pandemia, é fundamental que o progresso tecnológico advindo com a virtualização da Justiça seja aplicado em conjunto com estratégias

inclusivas para a garantia ampla e irrestrita de acesso à Justiça, inclusive aos métodos autocompositivos, para todos os cidadãos, de modo a se evitar que "a excepcionalidade do momento imprima transformações perenes, sem planejamento adequado e alheia a uma pauta inclusiva".[43]

5 Conclusão

É indene de dúvidas que no período da calamidade de saúde pública derivada da pandemia do novo coronavírus se verificou um nítido avanço do processo de virtualização do Poder Judiciário brasileiro. Uma das principais marcas desse "novo normal" (como se convencionou denominar) foi a ampliação generalizada do uso das audiências remotas. É verdade que a videoconferência já era aplicada em terras brasileiras, contudo, apenas de modo pontual e episódico, em determinadas situações excepcionais. Foi no período da pandemia de covid-19 que, para observância da necessidade de distanciamento social como forma de prevenção ao contágio da doença, houve um "surto" da videoconferência.

As audiências virtuais foram realizadas como forma eficaz de se assegurar a continuidade do acesso à Justiça, mesmo em tempo de tamanha adversidade. A bem dizer, garantir o acesso ao Poder Judiciário de forma ampla, como se entende hodiernamente. Portanto, incluindo a manutenção das práticas autocompositivas de solução consensual dos conflitos de interesse. Desse modo, não tardou que também as sessões de conciliação e de mediação começassem a ser realizadas em ambiente virtual. No Estado de São Paulo, a regulamentação veio com o Ato Normativo do NUPEMEC nº 01, de junho de 2020.

Após mais de dois anos de audiências de conciliação e de mediação realizadas por videoconferência em São Paulo, a presente pesquisa objetivou dar voz aos auxiliares da Justiça paulista, ouvindo o que os conciliadores e mediadores que atuam nos CEJUSCs de São Paulo entendem a respeito das sessões virtuais. Com a coleta dos relatos empíricos dos facilitadores paulistas, é possível responder satisfatoriamente à questão da pesquisa, identificando, a partir de suas falas, os benefícios e desvantagens das audiências remotas.

Evidentemente, os resultados da presente pesquisa são limitados. A uma porque reflete apenas e tão somente a realidade do Tribunal de Justiça do Estado de São Paulo, sendo interessante que sejam feitas novas pesquisas a fim de desvendar o cenário fático existente no âmbito de outros tribunais nacionais. A duas porque o alcance deste estudo, mesmo no Estado de São Paulo, é apenas

[43] SIQUEIRA, Dirceu Pereira; LARA, Fernanda Corrêa Pavesi; LIMA, Henriqueta Fernanda C. A. F. Acesso à Justiça em tempos de pandemia e os reflexos nos direitos da personalidade. *Revista da Faculdade de Direito da UERJ*, Rio de Janeiro, n. 38, p. 38, dez. 2020.

parcial, pois foram ouvidos apenas cinquenta conciliadores/mediadores judiciais atuantes nos CEJUSCs paulistas, sendo oportuno que seja feita uma posterior pesquisa mais ampla, que consiga acobertar um número maior de auxiliares da Justiça bandeirante. Um estudo mais abrangente pode ser capitaneado pelo Núcleo Permanente de Métodos Consensuais de Solução de Conflitos (NUPEMEC) do TJSP. Por fim, há limitação decorrente da anonimização dos dados dos respondentes do formulário eletrônico, o que impede sejam feitas análises parciais por categorias e filtros. De todo modo, a pretensão da presente pesquisa não foi captar a posição institucional dos conciliadores e mediadores paulistas, mas ouvir alguns deles, a fim de coletar subsídios de ordem empírica sobre o fenômeno em estudo (as sessões de autocomposição virtuais).

Os achados da pesquisa convergem no sentido de que, na visão dos conciliadores e mediadores que atuam nos CEJUSCs do Estado de São Paulo, as audiências remotas apresentam algumas deficiências, dentre elas: diminuição qualitativa do contato humano entre as partes, com prejuízo para o estabelecimento do vínculo de acolhimento e empatia entre os participantes do ato (para alguns, não há o "olho no olho" e o "calor humano"); dificuldade para que as partes envolvidas no conflito possam se ouvir e se compreender, impactando negativamente no restabelecimento do diálogo e da comunicação construtiva; riscos derivados de possíveis problemas de ordem técnica (*v.g.* quedas e oscilações do sinal de internet; qualidade precária da internet; quedas de energia; defeitos no vídeo e/ou no áudio do participante; congelamento da tela; *delays*; som inaudível, etc.), inclusive, com consequências para o entendimento da audiência; perda do senso de seriedade da solenidade judicial, com menor engajamento das partes; dilação da duração da sessão, afetando a pauta de audiências; risco de malferimento do princípio da confidencialidade e do dever de sigilo da sessão; eventuais dificuldades na aplicação, com qualidade, das técnicas autocompositivas; e a potencialidade do ato de segregar os usuários da Justiça, principalmente em relação àqueles que não dispõem de recursos materiais (computador, *smartphone*, provedor de internet, etc.) ou que não tenham habilidade e/ou conhecimentos técnicos para o manuseio das tecnologias (*v.g.* algumas pessoas de idade mais avançada).

Por outro lado, também foram apontadas várias vantagens e diversos benefícios decorrentes da realização das sessões virtuais, a saber: desnecessidade de deslocamento até o fórum ou o prédio do CEJUSC; economia de tempo e de dinheiro; eliminação do tempo ocioso de espera nas filas, aguardando-se o início da audiência; maior praticidade e comodidade, permitindo-se que o participante possa se dedicar a outras atividades (domésticas ou laborais), otimizando o tempo até que o ato, de fato, comece; possibilidade de se ingressar na audiência virtual de qualquer lugar do globo terrestre; maior segurança ao ato, evitando-se eventuais

encontros “face a face” indesejados; redução da necessidade de expedição de cartas precatórias e rogatórias; diminuição do índice de abstenção das partes às sessões; e maior agilidade e celeridade ao andamento processual, dentre outras.

Por derradeiro, sem prejuízo dos pontos desfavoráveis indicados (que, ao fim e ao cabo, podem ser contornados ou eliminados), a significativa maioria dos respondentes (38, sem ressalvas) entendeu que as audiências de mediação e conciliação virtuais devem permanecer mesmo após o encerramento do estado de calamidade pública decorrente da pandemia de covid-19. De fato, à luz do relato da maioria dos facilitadores ouvidos, a virtualização das sessões de conciliação e mediação parece ser mesmo caminho sem volta.

Conciliation and mediation hearings by videoconference in São Paulo state: benefits and disadvantages according to empirical reports from judicial conciliators and mediators

Abstract: The present empirical research, of qualitative nature, aims to collect reports of the professional experience of conciliators and judicial mediators who conducted conciliation and mediation hearings at a distance, by videoconference, within the scope of the Court of Justice of São Paulo State, notably from the covid-19 pandemic advent, in order to carry out a theoretical and practical analysis of possible benefits and disadvantages in performing the act by virtual modality. To achieve the proposed objective, data were obtained from an online form consisting of a semi-structured questionnaire with eight open questions, sent by link to the CEJUSCs of the São Paulo State and forwarded to the respective conciliators and mediators. The survey remained open to responses from June 6 to 24, 2022, and fifty respondents were obtained. As a result of the research, it was evident that the vast majority of conciliators and mediators who answered the form evaluate the virtual hearings in a very satisfactory way and, despite some disadvantages pointed out, believe that the practice will tend to continue even after the pandemic period.

Keywords: Videoconference. Conciliation and mediation hearings. Remote hearings. *Online Dispute Resolution (ODR)*. Access to electronic Justice.

Referências

ALMEIDA, Lília Bilati de; PAULA, Luiza Gonçalves de. O retrato da exclusão digital na sociedade brasileira. *Revista de Gestão da Tecnologia e Sistemas de Informação*, vol. 2, n. 1, p. 55-67, 2005. Disponível em: https://doi.org/10.1590/S1807-17752005000100005. Acesso em: 10 set. 2022.

BRASIL. Congresso Nacional. *Lei nº 13.105, de 16 de março de 2015*. Código de Processo Civil. Brasília: 2015a. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm. Acesso em: 9 set. 2022.

BRASIL. Congresso Nacional. *Lei nº 13.140, de 26 de junho de 2015*. Dispõe sobre a mediação entre particulares como meio de solução de controvérsias e sobre a autocomposição de conflitos no âmbito da administração pública. Brasília: 2015b. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13140.htm. Acesso em: 9 set. 2022.

BRASIL. Conselho Nacional de Justiça. *Resolução nº 125, de 29 de novembro de 2010*. Dispõe sobre a Política Judiciária Nacional de tratamento adequado dos conflitos de interesses no âmbito do Poder Judiciário. Brasília: 2010. Disponível em: https://atos.cnj.jus.br/files/compilado18553820210820611ffaaaa2655.pdf. Acesso em: 9 set. 2022.

BRASIL. Conselho Nacional de Justiça. André Gomma de Azevedo (org.). *Manual de Mediação Judicial*. 6. ed. Brasília: 2016. Disponível em: https://www.cnj.jus.br/wp-content/uploads/2015/06/f247f5ce60df2774c59d6e2dddbfec54.pdf. Acesso em: 8 set. 2022.

BRASIL. Conselho Nacional de Justiça. *Recomendação nº 101, de 12 de julho de 2021*. Recomenda aos tribunais brasileiros a adoção de medidas específicas para o fim de garantir o acesso à Justiça aos excluídos digitais. Brasília, DF: 2021. Disponível em: https://atos.cnj.jus.br/atos/detalhar/4036. Acesso em: 9 set. 2022.

BRASIL. Instituto Brasileiro de Geografia e Estatística (IBGE). *Pesquisa Nacional por Amostra de Domicílios Contínua – PNAD Contínua 2018*. Brasília: 2020. Disponível em: https://biblioteca.ibge.gov.br/index.php/bibliotecacatalogo?view=detalhes&id=2101705. Acesso em: 8 set. 2022.

CAIUBY, Celia; MAIA, Andrea. O afeto nos métodos de solução de controvérsias. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 02, n. 04, p. 45-56, jun./dez. 2020, p. 54.

CAPPELLETTI, Mauro; GARTH Bryant. *Acesso à Justiça*. Trad. por Ellen Gracie Northfleet. Porto Alegre: Sérgio Antônio Fabris Editor, 1988. Reimpressão 2015.

FERRAZ, Deise Brião; SILVEIRA, Simone de Biazzi Avila Batista da. *Online Dispute Resolution* (*ODR*) como ferramenta de acesso à Justiça e mudança na gestão de conflitos no Brasil através da Mediação *On-line*. *Revista de Direito Público*, Porto Alegre, vol. 16, n. 88, 2019, p. 119-143, jul./ago. 2019. Disponível em: https://www.portaldeperiodicos.idp.edu.br/direitopublico/article/view/3450. Acesso em: 2 out. 2022.

GODOY, Arilda Schmidt. Pesquisa qualitativa: tipos fundamentais. *RAE – Revista de Administração de Empresas*, São Paulo, v. 35, n. 3, p. 20-29, maio/jun. 1995. Disponível em: https://www.scielo.br/j/rae/a/ZX4cTGrqYfVhr7LvVyDBgdb/?format=pdf&lang=pt. Acesso em: 7 set. 2022.

JESUS, Antonio Marcos da Silva de. A confidencialidade na mediação de conflitos coletivos no âmbito do Ministério Público: uma abordagem analítico-comportamental do Direito. *Revista de Informação Legislativa*, Brasília, v. 57, n. 227, p. 105-130, 2020. Disponível em: https://www12.senado.leg.br/ril/edicoes/57/227/ril_v57_n227_p105.pdf. Acesso em: 8 set. 2022.

KATSH, Ethan. ODR: A look at history. *In*: WAHAB, Mohamed S. Abdel; KATSH, Ethan; RAINEY, Daniel (org.). *Online Dispute Resolution: Theory and Practice*. Eleven International Publishing, 2014. Disponível em: http://www.ombuds.org/odrbook/katsh.pdf. Acesso em: 5 out. 2022.

LOPES JR., Aury. O interrogatório on-line no processo penal: entre a assepsia judiciária e o sexo virtual. *Boletim IBCCRIM*, São Paulo, vol. 13, n. 154, p. 06-07, set. 2005.

MANFIO, Mônica Tucunduva Spera. Benefícios das audiências virtuais. *In*: TROSTER, Roberto Luis; ROSSI, Carolina Nabarro Munhoz; LAGRASTA, Valeria Ferioli (coord.). *O direito como instrumento de política econômica:* propostas para um Brasil melhor. São Paulo: 1. ed. CEDES, 2021.

MIRANDA NETTO, Fernando Gama de; PELAJO, Samantha. O futuro da justiça multiportas: mediação em risco? *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 01, n. 02, p. 121-138, jul./dez. 2019, p. 121.

OLIVEIRA, Ana Sofia Schmidt de. Interrogatório on-line. *Boletim IBCCRIM*, São Paulo, vol. 42, p. 01, jun. 1996.

PARKINSON, Lisa. *Mediação familiar*. Belo Horizonte: Del Rey, 2016.

PINTO, Ronaldo Batista. Interrogatório On-Line ou Virtual – Constitucionalismo do Ato e Vantagens em sua Aplicação. *Revista IOB de Direito Penal e Processual Penal*, Porto Alegre, vol. 1, n. 1, p. 7-18, abr./maio 2020.

SÃO PAULO (ESTADO). Tribunal de Justiça do Estado de São Paulo. Órgão Especial. *Resolução nº 809/2019*. Dispõe sobre o recebimento de remuneração pelos conciliadores e mediadores dos valores a serem pagos pelos serviços de mediação judicial. São Paulo: 2019. Disponível em: http://esaj.tjsp.jus.br/gecon/legislacao/find/197289. Acesso em: 11 set. 2020.

SÃO PAULO (ESTADO). Tribunal de Justiça do Estado de São Paulo. Núcleo Permanente de Métodos Consensuais de Solução de Conflitos. *Ato Normativo do NUPEMEC nº 01/2020*. Autoriza a realização das sessões de conciliação e mediação nos Centros Judiciários de Solução de Conflitos e Cidadania (CEJUSCs) por meio do sistema de videoconferência. São Paulo: 2020. Disponível em: http://esaj.tjsp.jus.br/gecon/legislacao/find/188453. Acesso em: 11 set. 2020.

SIQUEIRA, Dirceu Pereira; LARA, Fernanda Corrêa Pavesi; LIMA, Henriqueta Fernanda C. A. F. Acesso à Justiça em tempos de pandemia e os reflexos nos direitos da personalidade. *Revista da Faculdade de Direito da UERJ*, Rio de Janeiro, n. 38, dez. 2020. Disponível em: https://www.e-publicacoes.uerj.br/index.php/rfduerj/article/view/51382. Acesso em: 10 set. 2022.

TARTUCE, Fernanda. *Mediação nos conflitos civis*. 2. ed., rev., atual. e ampl. Rio de Janeiro: Forense; São Paulo: Método, 2015.

TARTUCE, Fernanda; BRANDÃO, Débora. Mediação e conciliação on-line, vulnerabilidade cibernética e destaques do ato normativo nº 1/2020 do Nupemec/SP. *Cadernos Jurídicos*, São Paulo, ano 21, n. 55, p. 153-162, jul./set. 2020. Disponível em: https://www.tjsp.jus.br/download/EPM/Publicacoes/CadernosJuridicos/cj_n55_5.2_media%C3%A7%C3%A3o%20e%20concilia%C3%A7%C3%A3o%20on-line_.pdf. Acesso em: 10 set. 2022.

ZANFERDINI, Flávia de Almeida Montingelli; OLIVEIRA, Rafael Tomaz de. Online Dispute Resolution in Brazil: Are we ready for this cultural turn? *Revista Paradigma*, Ribeirão Preto, ano 20, vol. 24, n. 1, p. 68-80, jan./jun. 2015. Disponível em: https://revistas.unaerp.br/paradigma/article/view/589. Acesso em: 2 out. 2022.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

OLIVEIRA, Heitor Moreira de; DIAS, Paulo Cezar. Audiências de conciliação e mediação por videoconferência no Estado de São Paulo: benefícios e desvantagens segundo relatos empíricos dos conciliadores e mediadores judiciais. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 146-186, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.8.

DOI: 10.52028/rbadr.v4i8.9

Future of Dispute Resolution and Investment in BRICS

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Abstract: The BRICS is a term which refers to the group of Five Nations – namely, Brazil, Russia, India China and South Africa. They are touted to be emerging economies and hold an annual BRICS summit to commemorate their partnership and further their growth. One of the crucial components for their growth is investment within the BRICS Nations. This is aimed at the promotion of an equitable international economic order and expediting the growth of the BRICS nations. The dispute settlement mechanism is the key to establishing a stable and progressive investment regime. The countries of BRICS are culturally different and have different legal systems. This also leads to a varied regime of investment protection. In the 2014 annual summit, the Ministries of External Relations of the BRICS nations agreed to build a common approach to improve the investment agreement and improve their dispute settlement mechanism. The paper analyses the existing investment regime, legal systems of the BRICS nations and provides suggestions as to how the dispute settlement mechanism can further be amended and applied for encouraging investment and promoting economic growth.

Keywords: BRICS. Investment Protection Regime. Dispute Resolution.

Summary: BRICS is an organisation where five of the world's most promising economies have joined hands with a view to make the global system fairer and equitable. A fairer and just arbitration mechanism at the International Level contributes to this in a significant manner as it allows the developing and the least developed countries a chance to establish their presence in the international order. The existing system of arbitration is said to be dominated by the Global North and the Global South is often on the receiving end during international arbitration. This has been recognised by the BRICS nations and they have already started taking steps to provide a solution to this issue through the development of a BRICS arbitration mechanism. It is pivotal as it allows for an alternative to the currently existing

world order. The establishment of the BRICS dispute resolution centre at Shanghai seemed like a solution but it never took off. However, the internal development amongst the BRICS nations such as the India-Brazil BIT have been encouraging. Moreover, India has led the way through amendments of the Indian Arbitration and Conciliation Act, 1996 in a manner where it is more conducive to undergo arbitration and the process is made convenient and fairer for all the parties involved. Moreover, the BRICS nations have not compromised on collective measures as well and have already set up the Rules of Procedure of BRICS Expert Committee on Arbitration. The results of the deliberations of the committee will play a pivotal role in the determination of the future of the arbitration regime in the future. The winds of change are coming with the global south taking the lead. The European Union too has made certain changes to its arbitration agreements and the BRICS is expected to lead the way into a reformed era of arbitration.

Objective and scope of research

The research is carried out to understand the arbitration mechanism in the BRICS nations. BRICS has positioned itself as an influential alternative in the global system rivalling the dominance of the Western nations. The International Arbitration mechanism has been under scrutiny multiple times particularly by the developed and the least developed countries who have accused the existing system of favouring the Western nations and under representation of arbitrators from their countries. The BRICS sought to provide an alternative forum for dispute resolution and the establishment of the Shanghai Dispute Resolution Centre and the Expert Committee on Arbitration seemed to be progressive steps towards the same. However, since the Covid-19 Pandemic, the BRICS nations seem to have fallen off track as no significant progress has been made. This paper analyses the flaws in the current arbitration system, the efforts of BRICS to provide a viable alternative and suggestions for the establishment of an alternate dispute resolution mechanism under the aegis of the BRICS nations.

Research methodology

The methodology that will be employed is a secondary research methodology. A study of the existing resources like judgments, journal articles, Bilateral Investment Treaties, Legislations, Rules and Mechanisms will be used to formulate an analysis and provide suggestions for improvement of the existing regime.

Introduction

BRICS

The current global order is still largely regulated and dominated by the developed countries. They are still able to manage institutions, regulate currency exchanges and valuations on terms which are favourable to them. The legal mechanisms at the International Level such as World Trade Organisation, International Court of Justice, Permanent Court of Arbitration and more are primarily developed with the jurisprudence of the Western nations.

The emergence of developing countries who have economies which are growing at a fast pace, the imbalanced nature of the current order is being challenged. BRICS which includes Brazil, Russia, India, China and South Africa is a joint initiative of the nations to improve the international trade and aid in the creation of a more equitable economic order.[1] These countries have great potential and are attempting to leverage their ample resources for collective growth and a greater say in International Trade and investment. However, the key to bringing significant change in the International Order will still be dependent on the change in the functioning of International Legal Systems. The paper explores the existing legal systems of the BRICS nations with respect to investment disputes, their shortcomings and the positive steps which have been taken by the BRICS nations to harmonise their systems for greater economic growth.

Understanding the unfair arbitration scenario: why the stance taken by BRICS is important?

The process of arbitration has been growing in relevance and importance over the last few years. Its acceptability as a mode of dispute resolution is increasing with several arbitration institutions being set up on the International Level. The bodies like World Anti-Doping Agency, International Olympics Association and more have also acknowledged arbitration as a key mode of dispute resolution. The establishment of the *Court of Arbitration for Sport* in Switzerland was also done keeping the same in mind. In addition to this, arbitration is a key component of the International Investment Treaty Regime. In nearly all of the treaties, arbitration has been used as the only method of dispute resolution with a very limited scope of appeal. The arbitration agreements allow the investors to directly negotiate with foreign government in case there is a conflict. It has been seen as a way to

[1] *Joint Statement of the BRIC Countries*, Leaders Yekaterinburg, Russia (June 16, 2009) 5.

reduce the political motives of these disputes and provide a neutral forum for the proceedings.[2]

Professor M Sornarajah in his book, "The International Law on Foreign Investment," has expressed his views on how the International Investment Law has been expanded by the West. The Jurisdiction and making of norms have been largely controlled by the West. In cases of conflict, the decision makers are usually the private arbitrators who practically control the entire landscape of Investor State Dispute Settlement (ISDS). Over the recent years, there has often been a lot of controversy related to the handling of such disputes by the arbitrators. In the infamous Vodafone case in India, India had to spend millions of dollars in legal fees, pay for the legal fees of the corporation, bear arbitration expenses in addition to losing out on $3.8 Billion of revenue. The persons who have awarded the damages to the corporations are not judicial officers or judges who are well versed with the principles of law and aim to deliver equitable justice. They are presided over by arbitrators who can be academicians or lawyers who decide on such major issues. The proceedings are often kept secret and are not made open to public.

This creates a lot of debate regarding the conflict of interest with the arbitrators who preside over the proceedings also working for law firms or offering consultancy services. They service big corporations and are dependent on them for revenue. Their image is dependent upon how they handle the cases involving them. There is no assurance at all that they are going to operate in a fair and unbiased manner without showing any partiality. It is a common practice for a judge to recuse themselves from a case if there is a conflict of interest or the judge feels that their judgment may be clouded. However, when it comes to arbitration, such principles are hardly followed. Therefore, the selection of arbitrators needs to be curated carefully and done in a manner which is not detrimental to the interests of the parties and provides a sense of fairness and justice.

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[2] I.F.I. Shihata, *Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, ICSID Review–FILJ 1–25 (1986).

are extremely narrow. In the case of C.M.S v. Argentina, an appeal was filed before the annulment committee. The committee had found that the decision of the arbitral tribunal "contained manifest errors of law." However, it was powerless to annul significant parts of the decision since it had a very limited mandate.[3] This is a clear-cut example of the way the arbitral system is misused by the Western countries to gain favourable decisions.

In another case, *re The Owners of the Steamship Catalina and The Owners of the Motor Vessel Norma,*[4] where a counsel to one of the parties cited an Italian case. The response of the arbitrator was shocking and reeked of bias. He said that, *"Italians are all liars in these cases and will say anything to suit their book. The same thing applies to the Portuguese. But the other side here are Norwegians and in my experience the Norwegians generally are a truthful people. In this case I entirely accept the evidence of the master of the* [*the Norwegian vessel*]*."*

This indicates a clear bias where the arbitrator had several pre-conceived notions and they are surely going to influence his final decision. The arbitrator was removed by the Court in the case. When there exists any similar instance in modern times, the arbitrator should also be removed and barred from undertaking related proceedings in the future.

'Neutrality' is the most desirable quality in an arbitrator as it means that the arbitrator in independent and impartial. One of the tests applied to determine the independence of the arbitrators is the notion of 'relative reversibility'. In order to understand its application, we can take an example where a dispute exists between a buyer of nationality A and seller of nationality B. If the nationalities of the buyer and seller were reversed, the stance of the arbitrator should remain the same. If there is any difference in the stance, the arbitrator would not be classified as neutral.

Abundance of investment treaties with inherent biases

As of now, it is estimated that there are nearly 3,000 investment treaties that provide access to the similar terms that have already adversely affected the countries. The states have realised the ills that have occurred to them due to multiple instruments like Bilateral Investment Treaties (BITs), Foreign Direct Investments (FDI) and other International Agreements. However, as of now they are still bound by them and are forced to adhere to the terms and conditions to protect diplomacy

[3] Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, The Political Economy of the Investment Treaty Regime (Oxford University Press, 2017).

[4] *The Owners of the Steamship Catalina and The Owners of the Motor Vessel Norm,* 61 Lloyd's Rep. 360 (1938).

and respect International Law in which lies the greatest irony. They are forced to follow the agreements based on principles which violate the core of International Law itself. It is pertinent to note that the disputes do not arise instantly and often end up arising 15-20 years after the treaty has been signed. Thus, the nations are stuck in the loop where despite recognising the outcomes of such treaties, they have to comply with the law for the time being.

Moreover, with further economic liberalization and increasing global cooperation, it is essential that the investment activity continues. The doubts raised over the current regime help no one as the corporations result in missing out big investment and growth opportunities while the states will potentially miss out on cash inflow and the technological advancement that is brought in by foreign investment. It also aids the diplomatic relationship between nations and global integration. Hence, this cannot be done away with and is instrumental to keep the world running. Therefore, there is a need for a change in approach to do away with the doubts and the potential shortcomings and amend it to make it much more equitable and feasible for the states to pursue and maintain a balance of rights. This is something which the BRICS has sought to challenge and change. The development of an equitable dispute resolution system will be a sure shot step towards the achievement of this goal.

Bias and arbitration

The conflict still lies in the bias of the arbitrators where they may be used to apply different domestic and institutional laws while carrying out the proceedings and are reluctant to abide by the soft law instruments. Moreover, the confidentiality of arbitration proceedings leads to further disputes over the issue. Therefore, despite the application of all kinds of laws, it is still necessary to sort out the issues related to the bias of the arbitrators which can largely be resolved through the rectification of the selection process.

The main purpose of the elimination of bias in arbitration is the decision of legal claims on their merits. There should be no preconceived notion in the mind of the decision maker about the outcome of the case. The key desire when it comes to the selection of any arbitrator is perfect objectivity. Perfect objectivity in any instance is hard to achieve. However, the basic elements of the process can be identified as sufficient distance from the litigants and a willingness to understand the issue om its merits and give a fair decision.

When it comes to cross-border disputes, the want for adjudicatory neutrality is further increased. There is a want for a level-playing field where both the parties can be assured of a decision based on fairness and justice and not one of bias. It can also be a great tool for fulfilling the expectations the parties harboured

when they entered into an agreement. I international arbitration, more often than not, there is a co-existence of the nomination of the arbitrators by the parties and the institutional appointing authorities. In such situations, there is a possibility of a conflict between the criteria to determine impartiality adopted by the arbitral institutions and the standards laid down by the Domestic Courts of the parties.[5] Therefore, there is always a possibility of discontentment when it comes to the selection of an arbitrator.

In such cases, the objections raised by the parties also need to be analysed carefully. There is a possibility that the request for removal of arbitrators is nothing more than attempts to get an unfavourable decision dismissed. The empirical studies conducted do show that the parties in an arbitration prefer 'fair and just results' in the arbitration process. The candidates with a strong legal acumen, fair-mindedness and intelligence remain the ones preferred by the parties as arbitrators.[6]

In a study conducted by Richard W. Naimark and Stephanie E. Keer, the candidates were asked to rank the importance of a number of variables in the arbitration process before the commencement of the arbitration and after the delivery of the award. They ranked, 'fair and just result' as the most important variable with 90% of respondents and 75% of claimants voting for the same. The developing countries as well as the least developed countries are also pushing for the same at the International Level. This shows the need to develop a fair and just mechanism of arbitration.

BRICS: Growth showing need for a robust legal system

The growth has been attributed to the rising foreign investments in these countries. A 2013 report of the UN Conference on Trade and Development (UNCTAD) stated that, *"Since 2010 developing and transition economies have absorbed more than half of global FDI inflows, and in 2012 FDI flows to developing economies, for the first time ever, exceeded those to developed countries—with US$130 billion more."*[7] The BRICS countries also survived the economic downturns better as the flows in 2019 fell just by 30 per cent which is significantly lower compared to the FDI inflow for the develop world, It also recovered faster post the 2008 economic crisis when the share of BRICS in global FDI reached 20 per cent in 2012 more than tripling from the 6 per cent in 2000.

[5] William Park, Arbitrator Bias, No. 15-39 Boston University School of Law, Public Law Research Paper (2015).

[6] Richard W. Naimark and Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People,* 30 Int'l Bus. L. 203 (2002).

[7] UNCTAD, Global Investment Trends Monitor (2013).

BRICS has not only been an attractive investment destination but also invested significantly in developing and least developed countries. In 2000, the foreign investment from the BRICS nations was just $7 Billion which grew significantly to $126 Billion in 2012. This accounted for 9% of the total world flows. UNCTAD observed that, *"The rise of FDI in manufacturing, which has positive consequences for job creation and industrial growth, is becoming an important facet of South–South economic cooperation."*[8] Therefore, the BRICS nations are emerging amongst the fastest growing economies while also leading other countries of the Global South towards economic prosperity.

CAGR (Compounded Annual Growth Rate) of FDI in BRICS countries
(in USD millions)

Year	Brazil	Russia	India	China	South Africa
2014	63486	29152	34577	268097	5772
2015	49961	11858	44009	242489	1729
2016	53700	37176	44459	174750	2235
2017	66585	25954	39966	166084	2007
2018	59802	13228	42117	235365	5447
2019	65386	32076	50610	187170	5125
2020	**24778**	**9679**	**64351**	**212476**	**3106**
CAGR	**-13%**	**-15%**	**9%**	**-3%**	**-8%**

Source: OECD and IMF

It can be seen from the above table that over the years, the FDI inflow has been significant and India and China showcased a year-on-year increase even during the Pandemic. This can largely be attributed to the capability of both the countries to produce medicines and medical equipment which was crucial in aiding the fight against the Pandemic. BRICS nations consist of more than 40% of the global population and their contribution to Global GDP is 33%. As per the estimates of International Monetary Fund (IMF), BRICS countries are expected to account for more than 50% of the global GDP by 2030.[9] This shows that the BRICS nations possess immense potential for investment and their coming together signifies a want to influence world economy at a larger scale.

[8] Gayle Tzemach Lemmon, Investing in (and from) the BRICS, Council of Foreign Relations (2013).
[9] Ghousia Khatoon et al., *Analysis of Foreign Direct Investment Inflows of BRICS Countries for Pre-Pandemic Period and during Pandemic Crisis*, 11 Information Sciences Letters 809–815 (2022).

When the countries undertake a task of this magnitude, there is always a potential for disputes and disagreements. In such a scenario, it is essential that a robust mechanism for dispute resolution is present. The efficiency, affordability and fairness of such a mechanism is one of the major factors which investors consider when investing in a country. The BRICS nations are culturally different, have different forms of governments and legal systems. Therefore, the disputes can be a major cause of conflict and hinder their economic growth if a stable method of their resolution is not in place.

Arbitration offers a significant advantage over other methods of dispute resolution as it allows the parties to be greatly involved in the dispute resolution process and provide for an equitable award. Unlike the traditional legal systems, which are largely overburdened with the pendency of cases, arbitration offers an efficient mechanism for the resolution of disputes. Moreover, as stated by Aristotle, arbitration is based on equity and a fair arbitrator will lead to a result which will serve the interests of all the parties involved. He elaborated it by stating that, *"An arbitrator goes by the equity of a case, a judge by the law, and arbitration was invented with the express purpose of securing full power for equity."*[10] The BRICS nations have also emphasized on arbitration and discussed its advantages during the 'Conference on International Arbitration in BRICS — Challenges, Opportunities and Road Ahead' hosted by India. Moreover, as stated earlier, arbitration is the preferred mode of dispute resolution at the global level. Therefore, it is imperative for the BRICS nations to influence the arbitration scenario in order to bring forth a fairer world order.

Understanding the factors behind legal system BRICS countries

One of the defining characteristics of the Global North is that most of the countries can be classified as democracies where the people have a significant role to play in the election of their representatives. On the other hand, the political set ups of the five BRICS countries differ from each other. Russia and China are classified as authoritarian regimes whereas India, Brazil and South Africa are primarily stated to be democracies. However, such a classification seems too simplistic since the system of electing representatives is not the only way one can understand the administration mechanism and legal system of the country.[11]

[10] Andrew Sucre, *Aristotle' s Conception of Equity in Context*, (2013), https://irl.umsl.edu/cgi/viewcontent.cgi?article=1201&context=thesis.

[11] Lucia Scaffardi, *BRICS, a Multi-Centre "Legal Network"?*, 05 Beijing Law Review 140–148 (2014).

A study undertaken by Ferrari in 2010, identifies three macro-families which can be used to understand a nation: *"Rule of Professional law, Rule of political law and Rule of traditional law."*[12] When this approach is applied to the BRICS nations, the following observations are made:

- Brazil and Russia will be a part of the Rule of Political law.
- India and South Africa will be under the Rule of Professional Law. However, the role of political hegemony and tradition still remains significant.
- China would be somewhere in the middle between the Rule of Political Law and the Rule of Traditional Law.

With this perspective, it can be seen that even though the countries differ largely in culture, tradition and mode of governance there is still a degree of commonality in the legal systems, understanding and administration. BRICS is an example of the changing geopolitical relationships and showcases the need to take a new inclusive approach to analyse the interaction between these nations. It should take the economic, institutional and social considerations into account.[13] There are two approaches which have been adopted at present:

Market-Focussed Approach: This approach focusses on binding the legal system and market rules in a way that it is favourable for meeting the economic objectives using *"legal transplant."*[14]

Rights-Focussed Approach: This approach uses the logic of policy transfer and also focusses on social interests.[15]

However, these approaches are largely based on a Western version. When it comes to BRICS, it needs to be understood that, *"The aspect of the BRICS phenomenon as a self-standing legal system not based on constitutional identities or common legal tradition, nor on express legal forms, is totally neglected; in fact, it is supported by 'legal flows' and mutual interactions of policy transfer and constitutional borrowing, that allow it to be a possible alternative to the models of regionalization tested in the western world"*.[16]

Therefore, it is improper to consider BRICS as a revolutionary organisation based on similar ideals and principles which seeks to overturn the existing world order. It is a group which has identified the need for a reform and seeks to gradually

[12] G. F. Ferrari, Crisi economico-finanziara e interventodellostato. Modellicomparati e *prospettive* (2010) p. 100.

[13] F.Fukuyama, The Future of History. Foreign Affairs (2012).

[14] G. Edwards, *Legal Transplants and Economics: The World Bank and Third World Economies in the 1980s—A Case Study of Jamaica, the Republic of Kenya and the Philippines. European,* 2, 243-283 Journal of Law Reform (2007*).*

[15] H. P. Glenn, Legal Traditions of the World: Sustainable Diversity in Law (Oxford University Press (2010).

[16] M. Carducci & S. Bruno, *The BRICS Countries between Justice and Economy. Methodological Challenges on Constitutional Comparison*, 2, 46-58 Sociology and Anthropology (2017).

change the status quo over time. The countries have a huge task on their hands and the challenge of working together despite their ideological differences. It has been observed that, *""The BRICS can play an increasingly important role in helping to improve the health and well-being of the world's poorest countries."*[17]

The BRICS countries have the challenge of transforming trade and economics and adjusting their laws accordingly for the transition to be possible. They need to find a way where common objectives can be achieved using different instruments. The coming together of the BRICS nations shows a willingness to forego their exclusiveness and work towards a shared objective keeping common goals in mind. The efficiency, fairness and acceptability of theDispute Resolution Mechanism will be pivotal to the success of BRICS. However, there are a number of challenges which are to be addressed

Issues of Cohesion amongst the BRICS countries

There has been tremendous growth of arbitration in the BRICS nations in lieu of the rise in foreign investment. However, despite that, there has been limited cooperation at an individual level amongst the BRICS nations. This is evident from the fact that even till date, some members of the BRICS do not recognise the awards given by the other members. For example, India adapted to the changing scenario by making significant amendments to its Arbitration and Conciliation Act, 1996 which brought the rules in line with International Norms.[18]

If one of the parties to an award refuse to enforce it, the aggrieved party can approach the Indian domestic courts for the enforcement of the award. In order for the Indian Courts to enforce the decision, it must meet certain requirements. One of the conditions is that the award should be issued in a country which has ratified the 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' for it to be considered valid by the Indian Courts. Moreover, it should be declared by the Central Government of India that such a country falls under the purview of the convention. As of now, the Indian Government has listed 48 such countries. All BRICS members have ratified the convention. However, there has been no official notification for Brazil and South Africa in India. Therefore, the arbitral award issued in these countries cannot be enforced in India. Moreover, if the arbitrator's decision is not honoured, the aggrieved party has no option but to approach the domestic judiciary in the respective nations. This process can be

[17] GHSi, Shifting Paradigm. *How the BRICS Are Reshaping Global Health and Developments* (2012).

[18] Katarzyna Kaszubska, *A BRICS-only arbitration forum will not be the panacea imagined*, ORF (2016), https://www.orfonline.org/research/a-brics-only-arbitration-forum-will-not-be-the-panacea-imagined/ (last visited Sep 8, 2022).

lengthy, expensive and time consuming. Therefore, there is a need to find a joint solution for such issues.

Protection clauses in BITs of BRICS

Each nation of the BRICS has its own clause for investment protection. The clauses vary since the countries have different standards and are at different stages of development. The increasing globalisation and constant inflow of Foreign Direct Investment has prompted states across the globe to develop Bilateral Investment Treaties (BITs) to establish the rules of investors and the way the investment will be treated. The main motive of their enactment is to attract foreign investors by providing them with assurances regarding their investment while also ensuring that the investments are not done in a manner which is detrimental to the home state.

There is a framework for dispute resolution which is based upon International Standards in each of the BRICS nations. The development has been driven by the BRICS nations being a popular investment destination for foreign investors. The traditional system of justice in most countries across the globe is slow and can involve lengthy resolution of disputes. Therefore, investors prefer faster and more efficient methods like mediation and arbitration for speedier resolution of disputes and protection of their investment.

Why are the BRICS nations apprehensive yet pushing for reform?

The BRICS nations themselves have been on the receiving end of adverse awards under the investor state arbitration mechanism. This has created an apprehension about the fairness of the existing BIT's. For instance, India has been at the receiving end of international awards in the *White Industries case* and in the *Antrix Devas case* where it blamed the broad interpretation of the terms of the treaty by the arbitral tribunals. This prompted India to review its Bilateral Investment Treaties. The objectives of the review were as follows:

- Encouraging Foreign Investments into India.
- Ensure that the rights of investors are protected in a manner that it does not compromise the right of the Government for pursuing domestic policy objectives.

Other BRICS members also followed suit and have been making efforts to find ways for being attractive destinations while not negatively impacting their sovereign power for the regulation of investments. South Africa made a significant change to

its investment policy through a Cabinet Level review in 2007.[19] The system followed by South Africa earlier encouraged all sorts of investments and considered them beneficial to the economy. The changes were aimed at the introduction of a proper regulatory framework which ensures that the incentivisation of FDI is done while examining that the investments are used to contribute positively to the economy.[20]

The enactment of the Protection of Investment Act by South Africa was a culmination of the process. In cases of Dispute Resolution, the Act states that the disputes are to be adjudicated in domestic courts. International Arbitration will only be consented to by the Government once the domestic remedies have been exhausted.[21] Similarly, Brazil also made a unique framework for the facilitation of international investments. A number of Agreements on Investment Cooperation and Facilitation were there which were based on mitigation of risks and preventing disputes as a consequence of foreign investments.

On the issue of dispute settlement, it disallows private investors from initiating arbitration proceedings against the state in the cases where there is a violation of investment treaties. In order to resolve disputes and implementing regulatory framework, a Joint Committee has been set up. It comprises of parties from the government and private members along with the creation of ombudsman under these agreements who acts in conjunction with the committee for dispute resolution.

This shows that the BRICS nations have realised the importance of reviewing BITs in the light of adverse decisions given against them. Moreover, there is also a requirement to streamline the system for enforcing the awards of arbitral tribunal. The BRICS members in general have a paradigm shift where they have modernised investment treaties to suit the changing times. They are attempting to modernise and renegotiate investment treaties, awards and their enforcement.

Towards the development of a comprehensive arbitration mechanism for BRICS

The BRICS is an organisation which is aimed at promoting the influence of emerging and developing economies. It has advocated for the member states to be financially independent and self-sufficient in pursuit of this goal. The self-sufficiency in the field of finance is sought to be achieved through the establishment of the New Development Bank (NDB), which is an institution which provides finance to investment initiatives and projects for the promotion of sustainable development

[19] Leandi Kolver, *SA proceeds with termination of bilateral investment treaties,* engineering news (2013).
[20] UNCTAD, *Shift African investment towards industry, South African Minister recommends* (2021).
[21] Gaye Davis, *SA's new investment legislation slips in under the radar* (2015).

to the member countries of the BRICS, in addition to other emerging market and developing nations.[22] This was a significant step towards the establishment of a more just and equitable world order.

In furtherance of the same principle of enhancement of economic capacities of BRICS and other developing economies, particularly with respect to foreign investments needs a significant reform of the present Investor State Dispute Settlement Mechanisms. The development of fair and transparent dispute resolution mechanism amongst emerging and developing countries is a must for promotion of trust and spirit of cooperation between the countries. It should follow principles of non-discrimination and should be predictable to a certain degree in order to become an accepted and preferred mechanism for resolution of disputes between investors and states.

Proposed features of a fairer system of dispute resolution

- The current system of arbitration suffers from structural bias and partiality due to over-representation of the Western Nations. Therefore, it is important to ensure that the developing countries have more representation in the arbitration panels. This will ensure that the decision-making process is fair and is not solely based on Western Jurisprudence.
- The mode of governance, economic parameters, business environment etc. vary across the globe. Therefore, the decisions should take the unique factors of each nation into consideration before giving a decision. It should also look into the domestic legal system of the state to know the requirements of an enforceable award even if it is not bound by the domestic law of the country.
- The arbitral decisions have often resulted in the States incurring significant financial costs. At times, the cost is of such a large magnitude that it can destabilise the entire economy of a country. Thus, the decisions should be reasonable and should take such local factors into consideration.
- Moreover, there have been instances where adverse decisions have given against countries in arbitration processes. However, the hands of the domestic courts are often tied and they are unable to reverse such decisions. Therefore, it is imperative to develop a mechanism which allows for appeal against such orders.

[22] VII BRICS Summit, 'Ufa Declaration – Ufa, Russian Federation, 9th July, 2015', available online at http://brics2016.gov.in/upload/files/document/5763c20a72f2d7thDeclarationeng.pdf.

Role of BRICS in bringing forth the change

There are a number of mechanisms and rules for arbitration which have been developed at an international level like the ICSID, SIAC, PCA and more. However, nearly all of these methods have been developed with a western perspective in mind. The BRICS could develop its own dispute resolution mechanism for the governance of disputes within its member nations. The mechanism can be expanded to other nations and evolved to be applicable at a global level. It should be developed to provide an alternative to the existing system of dispute resolution prevalent globally and bring forth the idea.

Measures taken towards the promotion of fairness in Arbitration by BRICS nations

Change in the process of the appointment of an arbitrator by India

Under the Indian Arbitration and Conciliation Act, 1996 there was no concrete procedure to make sure that the arbitrator who is appointed to adjudicate the dispute between the two parties is unbiased. In an effort to address the issues related to selection of arbitrators and discouraging bias in the arbitration process, the Arbitration and Conciliation (Amendment) Act, 2015 grants the liberty to the parties to appoint an arbitrator mutually. The number of arbitrators can be freely determined by the parties. If the parties are unable to reach an agreement, the process will be carried out by a sole arbitrator. This is a good step since it grants the power to the parties and provides them with discretionary power when it comes to the selection of an arbitrator.

Section 11 of the Arbitration and Conciliation Act, 1996 provides the procedure for the appointment of an arbitrator. The arbitrator can be of any nationality under the Act, unless the parties have agreed differently. There is a possibility that the parties are unable to come to a mutual agreement for the appointment of an arbitrator. In such a situation, either of the parties can request the appointment by the Supreme Court or a person or Institution designated by the Supreme Court when the case is one related to International Commercial Arbitration. In cases of domestic arbitration, the same task is carried out by the High Court or a person or institution designated by it.[23] Section 12 provides the disclosure which is needed to be made by an arbitrator to ensure that he fulfils the criteria of impartiality and can carry out the process in a fair and impartial manner.

[23] Abhishek Kumar, Selection and Appointment of Arbitrators in India, S & P (2017).

The Section 12(1) of the Act has been amended. It mandates that the arbitrator disclose the following:

> (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
>
> (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

The Fifth Schedule provides a number of grounds which can be used as justifiable doubts in order to raise doubts over the relationship of the client with the parties. Some of the grounds include:

- The presence of a business relationship of the arbitrator with one of the parties.
- The presence of legal relationship between the parties or the law firm which the arbitrator works and one of the parties.
- A close family relationship of the arbitrator with one of the parties.
- Major financial interest of the arbitrator with one of the parties.
- Previous involvement of the arbitrator in the dispute involved.
- The arbitrator shares a close relationship with a third party who will be affected by the outcome of the dispute

If the parties want to raise concerns, they can do so under the grounds mentioned in the Fifith and the Seventh Schedule of the Indian Act.

The Punjab and Haryana High Court in *Reliance Infrastructure Limited Vs. Haryana Power Generation Corporation*[24] that the words "*or has any other past or present business relationship with a party"* mentioned under the 1st Entry of the fifth schedule do not include a former employee, consultant or advisor of the party. It stated that the principles of Strict Statutory Interpretation will be applied when grounds under Section 12 of the Act have been taken. The Delhi High Court also allowed a past employee to act as an arbitrator in the case of *Hindustan Construction Company Limited* v. *IRCON International Ltd.*[25]

The Indian Courts have also given several positive decisions after the Amendment to the Act. In *Perkins Eastman Architects DPC* v. *HSCC (India) Limited,*[26] the Supreme Court faced the issue of appointment of arbitrator by one of

[24] Reliance Infrastructure Limited v. Haryana Power Generation Corporation, 2016 (6) ARBLR 480 (P&H).
[25] Hindustan Construction Company Limited v. IRCON International Ltd, ARB.P. 596/2016.
[26] Perkins Eastman Architects DPC v. HSCC (India) Limited, 2019 (9) SCC OnLine SC 1517.

the parties or their officers and employees. The Court stated that, *"There were two categories of cases. The first category comprises of cases where the managing director is himself named as the arbitrator and also has the power to appoint any other person as an arbitrator. The second category is one where a managing director is merely empowered to appoint an arbitrator but does not act as an arbitrator himself."* The Court took the view that both of the categories suffer from invalidity since the independence and fairness of the arbitrator is questionable in both the circumstances.

In another significant interpretation of the Indian Act, the Bombay High Court in the case of *DBM Geotechnics & Constructions Pvt Ltd* v. *Bharat Petroleum Corporation Ltd.,*[27] held that in case an arbitrator is disqualified under 7th Schedule of the Indian Act, it will also disqualify him from any contractual right he might possess as the arbitrator to the dispute. However, the Indian Supreme Court affirmed this decision in the case of *TRF Ltd.* v. *Energo Engineering Projects Ltd.*[28] where it allowed the appointment of an arbitrator by an ineligible arbitrator if allowed would practically allow the ineligible arbitrator to take part in the arbitration process and influence the outcome by proxy. It reaffirmed the stance taken by the Bombay High Court and held that, *"once an arbitrator has become ineligible by operation of law, he cannot nominate another person as an arbitrator."* These decisions can provide the guiding principles for a joint mechanism for arbitration by the BRICS nations.

India allowing India parties to choose a foreign seat of arbitration

If the parties involved in an arbitration were Indian parties, they were not allowed to hold the arbitration at a foreign seat since it was considered to be contrary to public policy. However, this argument was rejected by the Supreme Court of India in the case of PASL Wind Solutions Private Limited v. GE Power Conversion.[29] It held that 'party autonomy' is the bedrock of the arbitration process and termed it as "the brooding and guiding spirit of arbitration". It held that, "Nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals….".

This was a significant decision by the Supreme Court of India as it will give a great push to the arbitration process. There are a number of foreign companies which have wholly owned subsidiaries in India and may not prefer India as a seat for arbitration for the fear of bias. This allows them to undergo arbitration in a

[27] DBM Geotechnics & Constructions Pvt Ltd v. Bharat Petroleum Corporation Ltd., 2017 (5) ABR 674.
[28] TRF Ltd. v.Energo Engineering Projects Ltd., (2017) 8 SCC 377.
[29] Special Leave Petition (Civil) 3936 of 2021 (arising out of GHC judgment dated November 11, 2020), Supreme Court of India Judgment dated April 20, 2021.

neutral territory, thus widening their options. The Court has not commented on the flexibility in terms of law, so for the time being, the applicable law will be Indian Law. However, it signifies a sure step towards the adoption of arbitration and will provide guidance for the development of a joint arbitration mechanism involving BRICS.

Establishment of a BRICS Dispute Resolution Centre at Shanghai

All the member nations of the BRICS have a legal framework on arbitration which is based on international standards. The preference of investors and businessmen for these methods is well known and the nations have been using these methods for dispute resolution. India and China were the top two users of the Singapore International Arbitration Centre in 2015. This shows that arbitration does form a significant part of the business dealings of these nations.

Therefore, in furtherance of the ambition of the BRICS member countries to reform arbitration, a Dispute Resolution Centre was established at Shanghai. However, the centre has failed to take off and has not received any application for arbitration since its inception. The concept was novel as the centre had its own rules and model clauses. The website of the centre is partly functional and it does provide an option to submit an application for arbitration. However, the last update on the website with respect to an activity or an event has been in 2018 and post the onset of the Covid-19 Pandemic, the future of the Centre is uncertain.

Despite its failure, it can be seen as an attempt by the BRICS nations to provide an alternative forum to arbitration with just rules and better understanding of the ground level realities of the least developed countries and the developing countries. In the near future, the centre needs to be revived or a new one needs to be established so that the BRICS nations can set an example for the conduct of arbitration proceedings across the globe. Moreover, in order to ensure the success of the Centre, they must ensure that maximum possible arbitrations which involve a BRICS member country, as one of the parties are conducted at such a centre.

Establishing Rules of Procedure for BRICS Expert Committee on Arbitration

The BRICS nations are intent on the development of a model for single arbitration despite their differences. The task is proving to be monumental and has taken a significant hit particularly during the post pandemic phase. However, prior to the Covid-19 Pandemic, there were certain developments to fulfil their motive. The intention of the BRICS nations was expressed by a Russian lawyer who stated that, *"It is planned to create a BRICS+ single arbitration centre, comprising representatives of all countries. This initiative will be discussed by an international working group. Experts will present proposals from all the countries to develop a single*

arbitration standard. This is a rather complex procedure, requiring consideration of interests and observation of public order of all countries, development of a single website, a common system and common rules or reservations referring to common rules, single recommended list of arbitrators, elements of collective governance and establishment of such centres."[30]

In furtherance of the same, Rules of Procedure of BRICS Expert Committee on Arbitration have been established. It is a collaboration between the official organisations of lawyers of all the BRICS member countries which is established under the Legal Forum of the BRICS. Its purpose is to, "promote the overall development of arbitration in the BRICS countries, to achieve the integration of legal culture in the region, to prevent and resolve disputes arising within the region, and to discuss the significant issues as to refine and improve international arbitration rules and recommend regional arbitrators."[31]

However, the expert committee is yet to hold meetings or make any comprehensive progress towards the development of a concrete mechanism for an inter-BRICS dispute resolution mechanism. The Rules of Procedure are comprehensive and are sufficient to effectively guide the process of developing a concrete system of arbitration which can provide an alternative to the existing system.

India-Brazil BIT: A recipe of what lies ahead

India and Brazil signed a new investment agreement in January 2020. It is significant in the sense that it has abandoned the practice of investor-state arbitration in the favour of state-to-state arbitration. Moreover, it has taken the right to grant compensation award from the tribunal and limits the role of the tribunal to interpret the BIT and order the parties to conform to any measure which they are not complying with. The Preamble of the BIT states that its intention is to, *"maintain a dialogue and foster government initiatives that may contribute to an increase in bilateral investments."* An investor is not provided with the right to directly bring a claim against the state under this BIT.

The move seems to be radical at the first instance. However, the sentiment regarding investment treaties has been changing on a global level. The call for reforms has been heard by UNICTRAL as well, whose Working Group III is looking into options to reform investor-state arbitration.[32] Europe is also looking to change its arbitration landscape with more than 168 BITs along with their sunset clauses

[30] *Brics Nations Look Establishing Common Arbitration Centre*, SILK road briefing (2019).
[31] Rules of Procedure of BRICS Expert Committee on Arbitration.
[32] United Nations Commission on International Trade Law, Working Group III: Investor-State Dispute Settlement Reform, 2002.

to be terminated whenever there is a ratification of a new multilateral treaty.[33] They also plan to replace the investment-state arbitration mechanism with a court structure.

India and Brazil have amended their model BITs in the recent times after due deliberations. The approach adopted by India and Brazil in their model BITs is very different. India's Model BIT allows for investor-state arbitration once the local remedies have been exhausted by the investor for a period of five years. Brazil's model BIT on the other hand does not provide for investor-state arbitration. It adopts a scheme which provide for a mechanism of dispute resolution through joint consultations at the initial stage. If the dispute is not resolved, it provides for state-to-state arbitration. Therefore, it took a lot of effort to draw out a balanced BIT despite the differences in individual approaches.

The India-Brazil BIT incorporates features from the Model BITs of both the countries and also adds certain new elements. The approach of preventing disputes and their resolution looks to have had a greater influence of the Brazil Model BIT. Article 18 of the India-Brazil BIT provides that if either of the states are of the view that a measure violates the terms of the BIT, the matter can be referred to it to a Joint Committee which has members from the government of both the parties. The committee can recommend a general measure or one for the specific investor. It can also call representatives of the affected investor before it. Article 19 provides that if a dispute cannot be resolved using this method, the matter can be referred to state-state arbitration on the mutual agreement of both the parties.

The Brazil Model BIT allows the award of compensation. However, in the Brazil India BIT, the power to grant compensation has not been provided to the tribunal. Article 19(2) of the BIT states that, *"The purpose of the arbitration is to decide on interpretation of this Treaty or the observance by a Party of the terms of this Treaty. For greater certainty,* ***the Arbitral Tribunal shall not award compensation****."* Thus, the BIT is primarily aimed at resolution of disputes in an amicable manner without the imposition of hefty fines and compensation in an arbitrary manner which can be detrimental to the economy of the both the countries. It successfully accommodates some of the important aspects of the model BITs of both the nations and attempts to provide a fair and just mechanism for resolution of disputes. The components of the BIT can be important in deciding the future course of action taken by the BRICS when it seeks to develop a joint arbitration mechanism.

[33] Tom Jones, The pendulum has swung back, Global Arbitration Review (2019).

Final considerations

BRICS is an organisation made by five of the emerging economies in the world who have the potential to dominate International Trade in the years to come. They have recognized that the current system of dispute resolution is largely built by the Western Countries and has several unfavourable characteristics attached to it. Therefore, they seek to provide an alternative system of dispute resolution. At an individual level, all of the BRICS member countries have made changes to their dispute resolution mechanism, modified and amended BIT's and shifted to a system they believe to be relatively safer from the existing system of arbitration.

They have also made their ambition of providing an alternative system of Dispute Resolution public time and again. In furtherance of the same, they have gone to the extent of establishing a BRICS Dispute Resolution Centre in Shanghai and the Rules of Procedure of BRICS Expert Committee on Arbitration. This shows that the intention to provide an alternative system has been there. The major deterrent to this ambition has been the lack of cohesiveness amongst the BRICS nations and the impact of the changed geopolitical situations since the onset of the Covid-19 Pandemic.

This has changed the focal point of the discussions between the BRICS member countries who are emphasising economic recovery, global trade, advancement of science and technology, medicine and more. As a result of this, dispute resolution and arbitration seem to have taken a back seat. It is imperative that the BRICS member nations shift their focus back to arbitration and dispute resolution since it will form a key part in their future ambitions. Moreover, the lack of cohesiveness amongst some BRICS nations themselves is another hindrance for the success of joint initiatives. For example, India and China are often involved in geopolitical skirmishes and tensions. The BRICS countries had to be careful and chose to keep a neutral stance in the Russia-Ukraine War. The challenge on their hands is to bring about a change in a system developed by the Western countries while remaining dependent on them as a market for the goods and services provided by the BRICS countries.

The establishment of a fair and equitable system of dispute resolution is contingent on presenting a united front and showing the changed system in action. The BRICS countries need to work towards the system, establish a functional institution for arbitration and use the system to prove that a real alternative exists. If all the steps are fulfilled, then it will be a shot in the arm for the BRICS nations who are committed to the development of a fairer and just world order.

References

Joint Statement of the Bric Countries, Leaders Yekaterinburg, Russia (June 16, 2009) 5.

I.F.I. Shihata, Toward A Greater Depoliticization of Investment Disputes: The Roles of Icsid and Miga, Icsid Review–Filj 1–25 (1986).

Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, The Political Economy of The Investment Treaty Regime (Oxford University Press, 2017).

The Owners of The Steamship Catalina and The Owners of The Motor Vessel Norm, 61 Lloyd's Rep. 360 (1938).

William Park, Arbitrator Bias, No. 15-39 Boston University School of Law, Public Law Research Paper (2015).

Richard W. Naimark and Stephanie E. Keer, International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People, 30 Int'l Bus. L. 203 (2002).

Unctad, Global Investment Trends Monitor (2013).

Gayle Tzemach Lemmon, Investing In (And From) The BRICS, Council of Foreign Relations (2013).

Ghoulie Khatoon Et Al., Analysis of Foreign Direct Investment Inflows of BRICS Countries for Pre-Pandemic Period and During Pandemic Crisis, 11 Information Sciences Letters 809–815 (2022).

Andrew Sucre, Aristotle' S Conception of Equity in Context, (2013), Https://Irl.Umsl.Edu/Cgi/Viewcontent.Cgi?Article=1201&Context=Thesis.

Lucia Scaffardi, Brics, A Multi-Centre "Legal Network"? 05 Beijing Law Review 140–148 (2014).

G. F. Ferrari, Crisi Economico-Finanziara E Interventodellostato. Modellicomparati E Prospettive (2010) P. 100.

F. Fukuyama, The Future of History. Foreign Affairs (2012).

G. Edwards, Legal Transplants and Economics: The World Bank and Third World Economies in the 1980s— A Case Study of Jamaica, The Republic of Kenya and The Philippines. European, 2, 243-283 Journal of Law Reform (2007).

H. P. Glenn, Legal Traditions of The World: Sustainable Diversity in Law (Oxford University Press. (2010).

M. Carducci & S. Bruno, The Brics Countries Between Justice And Economy. Methodological Challenges on Constitutional Comparison, 2, 46-58 Sociology And Anthropology (2017).

Ghsi, Shifting Paradigm. How The Brics Are Reshaping Global Health and Developments (2012).

Katarzyna Kaszubska, A Brics-Only Arbitration Forum Will Not Be the Panacea Imagined, Orf (2016), Https://Www.Orfonline.Org/Research/A-Brics-Only-Arbitration-Forum-Will-Not-Be-The-Panacea-Imagined/ (Last Visited Sep 8, 2022).

Leandi Kolver, Sa Proceeds with Termination of Bilateral Investment Treaties, Engineering News (2013).

Unctad, Shift African Investment Towards Industry, South African Minister Recommends (2021).

Gaye Davis, Sa's New Investment Legislation Slips in Under the Radar (2015).

VII Brics Summit, 'Ufa Declaration – Ufa, Russian Federation, 9th July, 2015', Available Online At Http://Brics2016.Gov.In/Upload/Files/Document/5763c20a72f2d7thdeclarationeng.Pdf.

Abhishek Kumar, Selection and Appointment of Arbitrators in India, S & P (2017).

Reliance Infrastructure Limited V. Haryana Power Generation Corporation, 2016 (6) Arblr 480 (P&H).

Hindustan Construction Company Limited V. Ircon International Ltd, Arb.P. 596/2016.

Perkins Eastman Architects Dpc V. Hscc (India) Limited, 2019 (9) Scc Online Sc 1517.

Dbm Geotechnics & Constructions Pvt Ltd V. Bharat Petroleum Corporation Ltd., 2017 (5) Abr 674.

Trf Ltd. V.Energo Engineering Projects Ltd., (2017) 8 Scc 377.

Special Leave Petition (Civil) 3936 of 2021 (Arising Out of GHC Judgment Dated November 11, 2020), Supreme Court of India Judgment Dated April 20, 2021.

Brics Nations Look Establishing Common Arbitration Centre, Silk Road Briefing (2019).

Rules Of Procedure of Brics Expert Committee on Arbitration.

United Nations Commission On International Trade Law, Working Group III: Investor-State Dispute Settlement Reform, 2002.

Tom Jones, The Pendulum Has Swung Back, Global Arbitration Review (2019).

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

FATIMA, Naazish. Future of Dispute Resolution and Investment in BRICS. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 187-209, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.9.

DOI: 10.52028/rbadr.v4i8.10

‘Mediation’ as an Alternative Dispute Settlement Mechanism under the Consumer Protection Act 2019: An Analysis

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Abstract: ‘Mediation’ as an Alternative Dispute Settlement Mechanism under the Consumer Protection Act 2019: An Analysis.

Keywords: Mediation. Alternative Dispute Resolution. Consumer.

1 Introduction

“Mediation as an Alternate Dispute Resolution (ADR) mechanism has been introduced which aims at giving legislative basis to resolution of consumer disputes through mediation thus making the process less cumbersome, simple and quicker. This is being done under the aegis of the consumer courts.”

In Mediation a neutral third party is called “mediator”. It is a process of communication through which the litigants connect their differences, in order to find a solution of their disputes. It is a process of negotiation. However, the decision-making power is always with the parties. Mediator does not act like a judge. Mediator is just a connecting link. However, the ultimate decision-making power is left on the consumers. Mediation brings two parties together as sometimes; it is just the issue of non-communication instead of a big dispute. Mediation brings both parties at a platform of communication for settlement. In short it can be said

that Mediation is a process through which a third party makes an attempt to solve the dispute between the disputing parties. It is an alternative method to solve the disputes.[1] "In fact, mediator facilitates the negotiation between the parties by acting as platform for negotiation."

The relevance of Mediation can be explained through Mahabharata also, as Indian Epic. It was expressed by the then Chief Justice of N V Ramana, "Mediation, as a mode of alternative dispute resolution has a long history in the diplomatic arena. He further explained, Mahabharata, is best example of an early attempt at mediation as a conflict resolution tool, where Lord Krishna attempted to mediate the dispute between the *Pandavas* and *Kauravas* and also it is the best example of how the failure of mediation may lead to disastrous consequences taking lot of time."

Mediation is also helpful in cutting cost of dispute and it provides timely and fast redressal. Moreover, with the increase of commercial disputes in the modern era, mediation has been considered as a first preference by many consumers. The main advantage of Mediation is that it provides simple procedure too deal the dispute in terms of cost, and procedure as compared to the cumbersome procedure of traditional disputes resolution systems.

Mediation has also made an attempt to provide an easy procedure which gives an equal opportunity to both the parties to have full control upon the "process of resolution and the outcome of the process."

This paper is an attempt to make the consumers and academician and students aware about the consumer right activists so that they may be in a position to help and support common people who are interested to know how mediation works in settlement of consumer disputes.

2 History of Mediation

"The Mediation is a not a new concept in the field of law. Mediation as a method of dispute resolution can be traced to the ancient times as well. Also, in Pre-British India, mediation was popular among businessmen. Impartial and respected businessmen called Mahajans were requested by business association members to resolve disputes using an informal procedure, which combined mediation and arbitration. In the modern days, mediation is known but least practiced method of alternative disputes resolution due to lack of awareness. Developments in the medieval and the modern period led to growth of written laws which defined the rights of individuals very well. With the passage of time, to claim the rights, the written laws were adopted by the individuals as tools for dispute resolution".

[1] Mediation is an Alternative method for dispute resolution under section 89 of the civil procedure code.

"India has one of the oldest cultural histories of over 5000 years and a recent history of about 1000 years during which it was invaded by the Iranian plateau, Central Asia, Arabia, Afghanistan and the West Indian culture has absorbed the changes and influences of these aggressions to produce remarkable racial and cultural synthesis. The 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras [code of conduct] followed the Vedic epoch, during which period scholastic jurists developed the philosophy of basic laws. Their learned discourses recognized existing usages and customs of different communities, which included resolution of disputes by non-adversarial indigenous methods. Cases were decided according to the usages and customs as were approved by the conscience of the virtuous and followed by the people in general".

Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom, lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom".

"This Buddhist maxim reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past". Ancient Indian Jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong". Even during the regime of Mughals, Akbar used to decide various cases not in the King's court but through his mediator named Birbal. In order to keep, trade and commerce growing effectively, societies need to have a dispute resolving system. "These written laws proved to be tools for adversarial remedies for the parties, which again made a way for non-adversarial methods. Considering the same, need for recognition of mediation was felt by the legislature, which was performed by it through incorporation of the mediation in various laws and the Consumer Protection Act, 2019 is one such example." It is necessary to understand the term "Dispute" in order to find the solution of the dispute.

2.1 Dispute

If there are opposite views or disagreement it is called as a dispute. According to legal dictionary," dispute is a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other." Moreover, the parties who have difference of opinions or "interests" are called as a disputed party. There are various forms of Mediation.

2.2 Types of Mediation

The mediation can be referred through court or through private mediation. Let us discuss in detail:

2.2.1 Court – Referred Mediation

"Court referred mediation is one where a case has been filed before the Court and Court refers such matter for mediation under Sec. 89 of the Code of Civil Procedure, 1908. Court referred mediation is post litigation mediation. As in case of Consumer protection Act 2019, wherein Section 37, 49 & 59 empowers the Consumer Commissions to refer the Cases to the Mediation Cell Attached to it."

2.2.2 Private Mediation

"The private mediation is one, where qualified mediator offers the services of mediation on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigation disputes".

3 Difference Between Mediation and Arbitration

However, there is a difference between Mediation and the Arbitration. Arbitration is a quasi-judicial arbitrary process where the arbitrators appointed by the court or parties decides the dispute between the parties where as in Mediation the parties themselves participates. Mediation is a negotiation process and not an adjudicatory process.

Moreover, Arbitration is governed by the Arbitration and Conciliation Act, 1996, however, Mediation is a procedure and settlement that is restricted by the statutory provision and due to this it has a flexibility.

In case of Arbitration, the physical presence of parties is not required, however, in case of Mediation, personal appearance and active participation of the parties are required. In case of Arbitration, formal proceedings are held in the private strict procedural stages. On t he other hand, in Mediation a non- judicial and informal proceedings are held in the flexible procedural stages. The difference can be explained as under:

	JUDICIAL PROCESS	ARBITRATION	MEDIATION
1.	Judicial process is an adjudicatory process where a third party (judge/ other authority) decides the outcome.	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
2.	Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
3.	The decision is binding on the parties.	The award in an arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
4.	Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
5.	Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.
6.	A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.

It is pertinent to discuss if there is any advantage of the Mediation, why the need was felt under the Consumer Protection Act to include the procedure of Mediation. Let us discuss the mediation.

Advantages of Mediation

There are various advantages of Mediation.

3.1 Voluntary Process

"Mediation is a voluntary process and parties are at liberty to opt out of the mediation process at any stage if they don't find it useful. 'Voluntary Nature' is essence of mediation, where parties are not compelled to go through it, which ensures compliance with the settlement reached".

3.2 Control of the parties

"In mediation, during the entire process, parties have full control over the scope and outcome of the mediation. Parties themselves decide the scope of reference or issues of dispute subjected for mediation and also the outcome of the mediation process i.e to settle or not and also terms of settlement."

3.3 Active participation of parties

"Unlike other dispute resolution methods, mediation provides the parties an opportunity to actively participate in the mediation proceedings and to negotiate directly. Mediation facilitates parties to present their case by their own".

3.4 Cost and time efficient

"Due to absence of strict and rigid procedure, the mediation is time efficient and cost-efficient method of dispute resolution. Fees of professionals and other expenses in mediation will be very less compared to traditional methods of dispute resolution".

3.5 Convenient to the parties

"Simple and flexible procedure makes the mediation convenient to the parties. There will be no fixed/conditional adjournments in the mediation. Hearing can be modified to suit the demands of each case, which allows the parties to carry on with their day-to-day activities".

3.6 Ensures fair process

"The mediator chosen will be impartial, neutral and independent. The laws ensure that the mediator doesn't have pre-existing relationship/ interest of any kind with the parties or subject matter. If any suspicion arises on impartiality of the mediator, the parties have option to change the mediator".

3.7 Confidentiality

"Mediation process is much more confidential than conventional methods of dispute resolution. The name and facts of the cases which are resolved through adjudicating bodies are easily accessible to everyone, since they enter public domain and hence there will be threat to confidentiality. Especially in consumer disputes, consumers and sellers (including E-commerce companies) are more concerned about the privacy and confidentiality. In case of matters settling through mediation, laws ensure confidentiality of the proceedings."

3.8 Amicable settlement of disputes

"Mediation provides amicable settlement of the disputes which in turn helps to maintain, improve and restore relationships of the disputed parties."

3.9 Final settlement of all the disputes in full/ comprehensive

"In respect of the matters/issues which are referred for Mediation, at each stage of the dispute resolution process, long term and underlying interests of the parties are taken into account. While in examining alternatives, in generating and evaluating options and finally in settling the dispute main focus will be on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences. Further, there can be no appeal against the things settled through the mediation which leaves no scope for further disputes but ensures full, final and comprehensive settlement of the dispute."

3.10 Win-win deal for the disputed parties-more chances of compliance

"Mediation provides win-win situation for the disputed parties, since the parties to the dispute enter in to mutually beneficial settlement by themselves. When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance."

3.11 Refund of court fees

"Rules made under various laws provide for the refund of the 'Court Fees' in the case of settlement of dispute in court referred mediation."

4 Role of Mediators

"Mediation is an informal and non-adversarial method of dispute resolution intended to assist the disputing parties to reach a mutually acceptable solution. The role of the mediator is facilitative rather than suggestive in any mediation proceeding. Mediator being an impartial and neutral third person facilitates the resolution of a dispute without suggesting what should be the solution. The mediator has greater role to play in mediation proceedings, he facilitates proper communication between the parties, removes obstacles in communication, assists in the identification of issues and the exploration of options and facilitates mutually acceptable agreements to resolve the dispute. He performs all these functions without violating the 'right of self-determination' of the parties. The role of the mediator on basis of his functions can be classified in to two heads".

The President of India gave his assent to the long-awaited Consumer Protection Act, 2019 ("Act") on August 9, 2019, and it went into effect on July 20, 2020. Chapter V of the Act emphasizes the importance of mediation in consumer-related disputes, which encourages the parties to participate in mediation once the complaint has been admitted or at any later point. Chapter V of the Act emphasises the importance of mediation in consumer-related disputes, which encourages the parties to participate in mediation once the complaint has been admitted or at any later point. Let us discuss how the provisions and process of mediation shall be practically applicable under the Consumer Protection Act, 2019.

5 Mediation under Section 74

"Section 74 of the consumer Protection Act, 2019 states that the current act has included mediation as a remedy under the Consumer Protection Act. However, the Act does not make it clear that how much time can be taken by mediation for the resolution of dispute. However, the Act of 2019 states that the Mediator 'must undertake mediation within the time and manner authorized by the rules' made under the State and National Commissions".

"By notice, the state government will create a consumer mediation cell that will be connected to each district and state commission in the state. By notice, the Central Government will create a consumer mediation unit that will be connected to the National Commission and each of the regional Benches. A consumer mediation cell will be made up of the individuals who have been designated. The mediation cell shall maintain":

A list of empanelled mediators;

- A list of cases handled by the cell;
- Recording of proceedings and;

- Any other information as may be specified by the regulations

Every consumer mediation cell must provide a quarterly report in the manner prescribed by rules to the District Commission, State Commission, or National Commission to which it is connected.

The Consumer Protection Mediation (Rules), 2020 gives out a list of matters that cannot be referred to mediation. The new Consumer Protection Act of 2019 allows consumers to submit complaints electronically and in consumer commissioners that have jurisdiction over their (i.e. Complainant's) domicile, thereby nullifying the prior practice under the Act. For completion of mediation, the time limit permitted under the act is 30 days.

"Under the Act, the parties to the dispute will have to jointly consent on the mediator's appointment (i.e. sole mediator). If the parties cannot agree on who will function as the only mediator, the concerned commission will nominate/appoint the mediator at its discretion."

Total number of Cases Disposed by Consumer Forums Since Inception
(Update on 31.3.2022)

Sr. No	Name of Agency	Cases filed since inception	Cases disposed of since inception	Cases pending	% Of total disposal
1	National Commission	140712	118542	22170	84.24%
2	State Commission	878779	765614	113165	87.12%
3	District Commission	4826825	4327419	499406	89.65%
	Total	**55846316**	**5211575**	**634741**	**89.14%**

Source: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION (ncdrc.nic.in) retrieved on 26th September, 2022.

As per the statistics, the pending cases are 634741 which is a high number.

Analysis of data regarding number of cases disposed by consumer courts shows that on 31st March, 2022, at National, State and District level, a total number of 55846316 cases were registered out of which 52115755 cases had been disposed off. Thus, there is an astounding figure of 634741 cases which are still pending in various consumer foras and the disposal rate is 89.14%.

Table 1.1 depicts that 1,40712 cases were registered since inception up to 31st March, 2022 with the National Commission out of which 84.24% cases were disposed of, while 15.76% were still pending with the National Commission. In case of State Commission 878779 cases were registered since inception up to March 2022 and 87.12 percent cases were disposed of. A staggering number of 4826825 cases were registered throughout the District Consumer Forums in the country and performance of District Consumer Forums was better as 89.65% cases were disposed of. Sometimes, even for the cases of defective products, deficiency in service consumers have to wait for years to get justice.

No doubt, Mediation is critical for the timely and effective resolution of consumer issues, and it's admirable that the government has a strategy in place to hire mediators who can resolve conflicts, reducing the strain on the judiciary.

6 Provisions under the Consumer Protection Act, 2019

The process of mediation has been added under the CPA, 2019, let us discuss the provisions in detail with the practical aspect.

"As section 37 of the Consumer Protection Act, 2019 has increased its ambit and welcomed the provisions of the mediation". It includes the "Reference to Mediation". It states that in case the District Commission thinks or it appears from the case to the commission that settlement is possible though the settlement, then they may direct the parties to settle the dispute through mediation. Moreover, the civil procedure code (hereinafter CPC) also includes the provision of settlement of disputed though Alternative Dispute Settlement under section 89 (CPC). Moreover section 89(1) also empowers the court to refer the dispute through "arbitration, conciliation, judicial settlement or mediation". The provision of section 37 of CPA is as under:

"At the first hearing of the complaint after its admission, or at any later stage, if it appears to the District Commission that there exists elements of a settlement which may be acceptable to the parties, except in such cases as may be prescribed, it may direct the parties to give in writing, within five days, consent to have their dispute settled by mediation in accordance with the provisions of Chapter V.[2] Where the parties agree for settlement by mediation and give their consent in writing, the District Commission shall, within five days of receipt of such consent, refer

[2] Jagdish Chander v Ramesh Chander, [2007] 5 SCC 719, ADR can be referred under section 37 only if both the parties agree to it.

the matter for mediation, and in such case, the provisions of Chapter V, relating to mediation, shall apply".[3]

"As per the regulation of the Consumer Protection (Mediation) Regulations, 2020,[4] it is necessary that the speedy settlement must reach through the mediation process, in case, the mediation process is not reached within three months then mediation proceedings stands terminated".

However, "Mediation" as an Alternate Dispute Resolution (ADR) mechanism has been introduced which aims at giving legislative basis to resolution of consumer disputes through mediation thus making the process less cumbersome, simple and quicker. This is being done under the aegis of the consumer courts. "Mediation" as an Alternate Dispute Resolution (ADR) mechanism has been introduced which aims at giving legislative basis to resolution of consumer disputes through mediation thus making the process less cumbersome, simple and quicker. This is being done under the aegis of the consumer courts. Let us discuss the establishment of Mediation cell and its functioning in detail:

6.1 Establishment of Mediation Cell

Under section 74 of the Consumer Protection Act, 2019 deals with the establishment of the "mediation cell that means in the case of State government shall establish a consumer mediation cell to be attached to each of the District Commissions and the State Commissions of that State. The Central Government shall establish, by notification, a consumer mediation cell to be attached to the National Commission and each of the regional Benches and A consumer mediation cell shall maintain (a) a list of empaneled mediators;[5] (b) a list of cases handled by the cell; (c) record of proceeding; and (d) any other information as may be specified by regulations. (5) Every consumer mediation cell shall submit a quarterly report to the District Commission, State Commission or the National Commission to which it is attached, in the manner specified by regulations".

6.2 Empanelment of Mediators

"Under section 75 of the Act Empanelment of mediators shall be done and "for the purpose of mediation, the National Commission or the State Commission

[3] Hussainara Khatoon (II) v Home Secy. State of Bihar, [1980] 1 SCC 91 states that the speedy and fair trial must be insured by the state.

[4] Consumer Protection (Mediation) Regulations, 2020 Regulations 11.

[5] Ministry of Consumer Affairs, Food and Distribution, Government of India, New Delhi and chair on Consumer Law and practicehttps://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/ConsumerHandbook_Mediation.pdf, accessed on 26th September 2022.

or the District Commission, as the case may be, shall prepare a panel of the mediators to be maintained by the consumer mediation cell attached to it, on the recommendation of a selection committee consisting of the President and a member of that Commission. (2) The qualifications and experience, removal of the mediators shall be specified. Moreover, the panel of mediators prepared under sub-section (1) shall be valid for a period of five years, and the empaneled mediators shall be eligible to be considered for re-empanelment for another term, subject to such conditions as may be specified by regulations."

6.3 Nomination of mediators from panel

"Under section 76, the nomination of the panel of mediators shall be made by the District Commission, the State Commission or the National Commission. Under section 77, there shall be a duty of the mediator to disclose if he/she has any personal, professional or financial interest in the outcome of the consumer dispute; or the circumstances which may give rise to a justifiable doubt as to his independence or impartiality; and such other facts as may be specified by regulations".

6.4 Duty of mediator to disclose certain facts

"Under section78, the replacement of mediator in certain cases can be done by the District Commission or the State Commission or the National Commission if they satisfied that the information furnished by the mediator or on the information received from any other person including parties to the complaint and after hearing the mediator, it shall replace such mediator by another mediator."

6.5 Procedure for mediation

Under section 79, has explained the procedure of mediation, "as the mediation shall be held in the consumer mediation cell attached to the District Commission, the State Commission or the National Commission, as the case may be, moreover, where a consumer dispute is referred for mediation by the District Commission or the State Commission or the National Commission, as the case may be, the mediator nominated by such Commission shall have regard to the rights and obligations of the parties, the usages of trade, if any, the circumstances giving rise to the consumer dispute and such other relevant factors, as he may deem necessary and shall be guided by the principles of natural justice while carrying out mediation. However, the mediator so nominated shall conduct mediation within such time and in such manner as may be specified by regulations".

6.6 Settlement through mediation

"Section 80 deals with the settlement through mediation. In case "if an agreement is reached between the parties with respect to all of the issues involved in the consumer dispute or with respect to only some of the issues, the terms of such agreement shall be reduced to writing accordingly, and signed by the parties to such dispute or their authorized representatives. The mediator shall prepare a settlement report of the settlement and forward the signed agreement along with such report to the concerned Commission and where no agreement is reached between the parties within the specified time or the mediator is of the opinion that settlement is not possible, he shall prepare his report accordingly and submit the same to the concerned Commission".

6.7 Recording settlement and passing of order

"Under section 81 deals with the recording of settlement and passing of order where the District Commission or the State Commission or the National Commission, as the case may be, shall, within seven days of the receipt of the settlement report, pass suitable order recording such settlement of consumer dispute and dispose of the matter accordingly. Moreover, where the consumer dispute is settled only in part, the District Commission or the State Commission or the National Commission, as the case may be, shall record settlement of the issues which have been so settled and continue to hear other issues involved in such consumer dispute and where the consumer dispute could not be settled by mediation, the District Commission or the State Commission or the National Commission, as the case may be, shall continue to hear all the issues involved in such consumer dispute."

6.8 Limitation of Mediation

"There are some cases which cannot be referred under the Mediation and these includes the cases related to "fraud, forgery, non-compoundable offences, etc of like nature are not to be referred to Mediation. The list of offences is stated under **Rule 18 of CPC**. A mediation oriented statute will encourage autonomy with the parties to get their disputes resolved by **Rule 20 of CPC**, parties to the dispute shall not initiate any arbitral or judicial proceeding when the parties have so expressed not to initiate any such proceedings".[6]

[6] Consumer Courts in Gujarat adopt 'Mediation' mechanism vide Gujarat Consumer Protection (Mediation) Rules, 2022 Consumer Courts in Gujarat adopt 'Mediation' mechanism vide Gujarat Consumer Protection (Mediation) Rules, 2022 | SCC Blog (scconline.com), accessed on October 4, 2022.

7 Conclusion

"Since mediation is amicable settlement of the disputes, using mediation to settle the disputes has been proved very satisfactory because of very high rates of success. Parties' themselves deciding the outcome of the dispute is a notable feature of the mediation. An achieved result acceptable to both the parties of the dispute, gives no scope for further litigation on the decided subject unless there is serious violation in the procedure adopted for the mediation. Considering it's time &cost advantage and unstructured procedure, mediation has been recently introduced for resolving the consumer disputes to provide win-win situation to the consumer & business entities. However, still there is scope for creating awareness among the consumers &business entities to popularize mediation and make them use the mediation as an effective tool of ADR."

"The term mediation can be defined as a voluntary dispute resolution process where the third party facilitates negotiation between the disputed parties to negotiate for their rights and interests by themselves. The third party who facilitates the negotiation between the disputed parties is called mediator. As described by the Mediation and Conciliation Project Committee of Supreme Court of India, 'Mediation' is a voluntary, binding process in which an impartial and neutral mediator facilitates disputing parties in reaching a settlement. A mediator does not impose a solution but creates a conducive environment in which disputing parties can resolve all their disputes".

"Moreover, there will be no fee for filing cases upto Rs. 5 lakhs. There are provisions for filing complaints electronically, credit of amount due to unidentifiable consumers to Consumer Welfare Fund (CWF). The State Commissions will furnish information to Central Government on a quarterly basis on vacancies, disposal, pendency of cases and other matters".[7]

The Online Consumer Mediation Centre may also contribute in the dispute resolution system.

The Consumer Protection Mediation (Rules), 2020 gives out a list of matters that cannot be referred to mediation. Since the new Consumer Protection Act of 2019 allows consumers to submit complaints electronically and in consumer commissioners that have jurisdiction over their (i.e. Complainant's) domicile, thereby nullifying the prior practice under the Act. For completion of mediation, the time limit permitted under the act is 30 days.

[7] Press release by Ministry of Consumer Affairs Food & Public Distribution (2020) https://pib.gov.in/PressReleasePage.aspx?PRID=1639925, on 26 September 2022.

"Under the Act, the parties to the dispute will have to jointly consent on the mediator's appointment (i.e. sole mediator). If the parties cannot agree on who will function as the only mediator, the concerned commission will nominate/appoint the mediator at its discretion. Mediation is critical for the timely and effective resolution of consumer issues, and it's admirable that the government has a strategy in place to hire mediators who can resolve conflicts, reducing the strain on the judiciary".[8]

References

Consumer Handbook on Mediation. Consumer Handbook on Mediation book.cdr (consumeraffairs.nic.in) accessed on 10 August, 2022.

MEDIATION UNDER CONSUMER PROTECTION LAW https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=9377, accessed on 11 December 2020.

Mediation of consumer disputes; opening new avenues for redressal https://www.99acres.com/articles/mediation-of-consumer-disputes-opening-new-avenues-for-redressal.html, accessed on 11 December 2021.

Consumer Protection Act 2019- Role of Mediation and E-commerce platform https://www.webnyay.in/blog/19, accessed on 11 December 2021.

Mediation: A Resolution To Complaints Under The Consumer Protection Act, 2019 Consumer Protection India https://www.mondaq.com/india/dodd-frank-consumer-protection-act/975302/mediation-a-resolution-to-complaints-under-the-consumer-protection-act-2019, accessed on 11 December 2021.

Spicejet Ltd. v. Ranju Aery, 2017 SCC OnLine NCDRC 739.

Abhishek Bagga and Smita Paliwal (2020) Mediation: A Resolution To Complaints Under The Consumer Protection Act, 2019 - Dodd-Frank, Consumer Protection Act - India (mondaq.com), accessed on 4 October, 2022.

ODR In Consumer Disputes And Challenges Involved ODR IN CONSUMER DISPUTES AND CHALLENGES INVOLVED (iralr.in) accessed on 26 September 2022.

Ministry of Consumer Affairs, Food & Public Distribution, Consumer Protection Act, 2019 comes into force from today https://pib.gov.in/PressReleasePage.aspx?PRID=1639925, accesed on 3 October, 2022.

Mehta Pratham, Consumer Protection in India: Archetypal Challenges and Way Forward, retrieved from International Journal of Law, Management and humanityConsumer Protection in India: Archetypal Challenges and Way Forward - International Journal of Law Management & Humanities (ijlmh.com), accessed on 2 October, 2022.

Ministry of Consumer Affairs, Food & Public Distribution https://pib.gov.in/PressReleasePage.aspx?PRID=1835605, accessed on 26 September 2022.

Take your complaint further, Consumer Protection Take your complaint further | Consumer Protection Take your complaint further | Consumer Protection, accessed on 10 September, 2022.

[8] Expansion of Mediation Redressal with The Help Of Sec. 74 In Consumer Protection Act, 2019 https://viamediationcentre.org/readnews/MTM2Mw==/Expansion-of-Mediation-Redressal-with-the-help-of-Sec-74-in-Consumer-Protection-Act-2019, accessed 26 September.

Chowdhary Sohini, Consumer Disputes: Supreme Court Directs States To Set Up Mediation Cells & E-Filing Systems For District & State Commissions Consumer Disputes: Supreme Court Directs States To Set Up Mediation Cells & E-Filing Systems For District & State Commissions (livelaw.in), accessed on 12 September, 2022.

Anand Shruti, Mediation as a Resolution Technique for Complaints under the Consumer Protection Act, 2019 Mediation as a Resolution Technique for Complaints under the Consumer Protection Act, 2019 - Black n' White Journal (bnwjournal.com), accessed on 4 October, 2022.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

TAAK, Sangeeta; GANDHI, Rajiv. 'Mediation' as an Alternative Dispute Settlement Mechanism under the Consumer Protection Act 2019: An Analysis. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 211-226, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.10.

DOI: 10.52028/rbadr.v4i8.11

Patent Dispute settlement through Arbitration and the public policy concerns

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Abstract: India is a developing nation, which had shown both progress and decline in economy over the years. Intellectual property rights are considered as an important asset of a nation. National legislations are made in par with the international conventions and treaties, more concentration on the industry and investments are needed for the development of the nation. Patent legislations changed on basis of the national and international needs. The monopoly right granted for an invention is on the basis of their intellectual skill. Patent dispute settlement mechanisms are mainly patent office through controller of patent, District Court & High Court and the patent tribunals. Patent is granted for 20years in India. The patent holder can utilize the same within this short span of time. Hence all the patent holders and the public challenging the validity of the patent, expect a speedy justice in patent disputes. This research paper addresses the question as to whether subject matters that can be referred for arbitration can be limited on grounds of public policy. Further the paper will address the issues as to whether arbitration can be effective mechanism for settling patent disputes in India.

Keywords: Patent. Arbitration. Public policy.

Introduction

Intellectual property rights protect the creativity and helps in development of the nation. Evolution of intellectual property law can be seen as old as human evolution. The protection of ideas was inevitable at a point of time, when the concept of globalisation and consumerism increased. Pharmaceutical and biotechnology

companies rely most on the patent mechanisms. The protection granted by patent is domestic in nature. Intellectual property rights are territorial in nature. And they can exist in different nations at the same time. Multiple jurisdictions will come up with different dispute settlement mechanisms for settling disputes. The jurisdiction of national Court' are fixed.

The patent granted is for 20 years and the patent holder has the right to use, sell, offer to sell the patented invention. There are industries which invest large amount of money for the patented invention. All the inventions by these industries have an impact on the public by providing quality life. The monopoly right granted is limited and the high cost of the research is compelling to have a quick, effective and speedy settlement of disputes. Patents are assets to industries. Patent protection is essential for these companies to ensure they remain competitive in the market and license their inventions to others.[1]

Patent

Introduction to patent

Patents are granted for inventions which are new, involve an inventive step and are capable for industrial application. For promoting scientific research and for development of society, patent law has been enacted in India as the Patent Act, 1970.

TRIP's agreement mentions about granting patent to all inventions which are new, involve an inventive step and capable of industrial application. World Intellectual Property Organisation [WIPO] by Patent Cooperation Treaty [PCT] allows for filing of patent application procedure to be centralized in single procedure.

Patents are granted for inventions whether product or process and are new and involve an inventive step. The objective behind enacting Indian Patent Law, 1970 is the progress of scientific research and technology for public good. The patent registered with the patent office will be examined and the granted patent will be registered with the office. The patent holder has the exclusive right to make, use, sell the product. Patent holder can prevent third parties from using the patent. Once the patent is granted it is still open for a third party to oppose it. The dispute settlement mechanism for patent disputes are as follows:

1] the Indian Patent Office for examining the patent application and for accepting the post and pre- grant opposition applications.
2] the District Court for deciding infringement applications.

[1] David A. Allgeyer, In Search of Lower Cost Resolution: Using Arbitration to Resolve Patent Disputes, 12 CONFLICT MGMT. NEWSL. OF THE SEC. OF LITIG.'S COMMITTEE ON ALTERNATIVE DISP. RESOL. 1, 9 (2007).

3] High court for both counterclaim and infringement matters. High Court has original and appellate jurisdiction.
4] Supreme Court for appellate jurisdiction.
5] Patent tribunals.

The owner of the invention has a monopoly right to exclude others from using, selling or buying the patent. The grant of patent alone will not guarantee the validity of the patent. The procedure for challenging the patent varies from nation to nation on basis of National Patent legislation. A nation with strong and supporting economy can be obtained only by protecting the intellectual skills.

License and assigning of rights are allowed in case of patent, which in turn will lead to disputes later. License is a permission reflected in an agreement on which certain rights are assigned to a third party. The patent holder has the right to enter into a license agreement with the third party. Granting License can lead to disputes later as infringement or violation of terms and conditions in the license agreement.

Number of patents granted[2]

The number of patent applications filed have increased. On basis of the applications received the number of patents granted also increased. More the number of patents granted, more will be the number of disputes on basis of validity of patent and infringement matters.

Number of New Patent Rights Issued under Intellectual Property Rights in India	
(2016-2017 to 2021-2022-upto 15.03.2022)	
Year	**No. of Patents Granted**
2016-2017	9847
2017-2018	13045
2018-2019	15283
2019-2020	24936
2020-2021	28391
2021-2022-upto 15.03.2022	28091

[2] https://www.indiastat.com/table/patents/number-new-patent-rights-issued-under-intellectual/1425121, assessed on 02/08/2022 at 14: 24 PM.

Patent dispute settlement mechanism

Patent validity and infringement disputes are settled through Court and patent office. The Court proceedings are lengthy and the decision makers may not be experts in the filed always. Multiple appeals are allowed in a patent dispute. Difficult to maintain confidentiality in the entire proceedings. Patents are granted by the national authorities; the jurisdiction of the Court is limited on basis of the territorial nature of the patent granted.

Pre-grant opposition application

The opposition application can be filed within 3 months from the date of application or before grant of patent. The patent examiners will submit the first examination report within a period of 1 to 3 months from the date of reference. The applicant after receiving the first examination report, has to comply with the requirements in the report and can file an objection within a period of six months from the date of report.

After receiving the objection, the controller will fix a hearing date and decide on the claimed invention. The grant of patent will be published. The term of patent granted is for 20 years, from the date of filing complete specification. As per Sec.63 of Patent Act,[3] patentee has the right to surrender the patent.

As per Sec.25[4] any interested person will file objection for grant of patent, within 1 year of grant of patent.

[3] Section 63 in The Patents Act, 1970

63 Surrender of patents.

(1) A patentee may, at any time by giving notice in the prescribed manner to the Controller, offer to surrender his patent.

(2) Where such an offer is made, the Controller shall [publish] the offer in the prescribed manner, and also notify every person other than the patentee whose name appears in the register as having an interest in the patent.

(3) Any person interested may, within the prescribed period after [such publication], give notice to the Controller of opposition to the surrender, and where any such notice is given the Controller shall notify the patentee.

(4) If the Controller is satisfied after hearing the patentee and any opponent, if desirous of being heard, that the patent may properly be surrendered, he may accept the offer and by order, revoke the patent.

[4] 25 Opposition to the patent. -

(1) Where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the ground-

(a) that the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

(b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim-

(i) in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or

(ii) in India or elsewhere, in any other document: Provided that the ground specified in sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of sub-section (2) or sub-section (3) of section 29;

(c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after priority date of the applicant's claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim;

(d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim. Explanation. -For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

(e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim;

(f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

(g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

(h) that the applicant has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge;

(i) that in the case of a convention application, the application was not made within twelve months from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title;

(j) that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention;

(k) that the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere, but on no other ground, and the Controller shall, if requested by such person for being heard, hear him and dispose of such representation in such manner and within such period as may be prescribed.

(2) At any time after the grant of patent but before the expiry of a period of one year from the date of publication of grant of a patent, any person interested may give notice of opposition to the Controller in the prescribed manner on any of the following grounds, namely:-

(a) that the patentee or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;

(b) that the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim-

(i) in any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or

(ii) in India or elsewhere, in any other document:

Provided that the ground specified in sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of sub-section (2) or sub-section (3) of section 29;

(c) that the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the claim of the patentee and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the claim of the patentee;

(d) that the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim. Explanation. -For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

(e) that the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim;

Revocation of patent

Can be done by controller of patent, patent tribunal as the intellectual property appellate board is quashed on basis of the ordinance 2021 or by the High court. The original jurisdiction of the patent infringement suits lies with the district Court.

Infringement of patent

The patentee has the right to sue for infringement of process or product patent. In case of a product patent if someone make, use, offer for sale or sell or import the patented product without the permission of the patentee, it can be considered as an infringement.

District Court's as per Chapter 18 [sections 104 to 115] has jurisdiction to entertain the matter. If the revocation of the patent is addressed in the counter claim by the defendant the matter will be referred to the High Court.

Significance of dispute settlement mechanisms in patent

Dispute resolution mechanisms existing in a nation are for providing proper remedy to the parties to a dispute. Two types of dispute resolution mechanism are

(f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;

(g) that the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;

(h) that the patentee has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge;

(i) that in the case of a patent granted on a convention application, the application for patent was not made within twelve months from the date of the first application for protection for the invention made in a convention country or in India by the patentee or a person from whom he derives title;

(j) that the complete specification does not disclose or wrongly mentions the source and geographical origin of biological material used for the invention;

(k) that the invention so far as claimed in any claim of the complete specification was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere, but on no other ground.

(3) (a) Where any such notice of opposition is duly given under sub-section (2), the Controller shall notify the patentee.

(b) On receipt of such notice of opposition, the Controller shall, by order in writing, constitute a Board to be known as the Opposition Board consisting of such officers as he may determine and refer such notice of opposition along with the documents to that Board for examination and submission of its recommendations to the Controller.

(c) Every Opposition Board constituted under clause (b) shall conduct the examination in accordance with such procedure as may be prescribed.

(4) On receipt of the recommendation of the Opposition Board and after giving the patentee and the opponent an opportunity of being heard, the Controller shall order either to maintain or to amend or to revoke the patent.

(5) While passing an order under sub-section (4) in respect of the ground mentioned in clause (d) or clause (e) of sub-section (2), the Controller shall not take into account any personal document or secret trial or secret use.

(6) In case the Controller issues an order under sub-section (4) that the patent shall be maintained subject to amendment of the specification or any other document, the patent shall stand amended accordingly.]

in existence for providing justice, judicial dispute resolution and alternative dispute resolution. Diverse dispute resolution mechanisms are in existence for protecting the intellectual property rights. Remedies for solving disputes are available in different legislations. If the existing diverse dispute settlement mechanisms are not efficient enough to address the disputes or enforce the rights, then there is no use in having a detailed dispute resolution mechanism. All the existing dispute resolution mechanisms are taking time to decide the matter by giving less preference to the party's convenience or not understanding the significance of patent.

Dispute settlement through Arbitration

Arbitration is an alternative mode of dispute settlement mechanism. The parties through arbitration clause in an agreement agrees for referring matter for arbitration. The arbitrators will be the experts in the field. The arbitration clause in the contract specifies about how the arbitrator will be appointed, the place of arbitration, the substantive and procedural law applicable. The way in which the arbitral award will be enforced. New York Convention and Geneva Convention on arbitration gives you clarity regarding the enforcement and setting aside procedure for arbitration. The procedure for enforcing arbitral award varies for domestic and international arbitration. The arbitral awards are having validity depending upon the jurisdictions chosen and the multi- jurisdictional treaties.

Arbitration is a dispute settlement mechanism where the issues are submitted before a private tribunal and the decision is taken by the tribunal on basis of the evidence. The decision taken by the tribunal is final and binding on the parties. The advantages of arbitration proceeding are as follows:

1. Party autonomy and neutral proceedings

   Party autonomy in an arbitration can be seen in drafting the clauses in an arbitration agreement, the appointment of arbitrator, choosing the seat and venue of arbitration, the language to be used for the arbitration, the office of arbitration, the length of arbitration proceedings, the finality of the award.

   The entire arbitration proceedings are conducted on basis of the arbitration agreement. Where parties have complete autonomy to decide the arbitrators depending upon the experience and expertise of the arbitrators.

   The parties can decide the qualification required for the arbitrator, experience and the expertise required. The arbitrator appointed for any proceeding has to be independent and impartial. Where the neutral code of ethics will be decided either by the parties and the arbitrator or by

the institution they approach. The independence and impartiality of an arbitrator can be decided on various grounds.

2. Arbitration proceedings and party autonomy

   The framework of the arbitration proceeding can be decided by the parties. No fixed code or convention mentions about the entire procedure to be followed in an arbitration. Arbitral proceedings are less complex in nature. Few legislations had given a brief outline of the documents to be submitted in arbitration, how the proceedings have to be and the finality of the decision taken. The institutions dealing with the arbitration has their own arbitration rules.

   The tribunal can provide suggestion to the parties on basis of the administrative assistance needed, the language to be chosen and the time frame within which the arbitration proceedings can be concluded.

   The procedural aspects that can be decided by the parties include the entire structure of the arbitration, the timeline within which the IA can be decided, confidentiality clause regarding disclosure of information's, rules related to the evidence taking and fast track proceedings. Choice for the parties to decide any kind of dispute settlement mechanism during the arbitration proceedings.

3. Confidentiality in an arbitration

   Parties can fix the confidentiality clause depending upon their subject matter in dispute. Confidentiality can be fixed on the documents submitted including the evidence and the witness to be summoned, the proceeding to be followed in an arbitration, on the final arbitral award.

4. Autonomy to choose the third neutral person for taking decision

   The parties have the liberty to choose the decision makers depending upon the subject matter, the qualification required, and the experience of the neutral third party. Thus, experts in the filed can take decision. The number of arbitrators can be decided by the parties depending upon the complexity of the dispute. The arbitrators can do the fact- finding and come to a suitable settlement. Thus, depending upon the party's choice, it is possible that the arbitrator's themselves would be able to undertake fact- finding and decision – making process required to resolve the dispute.[5]

   In highly technical matters judges and neutral parties may not be qualified to understand and address the issue correctly.

[5] P. Nutzi, "Intellectual Property Arbitration", European Intellectual Property Review 4 (1997); 4.

5. Procedural flexibility
   Parties have the discretion to decide the procedure of arbitration. In an arbitration proceeding, parties are free to decide on the procedure.[6] The adhoc arbitration proceedings can be decided by the parties themselves and in case of Institutional arbitration proceedings, the institutions decide the proceedings with fixed set of rules.[7]
   Through agreement parties are free to decide the arbitration procedure including appointment of arbitrators. Further modification can be made to the Rules after appointing the arbitrators. The procedure decided by the parties include the timeline for arbitration, the rounds of arguments, the written submission deadlines, and the deadlines for production of documents for evidence and the expert opinions in a particular field.
6. Hybrid ADR mechanisms can be utilized
   The ADR mechanism which is most suitable for a particular dispute can be utilized by the parties. Parties with the consent of the arbitrator can change arbitration proceedings to mediation and to mediation-arbitration proceedings and mediation proceedings.
7. Arbitral Awards are final in nature, they are not subjected to appeal or review. Thus, state interference in arbitral decisions is allowed only on limited grounds. National courts tried to interfere in the arbitration matters to certain extend earlier. This has been limited in majority of the jurisdiction's including India through amendments in existing legislations or through new legislations.[8] Judicial Review is possible in New Zealand, Switzerland, and United Kingdom.[9]
8. Speedy settlement of the dispute in an arbitration mechanism. The time period for concluding an arbitration can be fixed by the parties. It depends on the subject matter in dispute, the number of parties involved, the kind of qualification required from the neutral third person. The length of arbitral proceeding will change again on basis of domestic and international arbitration.
9. The cost of arbitration as compared to litigation is high, on basis of various factors as decision makers are paid by the party's, any ancillary charges are paid by the party, the administrative assistance required for arbitrator is given either by the party or by party to the institutions

6 See. G. Born, 'International Commercial Arbitraion', 2nd edn (The Hague Kluwer Law International, 2001), 7-8.
7 LCIA Rules with 32 articles, ICC Rules with 35 articles, AAA international rules with 37 rules.
8 In India Arbitration Act 1940 mentions about converting arbitral award to a decree which was a lengthier procedure. Later when Arbitration Act 1940 was replaced by Arbitration and Conciliation Act 1996, the arbitral award is considered as final and has the same status of a decree. Hence court will not look into the merits of the case, but the court has discretion to setaside the award on various grounds.
9 See W. Park, 'Irony in Intellectual Property Arbitration '. Arbitration International 19. No.4 (2003): 453.

providing arbitrators for settling a matter. The cost of arbitration proceedings varies on basis of the time spend on the dispute, the qualification and the experience of the arbitrators.

Disadvantages of arbitration

1. Arbitral tribunal lacks coercive power to compel the parties to do or refrain from doing something, but judicial assistance can be taken to enforce the orders given by the arbitral tribunal especially on basis of temporary and perpetual injunction and for taking evidence, summoning the parties and for production of documents. Certain Arbitration legislations and rules mentions specifically about the consequence of not comply with the tribunal orders.[10]
2. Decision of the arbitrator binding only on the parties to the arbitration agreement. Thus, the arbitrators didn't have the right to take decision against the third party. The joinder of parties and adding of issues are allowed in arbitration only if parties to an arbitration agrees for the same. But the tribunal didn't have the power to order for adding of a party who is not connected with the entire dispute to the arbitration proceedings.
3. No precedent setting for arbitration proceedings.
4. The excessive exercise of powers or failure to exercise the powers by the arbitrators can lead to failure in the arbitration process. Where the proceedings can itself be delayed and the parties will get less opportunity to clarify the points or their statements.
5. Tribunal lacks coercive powers to enforce any decision. In India judicial assistance can be sought even form the beginning to appoint arbitrators,[11] for referring matter for arbitration for taking evidence. In UK under English Arbitration Act, 1996 legislation mentions about dismissing the claims on failure to comply with the rules.[12]
6. The contractual nature of arbitration, is not allowing the arbitrator to take a decision against any third party. the tribunal didn't have the right to add more parties to the arbitration proceedings without the third parties' consent.
7. The arbitral award didn't have a precedent value. It has only inter party effect.

[10] Sec. 41 (6) of English Arbitration Act.
Article. 56 (d) of WIPO Arbitration Rules.
IBA Rules on taking of rules in International Arbitration.
[11] Sec. 30.
[12] Sec.41 (6) & WIPO Arbitration Rules Art.56(d).

Public policy concerns in arbitration

Arbitration has been identified as an alternative method of dispute resolution. Where the final award is binding and the same can be enforced through Court. Public policy concerns in arbitration arises both in domestic and international arbitration. Public policy is a term which cannot be clearly defined. It varies form nation to nation and from generation to generation. Public policy concerns in arbitration comes into picture in three different stages, first at the time of referring a matter for arbitration and 2nd at the time of setting aside arbitral award and 3rd at the time of enforcing the arbitral award. The Indian legislation which specifically dealt with domestic arbitration was the Arbitration and Conciliation Act, 1940. The 1940 legislation failed to mention the term public policy. The 1996 Arbitration and Conciliation Act, include the term public policy in setting aside an arbitral award under sec.34 of Arbitration and Conciliation Act.

The Arbitration and Conciliation Act, 1996, while referring a matter for arbitration, failed to mention the significance of the term public policy under sec.8. Where in sec. 8 of Arbitration and Conciliation Act mentions about referring a matter for arbitration. While entertaining an application under sec.8, the Court will look into arbitration agreement and decide whether the subject matter of dispute is arbitrable or not. The honourable Court in various cases tried to give an explanation for the matters that are excluded from arbitration.

In Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors,[13] the Court followed a right based approach to decide whether the matter is arbitrable or not. Non-arbitrable disputes identified in Booz Allen case are as follows:

(i) criminal offences, (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody (iii) guardianship matters (iv) insolvency and winding up matters (v) testamentary matters (grant of probate, letters of administration and succession certificate) and (vi) eviction or tenancy matters governed by special statutes. Where Court clearly mentioned that right in rem cannot be referred for arbitration. While right in personam are allowed to be arbitrable.

Ayyasamy Vs. Respondent: A. Paramasivam and Ors. Civil Appeal Nos. 8245-8246 of 2016,[14] *the Court had pointed out that* Where fraud, even though is considered as a serious offence affecting the public, If the parties were able to prove that the decision will be affecting only the parties themselves, can be referred for arbitration. The Court here tried to give a distinction between fraud

[13] In Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors (2011) 5 SCC 232.

[14] *A. Ayyasamy Vs. Respondent: A. Paramasivam and Ors. Civil Appeal Nos. 8245-8246 of 2016.*

simpliciter and serious fraud. Here Court allowed arbitrability of disputes including fraud even though it is a matter of public interest, but will affect only the parties.

In Himangni Enterprises Vs. Respondent: Kamaljeet Singh Ahluwalia,[15] Respondent filed suit for eviction of the appellant from the shop and for obtaining unpaid arrears of rent, and for permanent injunction. Appellant relied on the arbitration clause and tried to refer the matter for arbitration. The Court relied on various decisions along with Booz Allen & Hamilton Inc. case which has given well recognized examples of matters that are not arbitrable. Where it is stated that eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

Public policy varies on basis of national, social and economic and moral needs. In all these decisions the main aspect taken into consideration by the court is whether the matter falls in public fore or not? As the matters of public policy issues are considered as coming within the sovereign authority of the Court and not a private tribunal appointed by the parties. Through various judgements the Court tries to inform that if there is special tribunal to address any issue, the matter cannot be referred for arbitration, if the decision has an impact on the third-party matter cannot be entertained by the arbitrator.

The public policy concern on setting aside of arbitral award and enforcement of arbitral award is on the following grounds as:

[1] foreign arbitration on grounds of (a) fundamental policy of Indian law, (b) interest of India; (c) justice or morality

[2] domestic arbitration on ground of (a) fundamental policy of Indian law, where the arbitration process should follow the natural justice principle, fair and reasonable procedure has to be followed (b) interest of India; (c) justice or morality, and (d) patent illegality which is applicable when there is an error of law [a]apparent on the face of record, [b] that goes to the root of the matter [c] violation of statutory law which is trivial in nature [d] a n award that shock the consciousness of the Court.

After amendment as per Sec.34, Explanation I- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if - (i) the making of that award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Explanation 2 - For the avoidance of any doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not

[15] Civil Appeal No. 16850 of 2017 (Arising out of S.L.P. (C) No. 27722/2017) and (D. No. 21033/2017).

entail a review on the merits of the dispute. The term interest of India was excluded in case of both domestic and international award.

The vague nature of the term public policy grants huge powers to the Court to interfere and review the arbitral award. The concept of public policy remains an elusive concept and the Indian courts have stuck, what has been suggested to be a discordant note.[16]

There exists no uniform standard to decide the term public policy. This itself is creating confusion in the public while entering into an agreement for referring a matter for arbitration. Parties choose arbitration for its finality, efficiency, and relative economy.[17]

Settling patent disputes through arbitration

Art. II (1) and V (1)(a) of the New York Convention mentions about the laws governing arbitrability.[18] Settling intellectual property disputes through arbitration is not a new idea. World intellectual property organisation has its's own mediation and arbitration centres and rules to settle intellectual property disputes.[19] Queen Mary, London University, School of International Arbitration carried out a survey in 2008 which mentions that 6% of the corporates used international arbitration to settle the matter. Arbitration of intellectual property disputes, especially patent is limited on basis of objective arbitrability in different jurisdictions. The major issue involved in arbitrability of patent disputes include party autonomy in arbitration.

There are nations which completely exclude arbitrability of patent disputes either expressly or impliedly.[20] Belgium,[21] US[22] expressly allows arbitrability of patent disputes. The contract drafted by the parties have clarity regarding the matters to be referred for arbitration. Thus, private contract issues are allowed to be arbitrable in majority of the jurisdiction's[23] in case of patents, utility models,

[16] Badrinath Srinivasan, 'Arbitration and the Supreme Court: A Tale of Discordance between the Text and Judicial Determination' (2011) 4 NUJS L Rev 639. 645.

[17] A See Christopher S. Gibson, Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law, 113 PENN ST. L. REV. 1227, 1228 (2009) (claiming that a "reformed concept of substantive public policy" is required in order to uphold the balance between finality and justice). melia C Rendeiro, "Indian Arbitration and Public Policy" (2011) 89:3 Tex L Rev 699.

[18] B. Hanotiau, "The Law Applicable to arbitrability", ICCA Congress Series 9 (1999): 154.

[19] WIPO administered more than 110IP arbitration matters.

[20] The Patent Act and Arbitration and conciliation Act didn't mention about arbitrability of patent disputes in India. But Court through various judgments tried to give a clarity for the same. In India subject matter arbitration is restricted on basis of public policy. Art.18(1) of Patent Act, 1978.

[21] Belgium Patent Act, Art.51 (1).

[22] 35 USC s. 294.

[23] US, UK, India.

registered trade marks concerns related to public policy arises. Parties are not allowed to challenge the validity of the majority of the intellectual property rights.

Challenge towards the granted patent can happen in different stages. Starting from the time the patent application is submitted, application itself can be challenged, once the patent is granted the validity of the patent granted can be challenged.

The arbitrability of patent disputes arises in different stages. Jurisdiction of the arbitrator to entertain the patent dispute will be first challenge. The special tribunals for deciding the matter including the High Court is in existence in India.

Lack of jurisdiction of the arbitrator to entertain the matter will in turn lead to setting aside of arbitral award once the decision is passed on validity of patent disputes. Even enforcement of the arbitral award will be difficult.

Competence – competence principle followed in deciding the jurisdiction will be an issue of major concern. Under sec.16 of Arbitration and Conciliation Act, 1996 in India, arbitrators have the right to decide their own jurisdiction. The contract and arbitration clause will provide clarity to arbitrator to decide on their jurisdiction in arbitration matters. The validity of the arbitration agreement will be in challenge if the question related to jurisdiction arises.

Whether tribunal themselves are entrusted to entertain non arbitrability disputes? National Court's in majority of the jurisdiction has the right to decide whether a dispute is arbitrable or not. While enforcing the arbitral awards the patent validity concerns and jurisdictional issues again arises.

Public policy concerns in patent arbitration

How public policy as a fundamental rule limits the autonomy of the party and the independent arbitrator in structuring the arbitration process needs more clarity. To what extend can there be a uniformity in the policies limiting arbitration especially on basis of subject matter is another question to be addressed seriously. And the third matter which has to be addressed seriously is Whether arbitration proceedings is subject to public policy?

Life style equity ventures Vs. QDSeatoman Designs Pvt. Ltd.

Lifestyle Equities CV is a Dutch limited have registered office at Chennai, Life style and QDS were running business of apparels and garments. The first agreement was for a period of 3 years and before three years the issue arise. Clause 40 was the arbitration clause in the agreement is as follows: Clause 40: Any dispute arising out of or in connection with this Agreement, shall first be resolved mutually by the Parties through negotiations. If the Parties are not able to settle the same through negotiations, each party may appoint an arbitrator and such appointed arbitrators shall appoint a third arbitrator for arbitration. The

arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996. The place of arbitration shall be Chennai, India and the language of arbitration shall be in English.'

Life style filed sec.9 application before the single judge for interim measures. QDS claimed that sec.9 application is not maintainable as the matter to be referred is a non-arbitrable subject matter. Intellectual property rights are rights in rem, and hence are not arbitrable. Where in Court had pointed out that patent validity disputes are matters of right in rem, hence the same cannot be referred for arbitration, while infringement matters are right in personam which can be referred for arbitration. The reason given for non-arbitrability of patent disputes are not conclusive in nature.

Arbitration of patent disputes and public policy concerns

1. The major concern regarding public policy issues in arbitration is the state involvement in granting patent. The sovereign nature of the state is reflected throughout. The patent is registered with the patent office, the same is not allowed to be invalidated by an arbitral tribunal. The final authority to decide whether a patent should be granted is the state. Patent rights are monopoly rights granted. Public authorities grant these titles. State delegate the power to different authorities. Where the concerned authorities will scrutinize the applications and grant patent. Thus only the state and not private parties has the right to undo the grant of patent.[24] A private arbitral tribunal didn't have the right to take decision on this matter. On basis of an agreement parties didn't have the right to decide on these matters. Thus, state involvement and state granted right is the first objection towards allowing arbitrability of patent dispute on basis of public policy.
2. Patent right is an exclusive right granted to an applicant. The state extracts some subjects matters from public domain and place the same under the control of certain individuals. Thus, individuals are granted powers to modify the patent rights and state thus oust the jurisdiction of state to certain extend.
3. Patent grants exclusive monopoly right to the holder of the patent. The public policy justification for grant of patent right is further advancement of science and technology for the benefit of the society.[25] Grant of patent will boost more inventions which will benefit the public.

[24] Cf. P. Janicke, 'Maybe we shouldn't Arbitrate', *Houston Law Review 39 (2002) : 702.*
[25] See. T. cook, 'A User's Guide to Patents'. 2nd edn (London: Tottel Publishing, 2007). 15-20.

4. Granting powers to a private body to decide such disputes can greatly affect the existence of the patent, which in turn will have a direct impact on the society and economy at large.
5. Specific bodies are in existence to decide the validity of the patent. State grants exclusive jurisdiction to certain authorities to decide on the validity of patent disputes. In India patent office can decide on the validity of patent. The High Court further has the right to decide on the patent validity dispute.
6. Enforceability of the arbitral award in patent disputes is the biggest issue. The patent holder can create agreement with other party for licensing, assigning or transferring the rights. Through these agreements he can create arbitration clause for referring matters for arbitration.
7. Monopoly right granted will remove the patent from public domain. This monopoly right is granted for the interest and protection of the patent holder. If patent holder uses patent for his benefit, why for validity reasons he is prevented from drafting an arbitration clause. It is difficult to understand the public interest involved in the patent validity issues. When parties submit their disputes to arbitration, they are not interfering with any state interest. The functioning of the patent system is in no way affected. The exclusive right to decide on the patent validity disputes vests with the patent office and the Court's now. As arbitration is between two parties, it is in no way affecting or interfering into the Court or tribunal jurisdiction.

Party autonomy and arbitration in patent disputes

Patent autonomy is the key element in an arbitration proceeding. Party autonomy will have applicability only for right in persona. Public policy concerns in different jurisdictions can limit the party autonomy. State sovereignty in any way cannot be affected by party autonomy. Arbitration clauses can be framed without affecting the rights of third party or taking away the rights granted by the sovereign power.[26]

Arbitrability of IP disputes are limited on basis of public policy. Indian Courts have allowed arbitrability of certain IP disputes. But arbitrability of patent validity disputes are limited on ground of public policy concerns.

[26] Art.2059 & Art.2060 of French Civil code not allow arbitrators to interfere on state sovereignty. Sec1 (b) of English Arbitration Act, 1996 states that "Parties are free to agree on how the dispute are resolved, subject only to such safeguards as are necessary in the public interest".

Validity of the decisions submitted to arbitration is the major concern in intellectual property dispute arbitrations. Party autonomy and public policy concerns are considered as taking extreme positions. Thus, arbitrable subject matter and public policy concerns in major jurisdictions act as a limitation to the party autonomy to refer certain disputes to arbitration.

Patent validity disputes can be addressed by an arbitrator who is an expert in the field. Where the parties can have the autonomy to decide the language of their choice. As far as patent validity disputes are concerned the language and the seat and venue should be decided by giving preference to the patent office regulations where the patent is registered or yet to be registered.

In patent infringement matters, depending upon the third party and the kind of infringement that happened, the patent license agreements can be drafted accordingly to provide an additional clause for referring patent infringement matters to be settled by either mediation or arbitration.

The parties can choose arbitrators depending upon the experience and expertise in a filed including technical expertise. Thus, the arbitrators will get the privilege of understanding the real disputes in the subject matter, and proceeding accordingly to reach a final decision on basis of the experience. The arbitrators themselves would be able to undertake the fact-finding and decision – making processes required to resolve the highly complex disputes.[27]

The length of the arbitration proceeding in a patent dispute can be decided by the parties on basis of the nationality of the parties to the dispute, the experience and expertise needed by the concerned neutral third person, the subject matter in dispute. lack of clarity in the domestic legislations related to arbitration of patent disputes is the major concern. International standard's related to arbitration is enhancing day by day. And more disputes are been referred to arbitration.

Neutral third party as an arbitrator in a patent dispute

Parties to a patent dispute can be either from the same nation or from the different nations, designing a neutral code of ethics for proceeding with the arbitration can help the parties in multiple ways. The benefits are as follows:

1. The neutral code of ethics will help in conducting the proceeding in a fair and reasonable manner
2. The neutral will be doing the justice to the parties and will address the subject matter in dispute in an efficient manner

[27] See P. Nuzi, "Intellectual Property Arbitration", European Intellectual Property Review (1997) : 4.

3. Neutral will be aware of the jurisdictional limits and at the same time parties will be in a position to understand whether the neutral third person acting as an arbitrator is not exceeding the jurisdictional limits granted to him.
4. The neutral third party or arbitrator will be more cautious and will inform the parties regarding any kind of official or personal bias.
5. The neutral third party appointed by the parties will have required experience and qualification to address the issue. For addressing patent disputes, as it is more technical in nature, scientific background is required. The parties can choose the person who have experience and qualification both in science and legal field. The international Survey of Specialised intellectual property Courts and tribunals[28] clearly point out that the tribunal judges specialised in IP disputes are less in number. Majority of the nations are not giving more significance to the need of a specialist in addressing IP disputes. Choosing a right decision maker has it's own benefits in arbitration.
6. The evidentiary value in a patent dispute is higher as compared to any other civil disputes. The arbitrator who has expertise in both patent and arbitration can clearly identify the authenticity of the documents submitted and provide a proper justice to the parties.

Patent cases are multi-jurisdictional in nature

Patent rights are territorial in nature. The disputes related to patent in multiple jurisdictions can be an issue, if for the same dispute multiple judgements are available. And the enforcement of these judgments will be an issue for the patent holder. Arbitration as a dispute resolution mechanism can resolve this issue to certain extend.

Single proceeding to resolve multi-jurisdictional dispute is a greater relief.

With consent of the parties' agreements can be drafted for deciding the disputes, in multiple jurisdiction's which will help the parties in saving cost and time. This takes time for the parties to a dispute to agree upon the arbitration clause. All the ADR mechanisms including arbitration is voluntary in nature.

[28] IBA 2006.

Patent dispute and confidentiality in the dispute settlement mechanisms

Party autonomy can be reflected throughout the arbitration process. The main advantage of an arbitration is the confidentiality throughout the proceeding. Which can effectively be utilized for the patent dispute settlement. The confidentiality of the arbitration can be fixed by the parties in the arbitration. Confidentiality clauses will be included in the arbitration clause. The institutions providing arbitration will also provide arbitration clauses.[29] Arbitral institutions as SIAC, American Arbitration Association are not imposing any specific Rules for confidentiality. Thus, if institutions are silent the arbitration agreement drafted by the parties has to provide clarity regarding the same. Accepting confidentiality in arbitration varies from nation to nation. Where US Court's considers that confidentiality clauses to be expressly mentioned. In English Court's, they impose clear responsibility of confidentiality upon the parties.

Thus, in patent disputes due to the nature of subject matter involved in the disputes, parties can decide on the confidentiality throughout the proceedings.

Hybrid ADR mechanisms as a patent dispute settlement mechanism

Parties depending upon the subject matter can decide which ADR mechanism to be utilized. In certain matters where parties are more concerned about the future relationship, they can rely on MED- Arbitration, where parties will start with mediation, which help them focus more on the interest and need of the parties and identifying the strength and weakness of each party. Later they can start with the arbitration process to reach the final settlement of the dispute.

The parties have the discretion to decide whether the same tribunal will continue through out the license agreement in a patent or not. This decision can be taken either in the beginning while drafting arbitration agreement or after constituting the tribunal to decide the first dispute between the parties.[30]

Arbitrator decision didn't have *Erga omnes effect*. With over thousands of international commercial arbitrations taking place across the globe, India's chances of being the most sought-after choice of seat depends largely on the nature of its laws.[31]

[29] WIPO Arbitration Rules, Articles 72 to 76. CIETAC Article.33, LCIA Rules Article. 30, Swiss Chamber of Commerce Article Article.43.

[30] Sec. 30 of Arbitration and conciliation Act, 1996.

[31] Sankalp Udgata & Ayush Chatuvedi, Contours of Commercial Arbitration: A Disquisition into the Arbitrability of IP Disputes in India, 25 Annals FAC. L.U. ZENICA 127 (2020), Heinonline accessed on Fri Dec 18

Conclusion and suggestions

1. Arbitrator's experience & expertise can help the parties in identifying the actual procedure depending upon the subject matter and helps in speedy disposal of the dispute.
2. Arbitral awards can be set-aside but not appealed. This can provide speedy remedy to the parties.
3. Two- tier arbitral proceedings can be allowed for deciding patent disputes. As the MNC's or companies are spending lot of money for funding research. Single forum for deciding the same without appeal can affect the parties. Additional quality assessment mechanisms are needed for concluding a dispute in the correct manner. More number of panel members in a dispute settlement mechanism like arbitration can provide justice to parties. Agreeing to judicial review on the merits of the case can lead parties to all kind of disadvantages which are reflected in a normal judicial dispute resolution mechanism. Judicial review can delay the enforcement of the award made by spending lot of money in the arbitration proceeding and the research for getting a patent. The final clause is added to avoid any further scrutiny on the same issues unless it is on basis of specific grounds. Thus two- tier arbitration proceeding can be best alternative in any proceeding, where parties themselves can agree through the arbitration agreement.
4. Tribunal cannot invalidate the IPR with *erga omnes* effect.
5. A neutral third person who has sound knowledge in the specific technical field and in arbitration can only entertain patent disputes settlement through arbitration. Identifying such an expert will be hectic task for the parties to a dispute.
6. An in-depth analysis of the reason for in arbitrability issues is needed. The international conventions and model laws have to be looked into and analysed carefully to bring fruitful changes in the national arbitration legislations.
7. The reason for the non-applicability in patent disputes is not clear. Inter- party effect of the arbitration agreement related to patent validity disputes can be taken into consideration for allowing patent validity disputes to arbitration.
8. Narrow interpretation has been given to the subject matter arbitrability of disputes. The term public policy is decided by each state.

05:17:43 2020.

9. Arbitral awards has interparty effect in certain matters, through modification in the national legislations the applicability of arbitral award can be extended to third party.
10. The justification given for non-arbitrability on basis of sovereign power of the sate cannot be accepted as such, as at the moment the state grants monopoly right to the patent holder, the right itself is taken from the public domain. He/she has the exclusive right to decide on the further modifications or the way in which dispute related to patent can be granted. State after undergoing lot of examination had granted patent. There are nations as Switzerland who considers that grant of patent is not a sovereign act and thus tribunals can invalidate the patente.[32]
Thus, arbitrability of patent validity and patent infringement dispute's is an urgent need to attract more investments in the research and for development of a nation. Intellectual skills are to be protected by the state for economic and national development. The protection can be provided by the state only if the dispute resolution mechanisms are effective enough to address the same. Arbitration of patent disputes can also be an additional dispute resolution mechanism which will definitely provide speedy settlement of the dispute.

References

Research and practice in international commercial arbitration, S. I. Strong PUBLISHER Oxford University Press, Incorporated DATE 2009-04-15.

ANALYSIS OF PATENT LITIGATION STATISTICS, STAFF REPORT OF THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SEss. 2 (1961).

PC Markanda, Law relating to arbitration and Conciliation (8th Edn Lexis nexis butterworths Wadhwa 2013) 1985.

Hiroo H. Advani "Public Policy", National Law School of India Review, Vol. 21, No. 2 (2009), pp. 55-63.

M.A. Smith, Arbitration of Patent Infringement and Validity Issues Worldwide, 19 HARVJ.OF LAW &TECH,299, 333 (2006).

Marion M. Lim, Note, ADR of Patent Disputes: A Customized Prescription, Not an Over-The-Counter Remedy, 6 CARDOZO J. CONFLICT RESOL. (2004).

Daniel Schimmel and Ila Kapoor, RESOLVING INTERNATIONAL IN William H Baker, ARBITRATING PATENT INFRINGEMENT DISPUTES, 5 Convergence 90 2009.

[32] Federal office of Intellectual Property rights. Decision of 15 Dec.1975.

William Grantham, The Arbitrability of International Intellectual Property Disputes Berkeley Journal of International Law Volume 14 | Issue 1996.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

SURESH, Sawmya; NAIR, Jayadevan S. Patent Dispute settlement through Arbitration and the public policy concerns. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 227-248, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.11.

DOI: 10.52028/rbadr.v4i8.12

A Modernized Pathway to Institutionalization and Privatization of Mediation in India

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Abstract: "*JUSTICE DELAYED IS JUSTICE DENIED*" can be completely related to the current situation in India. As of September 15, 2021, over 45 million cases were pending across all courts in India. It is high time for India to adopt an improvised solution to tackle the issue. Considering the ongoing endemic of pendency of cases in Indian courts, there is an urgency that, 'Alternative Dispute Resolution' mechanisms to no longer remain 'alternative' but become 'primary' and the most preferred modes of dispute resolution. Mediation is one such mode of dispute resolution which, if implemented efficiently has the potential to revolutionize the entire legal system and solve the issue of pendency in India. To mainstream mediation in Indian society the author proposes for Institutionalization and Privatization of mediation following the 'Early mediation' and 'Opt-Out Model'.

Keywords*:* Pendency. ADR. Mediation. Institutionalization. Privatization. Early mediation.

Summary: **I** Introduction – **II** Characters of Indian Mediation programs – **III** Proposed Models of Institutionalization – **IV** Conclusion – References

I Introduction

Justice is an evolving concept and hence there cannot be a universal definition or a universal idea of Justice.[1] At the present juncture wherein, courts in India are flooded with cases and Indian Judiciary is perceived as a paralysed institution

[1] Laila T. Ollapally, Integrating Mediation: A Holistic to Administration of Justice, International Journal on Consumer Law And Practice, 5 Nat'l L. School of India U. 25, 27-43 (2017); Michael Anderson, Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs, Paper for discussion at WDR meeting, 16, 17 (1996) (available at http://www.worldbank.org/poverty/wdrpverty/dfid/anderson.pdf (last visited on Aug. 29, 2022)).

due to the huge pendency and backlog of cases.[2] Thus, modern-day problems require modern day solutions,[3] and it can be said that that the traditional system of justice delivery is not enough to cater the needs of present therefore, we require an improvised version of justice.[4]

It is high time for 'Alternative Dispute Resolution' mechanisms to no longer remain 'alternative' but become 'primary' and the most preferred modes of dispute resolution. Mediation is one such mode of dispute resolution which, if implemented efficiently has the potential to revolutionize the entire legal system[5] and solve the issue of pendency in India.[6]

Mediation along with all other modes of ADR are forms of out of court settlement. But induction of mandatory mediation program into the justice delivery system at a premature stage of civil suit could give a taste of mediation to both the parties involved in a suit at an early stage of their dispute. The idea is to introduce mediation as a mandatory session prior to the beginning of proceedings before the judge i.e., an Early Mediation Program. Adoption of Early Mediation Program could lead to Institutionalization of mediation into our justice delivery system and contribute substantially to lessening the burden of the courts.[7]

Secondly, with regards to privatization of mediation[8] wherein, the parties privately appoint mediators in order to resolve their dispute without any interference of the court. The issue that revolves around the functioning of private mediation in India is that, it is highly unregulated. Which means that, there is no requirement of mediators to be trained professional. People acting as mediators without any training or certification has the potential to jeopardize the entire idea of mediation as a whole.

1 Regime and issues of Indian Mediation

When the India Government declared the lockdown in March 2020, already 36.8 million cases are pending in India. Recently a PRS Legislative Research reports 45 million cases is currently pending in India. This is not something new but the ongoing pandemic has escalated the issue.

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2 Moog Robert, Delays in the Indian Courts: Why the Judges Don't Take Control, 16 Just. Sys. J. 19, 22-30 (1992); Upendra Baxi, The Crisis of the Indian Legal System, 393-400 (1982).

3 Parikh Puja Scheinman, Modern Mediation in My Bharat, Disp. Resol. J. 68, 69 (2013).

4 Joseph B. Stulberg, Mediation and Justice: What Standards Govern, 6 Cardozo J. Conflict Resol. 213, 214-15 (2005).

5 Nancy D. Erbe, Appreciating Mediation's Global Role In Promoting Good Governance, 11 Harv. Negot. L. Rev. 350, 355 (2006).

6 Xavier Anil, Why Mediation Matters, Int'l J. on Consumer L. & Prac. 5, 21-26 (2017).

7 Arnab Hazra & Bibek Debroy Kumar, Judicial Reform in India: Issues and Aspects, 320-325 (1st ed. 2007).

8 Hannah Arendt, Mediation and the Privatization of Conflict (2018) (available at https://medium.com/quote-of-the-week/mediation-and-the-privatization-of-conflict-1fe45d979967 (last visited on June 15, 2022)).

Mediation as a form of ADR falls under the second approach. Thus, adoption and promotion of Mediation Culture in India can be one of the most efficient solutions to the issue of pendency and backlog in India. Despite being one of the most efficient, speedier, cost-effective means of amicable dispute resolution mechanism, the present Mediation framework practiced in India has not been able to achieve its full potential. The major reasons for this are 'lack of uniform legislation' and 'lack of awareness' with regards to mediation in India. Due to the absence of a statute, there is no uniform working structure of mediation in India.[9] Every mediation centre has adopted their own specific set of rules and regulations for their functioning. As every mediation centre works autonomously, the rules of mediation varies according to the jurisdiction, and this leads to several ambiguities in the minds of people which makes them reluctant towards opting for the process.[10]

However, in 2021 India took a step forward to deal with the issue and mainstream mediation within the nation by introducing a draft Mediation Bill, 2021[11] in Rajya Sabha but the Committee on Law and Justice was requested to examine the Bill based on the opposition. The draft bill is nothing but a shallow attempt by the Indian legislature which reflects lack of research before framing a legislation and ignorance of its significance with respect to the ongoing crisis of pendency and backlog of cases in Indian courts.

The Bill emphasizes enforceability of mediation through confidentiality and admissibility and privilege against disclose of sec. 23 and24.[12] However, the Bill might not clearly recognize the Council as mediation service providers and very minimal effort has been made to regulate the mediators as it nowhere mentions the qualifications of a certificated mediator. Therefore, the draft mediation bill is not enough to make mediation, the most preferred mode of dispute resolution and use it as tool to resolve the issue of pendency and backlog of cases in Indian Courts.

II Characters of Indian Mediation programs

1 Mandatory vs. Voluntary Mediation

Considering the idea of Institutionalization and Privatization of Mediation into the Justice delivery system in India, the mediation in India can be bifurcated into

9 Alok Prasanna Kumar, Strengthening Mediation in India, A Report on Court-Connected Mediations, Vidhi Legal Policy (2016). (March 29, 2022, 12:04 AM), https://vidhilegalpolicy.in/reports-1/2016/7/25/strengthening-mediation-in-india-an-interim-report-on-court-annexed-mediations.

10 Rajiv Dutta, Mediation in India -Building on Progress, Int'l Bar Assoc. (March 28, 2022, 11:04 AM), https://www.ibanet.org/Document/Default.aspx?DocumentUid=B705AE33-0AF0-4DA2-9C93-7421D28D2767.

11 The Mediation Bill, 2021.

12 Id.

"Voluntary" and "Mandatory" methods.[13] Parties opting for a private mediator or reaching out to mediation centres by themselves are forms of voluntary means. Conversely, when the parties under section 89 of are sent under Civil Procedure Code or if it is mandated by a statute to opt for mediation before reaching to the court (Mandatory Pre- Litigation Mediation) is said as a form of Mandatory Mediation.

Voluntary Mediation	Mandatory Mediation
Contractual	Reference by Court
Private Mediation	Mandatory Pre-Litigation Mediation

However, this is a general information derived based on the functionality of mediation in India. There can be private mediation which is directly or indirectly mandated by the court. Similarly, there can Pre-Litigation Mediation both voluntarily and mandatory. Therefore, there cannot be a strict compartmentalization of Voluntary and Private mediation, but the author is trying to differentiate and illustrate the most significant and popular modes of mediation in India basing upon this broad distinction.

2 Mandatory mediation

Because mandatory mediation means that the judiciary requests the disputing parties to attempt the mediation process before approaching court, parties could not be forced to settle disputes on mediation.[14] The parties have an option to resort to mediation prior to litigation or it can be mandated by a statute. Therefore, mandatory pre-litigation mediation means that the disputing parties should attempt to apply mediation before initiating a suit based on a particular statute.[15]

1) Need of Mandatory Mediation

An ordinary person can get entangled in a lengthy litigation that defeats the very purpose of justice because it is a well-known fact that *"justice delayed is justice denied"*.[16] In India, it is a common practice among the citizens to approach

[13] Hazel Genn, Reinhard Greger, & Carrie Menkel Meadow, Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads, 250-259 (1st ed. 2013).
[14] Hazel, supra note 14, at 260.
[15] Indovina, supra note 16, at 103.
[16] Sarika Mittal, Mandatory Pre-Mediation in Family Disputes, ACADR E-Newsletter 2 (April, 2022). (October 14, 2022, 11:00 PM) https://www.alliance.edu.in/committees/ACADR/assets/publication/ACADR-Newsletter-Vol01-Issue02.pdf.

the Court for the settlement of every kind of dispute, which in turn overburdens the courts and results in the case file simply piling up.[17]

Supreme Court in the case *Hussainara Khatoon v. Home Secretary, the State of Bihar*[18] held that "the right to a speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 of Indian Constitution," thereby mediation became the sine qua non in the access of speedy justice.

Therefore, in order to expedite the wheels of justice delivery mechanism and also to resolve the problem of backlog of cases, the mandatory pre-litigation mediation,[19] if implemented sincerely could result into wonders in terms of speedy disposal of disputes and also in lessening the burden of the courts which could contribute to resolving the issue of pendency and backlog of cases in due time.[20]

2) Court referred mediation

CPC was amended in 1999, adding section 89 for ADR programs.[21] It empowers the court to refer parties to different modes of Alternate Dispute Resolution (ADR), which includes mediation as well. By virtue of this provision, if the case is fit for mediation, then the court refers parties to mediation and this process of referral by court is said as court referred mediation. Courts more tend to refer the parties to mediation in cases of Matrimonial disputes, particularly divorce cases.[22] This is a first step taken towards institutionalization of mediation in India through setting up the Court- annexed Mediation centres.

Judiciary plays a significant role in this form of institutionalization as cases reach to Court- annexed Mediation centres only if it is referred by a judge. The judges who refer the cases to ADR mechanisms under CPC are known as referral judges.[23] Not all cases could be referred to mediation, only cases containing element of settlement could be sent for mediation. Thus, the ability to identify such cases does requires, a particular set of skill and training. There exists a strong inter-relationship between the court annexed mediation and judges. The role

[17] Sai Aravind R, Should Mediation be a Prerequisite to Civil Litigation: An Indian Perspective, Ipleaders.

[18] Hussainara Khatoon v. Home Secretary, the State of Bihar, AIR 1369 (1979).

[19] Micevska & Hazra, The Problem of Court Congestion: Evidence from Lower Courts (2004). (Sept. 03, 2022, 03:00 PM), http://ageconsearch.umn.edu/handle/18750; Hazra, supra note 7, at 330-33.

[20] Naval Sharma & Shriya Luke, Mandatory Mediation Prescribed Before Filing of Commercial Suits, Mondaq, (July 15, 2022, 08:00 AM) https://www.mondaq.com/india/arbitration-disputeresolution/729584/mandatorymediation-prescribed-prior-to-filing-of-commercial-suits.

[21] Sec. 89, Code of Civil Procedure, 1908.

[22] Hiram E. Chodosh, The Eighteenth Camel: Mediating Mediation Reform, 9 German L.J., 251, 255 (2008).

[23] Ramanathan Uma, Initiatives and Innovations for Effective Court-Mandated Mediation, Mediation and The Role of Referral Judges (2012), (Sept. 10, 2022, 11:00 AM) http://www.mediate.com/mobile/article.cfm?id=9805.

of referral judges in strengthening ADR mechanisms has also been recognized by the Supreme Court of India.[24]

Mediation and Conciliation Centre of the Delhi High Court referred total of 14665 cases and disposed through mediation. The number of cases reached merely 2% of all the cases in Delhi High Court from March 2006 to March 2020.[25]

It is quite evident, from the data that the judges are not exercising Section 89 for referring the parties to mediation. This seems to be a problematic situation. Number of cases being referred to the Mediation is inevitably co-related to the how mediation friendly judiciary is.[26]

Thus, it can be said that judges require certain objectivity while engaging in the process of determination element of settlement for cases to be referred to the mediation. Indian Judiciary is accustomed to the traditional adjudicatory process and to shift their attention to an alternate mode, requires certain efforts.[27] There exists a lack of judicial understanding about mediation. Thus, an elaborate training process must be carries out along with massive awareness programme in order to enhance the rate of referral cases.[28]

3) Pre-litigation mediation

Pre-Litigation Mediation simply, means the opportunity to have a formal process of mediation involving several steps prior to litigation. It can be both voluntary and mandatory.

In mandatory pre-litigation mediation**,** another form of institutionalization can be done by statute. The statute might enforce the disputing parties to use mediation prior to institution of proceedings in courts. Because it requires to mandatorily apply for mediation prior to proceeding, it could be a 'mandatory pre-litigation mediation.' Then, it contains two different characteristics of mandatory and prior to proceedings. Some limited numbers of states, such as the EU, US and Italy, applied it.[29] In United States mandatory mediation programs are adopted in many courts and government agencies even though they realised the limited applicability of voluntary programmes due to the no unified policy on mediation.

[24] Salem Advocate vs Union Of India Writ Petition (civil) 496 (2002).
[25] Kumar, supra note 10, at 35.
[26] Id, at 26.
[27] https://www.ielrc.org/content/n0401.pdf (last visited on Sept. 5, 2022)).
[28] Nathan Rehn, Justice Without Delay: Recommendations for Legal and Institutional Reforms in the Indian Courts in O.P. Jindal Global University, Research Paper No. 4, 33 (2011).
[29] Vittorio, supra note 16, at 30.

4) Mandatory Pre-Litigation Mediation in India

The position in India with regards to mediation has been mainly non-mandatory in nature. Whilst Section 89 of CPC provides for reference of disputes to different ADR procedures including mediation. In India, based on a directory provision, the courts do not necessarily refer their cases to the different forms of ADRs.[30] In addition, the new section does not push the disputing parties to consider mediation. But, considering the issue of pendency in Indian courts, the Indian legislature realised the need to make mediation process as a mandatory approach.[31]

For the first time, the Indian legislators have attempted to establish mandatory mediation as an alternative is seen in the Commercial Courts Act, 2015. It was subsequently amended in 2018, to insert a provision regarding "pre-institution mediation and settlement." Section 12A deals with this aspect and it mandates the disputants to resort to mediation before they would initiate a litigation process.[32] The settlement signed by the disputants "shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of section 30 of the Arbitration and Conciliation Act, 1996".[33] In *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, the Court emphasizes upon importance of reference toward ADRs for reducing the existing problems in Indian judicial system.[34]

The Parliament amended the Consumer Protection Act in 2019 by adding a provision of mediation. Based on section 37 of the Act, parties can be referred to mediation at the first hearing if recognized possibility of a settlement by the commission. Further, recently the Mediation Bill, 2021 makes participation in pre-litigation mediation mandatory for all such cases fit for mediation.

3 Voluntary mediation

1) Based on contract

The simplest mode to resort to mediation is through contract. When disputing parties faced a dispute, these two parties could reach a settlement, agreeing amongst themselves with third neutral party's assistance.[35] And a clause under a contract is entered in that regard. An effective and efficient ADR clause might produce not only cost and time-saving methods, but also build up better relationship

[30] Roy Nibedita, Mediation: Serving A Hope For Overwhelming Divorce Cases In India, ACADR E-Newsletter, (April, 2022). (October 14, 2022, 11:00 PM) https://www.alliance.edu.in/committees/ACADR/assets/publication/ACADR-Newsletter-Vol01-Issue02.pdf.

[31] As per the data of National Judicial Data Grid, as of November 12, 2020 3,59,08,679 cases are pending across all courts in India.

[32] Section12A, Commercial Courts Act, 2015.

[33] Shantha Chellappa &Tara Ollapally, Mandatory Mediation under Commercial Courts Act – A Boost to Effective and Efficient Dispute Resolution in India, Bar & Bench (Sept. 18, 2022, 10:30 AM).

[34] Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR SC 189 (2003).

[35] Peter S. Chantilis, Mediation U.S.A., 26 U. Mem. L. Rev. 1031, 1046 (1996).

between two disputing parties.[36] Such clause also provides parties to deal with disputes by themselves with the third neutral party's help as simple tools and provides them with an expedited and less expensive way of resolving a dispute prior to litigation. Therefore, the mediation program might provide a chance to build up constructive tool to disputing parties who already failed to reach an amicable settlement through ineffective negotiations.[37] Generally, such mediations are carried on by hiring a private mediator, without any interference by court. Thus, it is also an antecedent to Private Mediation.

2) Based on the private mediation

This is a form of mediation privately held, without any interference from the court. Where the parties instead of going to court for a dispute, directly go to a third party to resolve the disputes is said as private mediation. Whilst there can be a scenario that a court refers parties to mediation and the parties choose to opt for a private mediation. It can be said that the public functions of imparting justice through dispute resolution have been Privatized. Therefore, we need to address the issues attached to the functioning of this Privatized mode of dispute resolution.

3) Unregulated Private Mediation in India

There are no laws applicable to private mediation in India and the appointment of mediators are made voluntarily by the parties.[38] There is no guidance or obligation put upon the parties while they are making the decision about the appointment of a mediator.[39] Also, there is no such attempt made in the draft of Mediation Bill, 2020 as well. The draft bill does not contain any requisite to be followed while engaging into a private mediation by the parties.

Nevertheless, parties and lawyers need to check nominated or possible mediators' backgrounds, such as certificate and experience in order to appoint a mediator But, without a legal backing, if any and every person are given the power to act as a mediator then this could jeopardise the entire system of mediation. Then, private mediators need not be lawyers they could belong to any job or profession.[40] Even the close family members without any background could act as a private

[36] Robert J. Niemic, Mediation Becoming More Appealing In Federal And State Courts, 5-4 Disp. Resol. Mag. 13, 14 (1999).
[37] Id. at 15.
[38] Kumar, supra note 10, at 30.
[39] Patil B. S., Common Mistakes in Mediation, 5 Int'l J. on Consumer L. & Prac., 25, 85 (2017).
[40] Raj Panchmatia Raj & Jonathan Rodrigues, Legitimacy of Private Mediation in the Pre-Legislation Era: Busting Myths with Facts (2021).

mediator.[41] Thus, this could lead to situations where even the basic integrity and coherence of mediation as a process is completely ignored.

There could be scenarios where parties are threatened or pressurized to sign the settlement agreement. And if such cases reach to a court, it puts a huge responsibility on the shoulders of a judge wherein he will be expected to authenticate the authority of mediator without any statute or code in place.

4) Privatization of Mediation: Suggested Reforms

There is a need to have at least some regulation with respect to the functioning of private mediation in India. A legal mandate that, for private mediation that the selection of mediator to be made from the enlisted mediators at court-annexed mediation centres could put this issue at rest. Only professionals who have gained the certification by undergoing 40 hours of training as provided by the court annexed mediation centres must also be implemented for private mediation. There are also issues with regards to fees to be paid to the private mediators, thus, a benchmark for the payment should be set for the private mediators on the basis of their qualifications and training undergone. We need to make the profession of a mediator to be lucrative in order to increase the participation in the field of mediation. Besides, the statutory mandate with respect to the qualification and minimum expertise required for the mediators to undertake mediation, there is need of a singular controlling authority which would be responsible to guide and control the mediators in India.[42]

The Mediation Bill, 2020 which is still pending at the parliament provides for an establishment of Mediation Council. A parliamentary panel has recommended a singular controlling authority for all types of mediation service providers and mediation institutes, instead of multiple authorities proposed in the Mediation bill 2021. Therefore, if the recommendation in the draft bill is accepted there can be a single body set up i.e. Mediation Council of India, which would be responsible for Training, Education and Certifying the mediators. As we have Bar Council of India in order to regulate the legal professionals and legal practise in India. Similarly, Mediation Council of India would be guiding and controlling authority with respect to mediation in India. However, it would take a long time for the Mediation Council to prepare additional training courses; it also needs to test its proper work as a pilot program.

[41] Sriram Panchu, Mediation Practice and Law: The Path to Successful Dispute, 212-213 (3rd ed. 2022).
[42] Recommendation by parliamentary panel.

III Proposed Models of Institutionalization

1 Opt-Out Model

The opt out model has been successfully implemented by countries like, Turkey and Italy.[43] As per this model, the parties mandatorily participate the first meeting date on which the mediator designated. The meeting is made affordable for everyone and thus are inexpensive. If parties refuse to attend the meeting, certain material penalties could be imposed for non-attendance. Therefore, parties have option to move out of the mediation process and back to the litigation after the first mediation meeting. It is very interesting to note that, under this opt-out model, the first mediation meeting could be mandatory and formal process, but the parties are at liberty to either opt in or opt out of the mediation after it.

2 Early Mediation Program

In India, it might usually take 4-6 months for the first court-date. This Early mediation program might dramatically reduce the waiting lines in the civil matters in India. Early Mediation is a process where cases fit for mediation i.e., civil cases, after filing a suit, first enter into mediation and if unsuccessful, then only the matter would reach before the court.[44] In this way, most of the cases will be resolved at the early stage of the suit itself.

In 2004, California conducted a study to understand the feasibility and the benefits of early mediation program.[45] Upon filing a law suit the mediation was conducted between the first 90 to150 days. The court would have a set panel of mediators who would mediate the matter at the early stage of the suit. This resulted in early disposal of cases and very few cases reached before the court. Therefore, the study has been found to be successful for both voluntary and mandatory mediation. It resulted in benefitting both litigants and the courts by reducing the burden of the court and speedy remedy to the litigants.[46]

Adopting these models in Indian scenario, based on the current India's pendency problem, Early mediation might be the best solution. Furthermore, the young lawyers might get benefits to survive in the current tough Indian legal market because they could take a position of mediator. Furthermore, we should consider the legal fee for mediators in proposed program. Furthermore, it requires a training program to produce qualified mediators in private sector of mediation.

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43 Ruslan Mirzayev, After Italy And Turkey, Azerbaijan Also Follows The Opt-Out Mediation Model, Kluwer Mediation Blog (May, 2019).

44 Adam Noakes, Mandatory Early Mediation, A Vision For Civil Lawsuits Worldwide, 36 OHIO ST. J. ON DISP. RESOL. 1, 3 (2021).

45 Available at https://www.courts.ca.gov/documents/empprept.pd (last visited on June 10, 2022).

46 Noakes, supra note 43, at 8.

1) Necessity of adopting Early Mediation

Even though the India judiciary adopted several different mediation programs, these produced unexpected outcomes; the Indian mediation programs still could not figure out the delay and pendency problems, and the Indian lawyers could not participate in these mediation process based on the complicated process and exclusion of advantage of using mediation, which makes the Indian mediation unpopular. Even though people recognized the delay problem in the India judiciary, they still want to use the litigation.

The mediation programs in India are slightly institutionalized, it is not that popular. Because all participants could not get advantages of using mediation programs, some parties and lawyers might be excluded from it. Especially the Indian lawyers might be excluded to take advantage or could not get enough benefit to persuade their clients to use mediation programs in India.

It can be explained in two examples. Even though the India judiciary has operated the institutionalized mediation program for a long time, it did not efficiently used; because of the delay and pendency, it is currently talking for a while from the filing date and the first hearing date. In the other, the Indian lawyer should spend a major time to prepare the memorandum of complaint and response. After that, the judge might refer his or her case into the mediation program with two parties' consent. At that moment, the lawyer might hesitate to advise the client because this lawyer might lose a chance to make money. Because the Indian lawyers usually charge the legal service fee based on the appearance in the courtroom, they might be unwilling to move toward mediation.

In India, opt-out program with early mediation for civil cases can be revolutionary step in resolving the issue of pendency in Indian courts. There can be a mandatory process substituted under the code of civil procedure, wherein, before the first hearing of the suit, the parties must sit before a mediator with a genuine attempt to mediate. After submission of plaint and written statement by both the parties, during the first appearance, a loop of 15-30 days can be introduced for an Early Mediation.

Here, Judges before whom the case is listed can also act as a mediator or parties can also choose a mediator from the panel of enlisted mediators available at court annexed mediation centres. Only those cases, which fails to reach a mediated agreement would be produced before the court. As a result, many cases will be resolved at an early stage and even cases which do not resolve the parties will get be enlightened towards the process of mediation as an viable option and they might choose to avail this option at a later stage as well. It will not only lead to early disposal of cases but also lessening the burden of the courts.

This process is wasting a time from the filing date to the first court-date until the judge suggests the mediation program and refers his or her case to it. Then, an appointed mediator set up an available time for both parties in or outside of the court mediation center. Instead of waiting for the first court-date, the court releases and refers its cases into the early mediation program.

2) Any possible problems

Regarding to issue of Jurisdiction, while following the Early Mediation program along with opt-out model, there might arise issue with jurisdiction as the case would reach for mediation without actually reaching before a judge in a court. So, to simplify the issue and question as to where the mediation case should be taken up. It is suggested that: 1) The court should release its cases to mediation centre, 2) private professional organizations, 3) private professional organization to be referred by the court, and 4) if it is a private, what about fee for mediator?

Arbitration in India is fully institutionalized by the virtue of Arbitration Act of 1996. Similarly, Meditation also requires addition regulation related with legal perspectives, such as jurisdiction and Statute of Limitation to control privatized mediation programs in India. Current Mediation Bill, 2020 is completely silent regarding application of the Law of Limitation under mediation which provides a loophole in the system and can be abused by the parties opting for mediation.

IV Conclusion

India being a developing country faces several issues with regards to lack of resources, lack of infrastructure and it is difficult to manage the huge inflow of cases in the courts. But India has always been ready to incorporate changes and allocate funds whenever a grave issue is recognized. India in the past had adopted the concept of 'fastrack courts' to expedite the disposal of cases. Similarly, India had also set up 'Lok Adalat' as a unique concept of ADR.

Lok Adalat is a form of civil court known as people's court consisting of retired or currently serving judicial officers. It is a 'system of conciliation or negotiation' for the cases which are pending in a court, or which are at the pre-litigation stage are compromised or settled in an amicable manner.

Therefore, we can say that if India can optimally allocate its available resources and undertake to implement these concepts. Early mediation can also be adopted and implemented in similar fashion, which will not only lead to an easy and fast disposal of cases but lower the courts' burden. In addition, the volume of pendency could assuage in the near future with an effective implementation of the suggested model.

References

[*Books*]

Upendra Baxi, The Crisis of the Indian Legal System, 393-400 (1982).

Hazel Genn, Reinhard Greger, & Carrie Menkel Meadow, Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads (1st ed. 2013).

Arnab Hazra & Bibek Debroy Kumar, Judicial Reform in India: Issues and Aspects (1st ed. 2007).

Sriram Panchu, Mediation Practice and Law: The Path to Successful Dispute, 212-213 (3rd ed. 2022).

Nathan Rehn, *Justice Without Delay: Recommendations for Legal and Institutional Reforms in the Indian Courts* in O.P. Jindal Global University, Research Paper No. 4 (2011).

[*Articles*]

Shahla F. Ali, *Nudging Civil Justice: Examining Voluntary And Mandatory Court Mediation User Experience In Twelve Regions*, 19 Cardozo J. Conflict Resol. 269 (2018).

Xavier Anil, *Why Mediation Matters*, Int'l J. on Consumer L. & Prac. 5 (2017).

Patil B. S., *Common Mistakes in Mediation*, 5 Int'l J. on Consumer L. & Prac., 25 (2017).

Peter S. Chantilis, *Mediation U.S.A.*, 26 U. Mem. L. Rev. 1031 (1996).

Hiram E. Chodosh, *The Eighteenth Camel: Mediating Mediation Reform*, 9 German L.J., 251 (2008).

Nancy D. Erbe, *Appreciating Mediation's Global Role In Promoting Good Governance*, 11 Harv. Negot. L. Rev. 350 (2006).

Vittorio Indovina, *When Mandatory Mediation Meets The Adversarial Legal Culture Of Lawyers: An Empirical Study In Italy*, 26 Harv. Negot. L. Rev. 69 (2020).

Robert J. Niemic, *Mediation Becoming More Appealing In Federal And State Courts*, 5-4 Disp. Resol. Mag. 13 (1999)

Laila T. Ollapally, *Integrating Mediation: A Holistic to Administration of Justice, International Journal on Consumer Law And Practice*, 5 Nat'l L. School of India U. 25 (2017)

Moog Robert, *Delays in the Indian Courts: Why the Judges Don't Take Control*, 16 Just. Sys. J. 19, 22-30 (1992).

Parikh Puja Scheinman, *Modern Mediation in My Bharat*, Disp. Resol. J. 68 (2013).

Joseph B. Stulberg, *Mediation and Justice: What Standards Govern*, 6 Cardozo J. Conflict Resol. 213 (2005).

Nancy A. Welsh, *Bringing Transparency and Accountability (With A Dash Of Competition) To Court-connected Dispute Resolution*, 88 Fordham L. Rev. 2449 (2020).

[*Internet Resources*]

Michael Anderson, *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs*, Paper for discussion at WDR meeting (1996) (available at http://www.worldbank.org/poverty/wdrpverty/dfid/anderson.pdf).

Sai Aravind R, *Should Mediation be a Prerequisite to Civil Litigation: An Indian Perspective*, Ipleaders, (available at https://blog.ipleaders.in/should-mediation-be-a-prerequisite-to-civil-litigation-anindian-perspective/).

Hannah Arendt, *Mediation and the Privatization of Conflict* (2018) (available at https://medium.com/quote-of-the-week/mediation-and-the-privatization-of-conflict-1fe45d979967).

Shantha Chellappa &Tara Ollapally, *Mandatory Mediation under Commercial Courts Act – A Boost to Effective and Efficient Dispute Resolution in India*, Bar & Bench (available at https://www.barandbench.com/columns/mandatorymediation-commercial-courts-act).

Alok Prasanna Kumar, *Strengthening Mediation in India*, A Report on Court-Connected Mediations, Vidhi Legal Policy (2016) (available at https://vidhilegalpolicy.in/reports-1/2016/7/25/strengthening-mediation-in-india-an-interim-report-on-court-annexed-mediations)

Lokur Madan B, Judge, Delhi High Court, *Case Management and Court Management* (2003) (available at lawcommissionofindia.nic.in/adr-conf/Justice_Lokur.pdf).

Maja B. Micevska & Arnab K. Hazra, *The Problem of Court Congestion: Evidence from Lower Courts* (2004) (available at http://ageconsearch.umn.edu/handle/18750).

Sarika Mittal, *Mandatory Pre-Mediation in Family Disputes*, ACADR E-Newsletter 2 (2022) (available at https://www.alliance.edu.in/committees/ACADR/assets/publication/ACADR-Newsletter-Vol01-Issue02.pdf).

Roy Nibedita, *Mediation: Serving A Hope For Overwhelming Divorce Cases In India*, ACADR E-Newsletter, (April, 2022) (available at https://www.alliance.edu.in/committees/ACADR/assets/publication/ACADR-Newsletter-Vol01-Issue02.pdf).

Naval Sharma & Shriya Luke, *Mandatory Mediation Prescribed Before Filing of Commercial Suits*, Mondaq (available at https://www.mondaq.com/india/arbitration-disputeresolution/729584/mandatorymediation-prescribed-prior-to-filing-of-commercial-suits).

Ramanathan Uma, *Initiatives and Innovations for Effective Court-Mandated Mediation, Mediation and The Role of Referral Judges* (2012) (available at http://www.mediate.com/mobile/article.cfm?id=9805).

Nancy A. Welsh, *Mandatory Mediation and Its Variations*, 108, 109 (Susan D. Franck & Anna Joubin-Bret eds., 2011) (available at https://scholarship.law.tamu.edu/facscholar/974).

[*Acts, Bills, and Cases*]

Code of Civil Procedures sec. 89.

Mediation Bill, 2021, Bill No. XLIII of 2021.

Hussainara Khatoon v. Home Secretary, the State of Bihar, AIR 1369 (1979).

Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR SC 189 (2003).

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

CHOUNG, Yonghwan; KUMARI, Saloni. A Modernized Pathway to Institutionalization and Privatization of Mediation in India. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 04, n. 08, p. 249-262, jul./dez. 2022. DOI: 10.52028/rbadr.v4i8.12.

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ISSN 2596-3201