MediateGuru's Edited Book on

A PATHWAY TO THE FUTURE OF ADR

COMPARATIVE PERSPECTIVES FROM AROUND THE WORLD

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A PATHWAY TO THE FUTURE OF ADR

Comparative Perspectives from Around the World

ISBN: 978-1-63974-789-4

DEDICATION

This book is dedicated to all the ADR enthusiast around the world. This book is also dedicated to all the members and supporters of MediateGuru, who has helped us to create this initiative encouraging promotion of ADR methods around the globe as to ensure the longevity of "Right to Justice".

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EDITORS' NOTE

Mediation and other forms of conflict resolution, which may, in the modern sense at least, be termed 'alternative' to traditional ways of resolving legal disputes, have grown exponentially over recent years. The last few decades in particular have seen a range of developments both within and across different jurisdictions, including increased governmental promotion of Alternative Dispute Resolution ('ADR') processes, judge-led developments in courts and tribunals, new legislative mechanisms designed to regulate aspects of ADR processes, measures designed to professionalise ADR practice, increased education in mediation and other ADR processes for law students and international treaties designed to strengthen and promote the further use of ADR. As well as spanning different jurisdictions these measures have also been found across many different dispute areas including commercial, employment, family, consumer, housing and sectors such as international business and investor/state matters.

Running alongside these developments, the reduced possibility of in-person interaction in the current COVID 19 environment has accelerated trends that were already taking root around the increasing use of virtual or online environments to host dispute resolution processes. Although there have been many false dawns in the past, we do seem to be at some kind of tipping point in which mediation and other ADR processes move from the fringes to centre stage in the arena of dispute resolution. The role of technology in accelerating the evolution of ADR, particularly during the COVID 19 pandemic, cannot be understated. Several chapters in this collection

explore the promise and peril of the digital ADR landscape.

Reflecting these developments, this book is hence a timely contribution the field. This collection draws together chapters on ADR topics across a range of areas including international commercial matters, general civil business, employment issues and the resolution of disputes in the online environment. This collection of works also has an international flavour dealing with topics drawn from such countries as India, Bangladesh, Greece, Germany, Zimbabwe, Hong Kong, Macau and in the cross-border context. Many chapters have a focus on consensual processes in which the parties themselves determine how to resolve the dispute at hand such as mediation and conciliation. Other chapters include treatment of adjudicatory processes such as arbitration, which nonetheless represent an alternative to formal litigation procedures.

While the chapters have different focal points there are commonalities to be found and the contributions touch upon a range of issues that are central to debates around ADR development. As outlined in some of these chapters, ADR processes may be characterised by certain intrinsic benefits including those around costs and speed of resolution, flexibility, creativity and, for some forms at least, the increased prospect of relationship repair between the disputing parties. However, it would be wrong to suggest that recent advancements in mediation and other forms of ADR have been seamless. As the commentary in these contributions suggests, barriers to the further embedding of ADR processes continue to exist given the challenges they pose for traditional ways of resolving disputes, the

expectations of disputants and the preferences of professionals working in these fields.

Moreover, there are legitimate policy questions to be determined over such issues as the training and regulation of ADR professionals, the ability of potential users to gain access and participate in an informed way in ADR processes as well as the impact such developments may have on the enforcement of legal rights through courts. Particular issues such as security concerns, ensuring confidentiality and providing adequate and meaningful access to all parts of society are particularly relevant in the context of online dispute resolution. As a response to some of these difficulties, one hallmark of recent ADR developments is the increasing institutionalisation of these processes through such avenues as formal legislation underpinning or regulating practice. Supra-national developments are also afoot including the Singapore Convention on Mediation designed to help expedite growth in international commercial mediation and shore up fears over the lack of enforceability of settlements rendered in this context, a topic explored in one of the chapters in this volume.

The development of ADR also has wider connotations beyond helping develop the processes themselves. A theme identified in some chapters – the importance of fostering efficient and effective dispute resolution systems within a country – is also important for different jurisdictions seeking to enhance their economic development and support their quest to attract both foreign investment and business as a recognised international dispute resolution hub.

In terms of the importance of this book, as editors we believe that in its own modest way, this collection will help disseminate the message regarding mediation and ADR, foster growth and signpost some of the debates and controversies that must be addressed by the global ADR community if these new processes are going to reach their potential. This edited collection has also provided an opportunity to hear from new, distinctive voices. While some of the contributors are experienced practitioners and academics, it is heartening to find a number of student authors featured here. This is important not least because it is the lawyers and ADR professionals of tomorrow that will be central to the future growth of mediation and other ADR processes. By encouraging scholarship in the field by young enthusiasts, this collection can thus be seen as one small part of the significant activity that MediateGuru undertakes through its wider activities including webinars, guest lectures, training courses and student competitions, that seek to foster knowledge, insight and enthusiasm in these processes within those that will become ADR leaders of the future. As editors, we are proud to support these endeavours and are grateful for the opportunity to play a role in this process.

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ACKNOWLEDGMENTS

This book is the brainchild of the Initiative envisioned by our Founding Partners, **Mr. Param Bhamra & Mr. Aditya Mathur** and we are so honored and pleased to launch this book on ***1st Anniversary of MediateGuru***. It took an immense amount of work and would not exist without the invaluable contribution of a number of incredibly supportive and thoughtful personality; **Ms. Garima Rana.**

MediateGuru would like to express our deep gratitude to **Prof. Dr. Bryan Clark, Dr. Ashu Dhiman, Ms. Amanda J. Lee** and **Mr. Patrick McPhilamy III,** the editor's of the book, for their patient guidance, enthusiastic encouragement, spending countless hours and efforts by giving useful critiques of the research work in this book.
To all the authors of the chapters enshrined in this book, thank you for being a part of our initiative and for helping us to further our mission of creating awareness on ADR mechanisms globally.
We would also like to thank **Ms. Mallika Arora,** for her advice and assistance in keeping our progress on schedule.
Our grateful thanks are also extended to the Global Advisors of MediateGuru from various jurisdictions as this book wouldn't be possible without their support.

We would also like to extend my thanks to the editorial team at MediateGuru for providing their efforts to turn this book into reality.

Finally, We wish to thank all the members of MediateGuru from across the globe for their constant support for whom we thrive to make ourselves better every day.

CHAPTER - I

Two Paths to The Same End? A Discussion of the Future of Hong Kong and Macau as International Legal And Dispute Resolution Service Hubs

Author's Profile

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Abstract

In the wake of Hong Kong's turmoil in 2019, there is a heated debate concerning the future status of Hong Kong as a leading international legal and dispute resolution service hub. Simultaneously, compared to its sister island Hong Kong, Macao is less expensive but not so famous for arbitration. However, as a typical civil law jurisdiction, Macao has the potential to be a boutique centre for civil-law disputes in the Asia-Pacific region. The purpose of this chapter is to examine two different development paths taken by Hong Kong and Macao to become leading international and dispute resolution service hubs. The first part of this chapter provides an overview of the development of legal systems in Hong Kong and Macao. It then analyses the challenges facing Hong Kong and Macao in view of their international reputations. Building on the comparative analysis, the chapter unpacks Hong Kong and Macao's different roles in becoming the international legal and dispute resolution service hubs for the Guangdong-Hong Kong-Macao Greater Bay Area and the Belt and Road Initiative-related disputes. Suggestions for potential law reform will be provided at the end of the chapter.

A. Introduction

Ever since the turmoil in the Hong Kong Special Administrative Region (‘Hong Kong’) in 2019, there has been a heated debate concerning the future status of Hong Kong as a leading international legal and dispute resolution service hub. The Financial Times recently reported that numerous large international corporations doing deals in Asia are considering excluding Hong Kong from their legal contracts.[1]At the same time, compared to its sister island Hong Kong, the Macao Special

Administrative Region of the People's Republic of China ('Macao'), as a typical civil law jurisdiction, has the potential to be a boutique centre for civil-law disputes in the Asia-Pacific region.[2]The Guangdong-Hong Kong-Macao Bay Area ('Greater Bay Area') is one of the fastest-growing economic regions globally, which comprises these two Special Administrative Regions and nine municipalities in Guangdong Province, which has been granted critical strategic planning status in the blueprint of China's development. As two of the Greater Bay Area's major cities, Hong Kong and Macao play a vital role in developing the Greater Bay Area. There is a heated debate concerning the future status of Hong Kong and Macao as the leading international legal and dispute resolution service hubs. This chapter's chief purpose is to unpack the different roles of Hong Kong and Macao in becoming the international legal and dispute resolution service hubs for the Guangdong-Hong Kong-Macao Greater Bay Area and the Belt and Road Initiative-related disputes.

B. Overview of the Development of Legal Systems in Hong Kong and Macao:

Article 5 of the Basic Law of Hong Kong and Macao provide that '[t]he socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years'.[3]Hence, it can be deduced that these two special administrative regions' legal systems shall remain unchanged for 50 years. This part seeks to provide an overview of the development of such legal systems, particularly on arbitration in Hong Kong and Macao, to set the stage for later discussion.

1. Hong Kong

Hong Kong has a long history of having an independent judiciary. Under the policy of ‘one country, two systems, Hong Kong maintains a different legal system from mainland China. Article 8 of the Basic Law of Hong Kong ensures that ‘[t]he law previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravenes this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region’.[4]Article 2 and 19 of the Basic Law of Hong Kong stated that Hong Kong ‘shall be vested with independent judicial power, including that of final adjudication’[5]. Article 85 of the Basic Law offers reassurance that ‘[t]he courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions’.[6]Additionally, Hong Kong is the only jurisdiction in the world that enacts legislation in English and Chinese languages. Copies of the legislation in both languages are equally authentic. Further, Hong Kong is ranked as one of the most judicially independent places in Asia by the World Economic Forum's Global Competitiveness Report. In 2019, Hong Kong ranked eighth in its performance (second in Asia) in judicial independence. [7] Hong Kong has a broad pool of skilled, qualified lawyers trilingual in Cantonese, Mandarin Chinese, and English. The above shreds of evidence prove that Hong Kong is a leading international legal hub for dispute resolution.

Hong Kong is an arbitration-friendly jurisdiction, the first jurisdiction in Asia to introduce an arbitration statute based on the 2006 UNCITRAL Model Law, the Arbitration Ordinance (introduced on 1 June 2011). The courts in Hong Kong have an excellent track record in enforcing arbitral awards.

2. Macao

As a neighbour city of Hong Kong, Macao also maintains a different legal system from mainland China. Same as Hong Kong, Article 8 of the Basic Law of Macao provides that 'the laws, decrees, administrative regulations and other normative acts previously in force in Macao shall be maintained, except for any that contravenes this Law, or subject to any amendment by the legislature or other relevant organs of the Macao Special Administrative Region in accordance with legal procedures'.[8]Articles 2 and 19 of the Basic Law of Macao state that Macao'shall be vested with independent judicial power, including that of final adjudication'.[9]Macao's legal system is largely based on the Portuguese civil law system, and it has a fully independent judiciary. Also, Macao is the only jurisdiction globally that enacts legislation in both Chinese and Portuguese. Copies of the legislation in each language are equally authentic. As a former Portuguese colony, Portuguese law is the primary reference for the legal system in Macao. Additionally, Macao has a civil law tradition that originated in continental Europe. There is a broad pool of skilled Portuguese-speaking legal practitioners in Macao to provide arbitration services. Many dual qualified lawyers in Macao are familiar with both Macao law and Portuguese law. Hence, Macao's legal framework and well-equipped legal professionals

make the region ideal for disputes resolution involving parties from Portuguese-speaking countries.

Compared to its sister island Hong Kong, Macao is considered less expensive but not as famous as an international legal and dispute resolution hub. However, as a typical civil law jurisdiction, Macao has the potential to become a boutique centre for civil-law disputes within the Asia-Pacific region. Parties from civil law jurisdictions may choose Macao as their seat of arbitration rather than other common law jurisdictions, like Hong Kong and New York. Such parties may wish to appoint civil-law arbitrators and institutions that are familiar with civil law. Yet, it is necessary to increase the pull of legal professionals, particularly alternative dispute resolution professionals, to enhance Macao's attractiveness as a seat of arbitration.

There are a total of five arbitration centres in Macao. The Macao Arbitration Association's establishment shows the Macao arbitration community's commitment to raising awareness of its expertise and establishing its place in the field of international dispute resolution. The Macao Arbitration Association seeks to promote arbitration as a dispute resolution mechanism in the Greater Bay Area and provides a hub for dispute resolution between China and Portuguese speaking countries.

C. Challenges Facing Hong Kong and Macao:

This part aims to examine those challenges facing Hong Kong and Macao in establishing themselves as arbitration centres. It will then analyse whether Hong Kong and

Macao are preferred international legal and dispute resolution service hubs.

1. Hong Kong

The turmoil surrounding the protests in 2019 posed a severe challenge to Hong Kong's position as a preferred seat of arbitration in an intangible way. This is because the protests and political instability in 2019 caused a negative perception by users towards Hong Kong. It also affected Hong Kong's reputation as an international arbitration hub.

Regarding economic instability, the COVID-19 pandemic has deeply plagued the economy of Hong Kong. It has been noted that Hong Kong's GDP has slumped at a record rate. The economic stability of a jurisdiction is one factor that parties will consider when choosing an arbitral seat. Zahid Hussain, the World Bank's lead economist, mentioned that economic growth and political stability are deeply interconnected.[10]The political unrest will result in negative economic growth. Hence, political instability will undermine parties' perception of the legal certainty of Hong Kong. However, as suggested by the Secretary for Justice of the Department of Justice, the National Security Law's implementation in Hong Kong has restored order and stability in Hong Kong.[11]

Some critics stated that the political relationship between Mainland China and Hong Kong would negatively impact Hong Kong's future as a seat of arbitration. For instance, Alyssa King pointed out that Hong Kong's status as a legal centre in the world depends on Hong Kong's separation from Mainland China's legal system.[12]In 2019,

Moody's downgraded the outlook on Hong Kong's Aa2 rating to negative from stable.[13] Moody's suggested that the downgrade was triggered by a shift in the current equilibrium between Hong Kong's economic proximity to and legal and regulatory distance from Mainland China. Moody's also pointed out that months of protests in 2019 revealed the erosion in the institutions' strength and the low effectiveness of government and policy effectiveness.[14]Since neutrality and impartiality of the arbitration seat's legal system is one of the criteria that parties will look into when choosing the seat for their arbitration case, those comments stated that the shift in the current equilibrium between Hong Kong's economic proximity to and legal and regulatory distance from Mainland China might pose a serious challenge to the position of Hong Kong as an ideal seat of arbitration. Those comments might undermine parties' confidence in the Hong Kong legal system.

Although Hong Kong suffered from the turmoil in 2019 and the COVID-19 Pandemic, Hong Kong could still be considered a preferred international legal and dispute resolution hub, particularly a seat of arbitration. The seat of arbitration is not just about the place of arbitration; it is also about the arbitral institution in that jurisdiction. An established and long and well-known arbitration institution would strengthen users' perception of the seat's formal legal infrastructure. Hong Kong is known as the most desirable arbitral seat for China-related arbitration. For instance, with effect from 1 October 2019, Mainland China's courts will order interim measures to support Hong Kong seated arbitrations. The Hong Kong International Arbitration Centre (HKIAC), as the statutory appointing authority for arbitrations seated in Hong Kong since 1997,[15] introduced the 'Belt and Road Programme' in April 2018. This consists of an

online resource platform dedicated to Belt and Road disputes and an industry-focussed Belt and Road Advisory Committee.[16] Recently, the HKIAC amended its rules[17] (i.e. the Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules (Cap 609C))[18] with effect from 1 August 2019 to waive fees in certain ad hoc arbitration in Hong Kong.[19] Besides, the China International Economic and Trade Arbitration Commission (CIETAC) and the HKIAC also helped strengthen the role of Hong Kong as an ideal seat of arbitration in the Greater Bay Area by organising CIETAC's Inaugural Greater Bay Area Summit in Hong Kong.[20]

The Permanent Court of Arbitration in The Hague has signed a Host Country Agreement and related Memorandum of Administrative with Mainland China's government to allow for ad hoc dispute resolution proceedings administered by it to be conducted in Hong Kong. This arrangement will increase Hong Kong's capacity to deal with the disputes between investors and states involving parties in Asia. It has enhanced the position of Hong Kong as an ideal seat of arbitration.

In 2017, Hong Kong passed a new law to allow third-party funding of arbitration and mediation. This legislation enables the third-party funder to receive a financial benefit if the arbitration is successful. However, the new law does not allow lawyers and firms to provide funding for any of the arbitration parties. It shows that the lack of conditional and contingency fees- related legislation in Hong Kong. The prohibition of contingency and conditional fees in Hong Kong will hinder Hong Kong's potential further development as an international arbitration hub.

2. Macao

Macao's economy also suffered record declines after the Covid-19 hit, which posed a significant threat to Macao's position as a boutique centre for civil-law disputes in the Asia-Pacific region. Nevertheless, Macao's legal system is well-tested, transparent, and independent, providing a strong foundation for its development as an international legal and dispute resolution service hub. For instance, a new arbitration law (No. 19/2019)[21] has been passed and entered into force in Macao in 2020. This new piece of legislation replaced and unified the pre-existing parallel regimes on arbitration (i.e. Decree-Law (29/96M) (i.e. arbitration legal act)[22] and the Decree-Law 55/98/M (external commercial arbitration legal act)[23]). The new arbitration law(No. 19/2019)[24]unifies and modernizes both the domestic and international arbitrations' legislative regimes in Macao. This legislation includes provisions based upon the UNCITRAL Model Law on International Commercial Arbitration,[25] and represents a significant milestone for the future development and promotion of international arbitration in Macao. The new arbitration law aims to eliminate existing gaps between Macao's law and international standards and practices, to increase its efficiency. This law enables the courts in Macao to enforce and recognise foreign arbitral awards. It seeks to eliminate the existing restrictions for an arbitration-related legal framework in Macao and attract globally well-known arbitrators to the jurisdiction.

Like Hong Kong, under the existing legal framework in Macao, contingency or conditional fee arrangements between lawyers and clients are not permitted under the code of ethics of lawyers practising in Macao. Furthermore, third-party funding for arbitration is still prohibited in Macao. Under the Macao legal regime, there

is no law concerning third-party funding. Macao's prohibition on contingency and conditional fees and third-party funding will hinder Macao's potential as an international legal and dispute resolution hub. The reform of legislation related to contingency fees and third-party funding in international arbitration is required.

Aside from the introduction of the new arbitration law in Macao, the Secretary for Administration and Justice of Macao is developing a new set of mediation law to strengthen the position and capabilities of Macao as an international legal and dispute resolution hub in the Greater Bay Area and as part of the Belt and Road Initiative. The establishment of the International Negotiation Mediation Society Macau in 2014 also promote mediation in Macau.

D. Roles of Hong Kong and Macao Play Towards Becoming International Legal and Dispute Resolution Service Hubs:

The following will unpack the different roles of both Hong Kong and Macao in becoming international legal and dispute resolution service hubs for the Guangdong-Hong Kong-Macao Greater Bay Area and the Belt and Road Initiative-related disputes. Suggestions for potential reform will also be provided.

Hong Kong is, was and will remain a preferred seat of arbitration for Belt and Road Initiative and Greater Bay Area related disputes. Even though Hong Kong suffered from turmoil in 2019 and during the COVID-19 pandemic, Hong Kong has several established and well-known arbitration institutions that enhanced the parties'

perception of Hong Kong as an ideal seat of arbitration. Hong Kong will become an ideal place to resolve disputes related to the Guangdong-Hong Kong-Macao Greater Bay Area and the Belt and Road Initiative.

On the other hand, Macao plays a vital role in entertainment (particularly gaming), serving as a conference and tourism hub in the Asia-Pacific region. Macao is the only city in China that permits gambling in casinos, making it one of the world's foremost gambling capitals. Thus, Macao has well-established legislation on gambling-related matters. There is an extensive pool of well-equipped legal specialists in Macao specialising in gaming.

As mentioned by Zhou Qiang, Chief Justice of the People's Republic of China and President of the Supreme People's Court, China and Portuguese-speaking countries keep close economic, trade and talent ties, and exchanges and cooperation in the judicial sector are proceeding smoothly.[26]As one of the Greater Bay Area's major cities, Macao is committed to serving as a bridge between China and Portuguese-speaking countries.

Macao has never been seen as a leading international legal and dispute resolution hub in the Asia-Pacific Region by the international legal community. However, Macao's recent developments in arbitration and mediation will advance the status of the place as an attractive dispute resolution hub for different parties (in particular for parties from Portuguese-speaking countries with gaming-related disputes). The establishment of the Macao Arbitration Association will further promote arbitration in Macao.

Hong Kong and Macao, both jurisdictions in the Greater Bay Area, are working to become international legal and dispute resolution service hubs for different types of disputes that may arise within the Greater Bay Area and due to the Belt and Road Initiative.

E. Conclusion:

Even though both suffered from the effects of the COVID-19 pandemic, the developments in each of the jurisdictions- Hong Kong and Macao, have brought about relatively successful pluralist accounts. These two jurisdictions' developments will contribute towards the provisions of an integrated legal service and dispute resolution hub for the Greater Bay Area and resolution of Belt and Road Initiative-related disputes.

[1]Tabby Kinder and Leo Lewis, Companies consider writing Hong Kong out of legal contracts, FINANCIAL TIMES, Jan. 31, 2021, https://www.ft.com/content/1070440a-0993-4c19-9797-2c0e781fd7db.

[2]Charles Ho Wang Mak, The Role of Macao as a Dispute Resolution Hub in the Guangdong-Hong Kong-Macao Bay Area,INVESTMENT AND COMMERCIAL ARBITRATION REVIEW (Aug. 17, 2020), https://www.investmentandcommercialarbitrationreview.com/post/the-role-of-macao-as-a-dispute-resolution-hub-in-the-guangdong-hong-kong-macao-bay-area.

[3]The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art. 5 (H.K.).

[4]Id.art. 8.

[5]Id.arts.2 and 19.

[6]Id.art 6.

[7]Klaus Schwab, The Global Competitiveness Report 2019 (2019), http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf.

[8]The Basic Law of the Macao Special Administrative Region of the People's Republic of China, art. 8 (Macao.).

[9]Id.arts.2 and 19.

[10]Zahid Hussain , Can political stability hurt economic growth?, WORLD BANK BLOGS (June. 01, 2014), https://blogs.worldbank.org/endpovertyinsouthasia/can-political-stability-hurt-economic-growth.

[11]Teresa Cheng, Hong Kong continues to be an international legal hub, SJ'S BLOG (Feb. 01, 2021), https://www.doj.gov.hk/en/community_engagement/sj_blog/20210201_blog1.html.

[12]Alyssa King, Pearl River Delta Blues: Extradition and Hong Kong's Position as Arbitral Seat, KLUWER ARBITRATION BLOG (June. 16, 2019), http://arbitrationblog.kluwerarbitration.com/2019/06/16/pearl-river-delta-blues-extradition-and-hong-kongs-position-as-arbitral-seat/.

[13]Martin Petch and Marie Diron, Moody's changes outlook on Hong Kong's Aa2 rating to negative from stable; affirms rating (Sep. 16, 2019), https://www.moodys.com/research/Moodys-changes-outlook-on-Hong-Kongs-Aa2-rating-to-negative--PR_409149.

[14]Id.

[15]Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules (Cap 609C).

[16]Hong Kong International Arbitration Centre, HKIAC announces Belt and RoadProgramme (Apr. 26, 2018), https://www.hkiac.org/news/hkiac-announces-belt-and-road-programme.

[17]Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) (Amendment) Rules 2019 (Cap. 609), §13(3).

[18]Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules (Cap 609C).

[19]Hong Kong International Arbitration Centre, HKIAC Amends its Rules to Waive Fees in certain Ad Hoc Arbitrations in Hong Kong (Aug. 01, 2019), https://www.hkiac.org/news/hkiac-waive-fees-certain-ad-hoc-arbitrations.

[20]China International Economic and Trade Arbitration Commission, CIETAC's Inaugural Greater Bay Area Summit Will be Held in Hong Kong on 18 October 2019 (2019), https://hkarbitration.files.wordpress.com/2019/08/cietacs-inaugural-greater-bay-area-summit-english-1.pdf.

[21] Lei da arbitragem, Lei n.º 19/2019.

[22]Aprova o regime da arbitragem, Decreto-Lei n.º 29/96/M.

[23]Aprova um regime específico para a arbitragemcomercial externa, Decreto-Lei n.º 55/98/M. [24] Lei da arbitragem, Lei n.º 19/2019.

[25] UNCITRAL Model Law on International Commercial Arbitration, 1985.

[26]The Supreme People's Court of the People's Republic of China,Law Base Between China, Portuguese-Speaking Countries Unveiled In S China (Mar. 26, 2018),http://english.court.gov.cn/2018-03/26/content_35920163.htm..

CHAPTER – II

The Evolution of Mediation in Greece

Author's Profile

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reputed institutions (CIArb, Harvard Kennedy School, JAMS, European Court of Arbitration etc.). She regularly publishes and speaks on mediation in national and international fora. She works in Greek, English, French, German and Spanish and knows Japanese.

Abstract

The Greek journey of mediation through time officially starts with the implementation of the EU Mediation Directive by the first Mediation Act, which introduced a purely voluntary mediation regime. The latter has been replaced by the subsequent two Mediation Acts, which introduced a quasi-mandatory mediation regime concerning particular categories of civil, commercial and family disputes. Such regimes reflect the respective legislative attempts to promote mediation in the country, with the aim of eventually creating a balanced relationship between mediation and judicial proceedings.

I. INTRODUCTION

The Greek tradition has long been familiar with amicable dispute resolution methods. Conciliatory schemes with the intervention of a third neutral have been recognised since ancient times. In the Archaic period (800 B.C. to 459 B.C.), high status citizens called "conciliators" (in Greek: συμβιβαστές) were entrusted with proposing conciliatory solutions to the parties. During the Classical period (459 B.C. to 323 B.C.), negotiating parties used to assign to servants (in Greek: θεράποντες) the confidential transmission of proposals and counterproposals between them. Methods of compromise and conciliation were also applied during both the Byzantine and the post-Byzantine

period. Particular mention should be made of the unofficial institution of "Sasmos" (in Greek: Σασμός), which still applies in areas of mountainous Crete: an elder villager called "Sastis" (in Greek: Σάστης) undertakes to peacefully resolve 'vendettas' in case of commission of crimes, such as murder, animal theft etc.[1]

In the Modern Greek State, wide conciliatory tasks have been assigned to judges by the Greek Code of Civil Procedure (hereinafter: CCP)[2]. However, the Greek journey of mediation through time officially starts with the implementation of the EU Mediation Directive[3] by the first Mediation Act of 2010 (hereinafter: first MA)[4], which introduced a purely voluntary mediation regime. The latter has been replaced by the subsequent two Mediation Acts of 2018 (hereinafter: second MA)[5] and 2019 (hereinafter: third MA)[6], which introduced a quasi-mandatory mediation regime concerning particular categories of civil, commercial and family disputes. Such regimes reflect the respective legislative attempts to promote mediation in the country, with the aim of eventually creating a balanced relationship between mediation and judicial proceedings[7].

This paper aims to explore this evolution of the Greek mediation regime highlighting its main provisions and, thus, offering foreign practitioners the opportunity to familiarize themselves with it and comprehend its peculiarities.

II. FROM A PURELY VOLUNTARY MEDIATION REGIME…

A. Underpinnings of the first MA

The promulgation of the first MA derived from the obligation of the legislature to implement the EU Mediation Directive as a consequence of increasing concerns about court costs and workload as well as other obstacles to cross-border dispute resolution in the single market[8]. By establishing a core framework for cross-border mediation in Europe, which can also be applied to domestic disputes[9], the EU Mediation Directive aimed to promote its use for all disputes concerning civil and commercial matters, "ensuring a balanced relationship between mediation and judicial proceedings"[10]. In order to avoid conceptual ambiguities, the EU Mediation Directive states that mediation shall be understood as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator"[11]. The key issues embodied in the EU Mediation Directive concern the voluntary[12] and confidential[13] character of the mediation process, its effect on limitation and prescription periods[14] and the enforceability of the agreements reached by the parties[15].

Greece was among the first Member States to implement the EU Mediation Directive by promulgating the first MA, which adopted the monistic approach, establishing a uniform system for both domestic and cross-border mediation and delimitating its scope of application to private law disputes, which can be referred to mediation upon agreement of the parties provided that they have the right to dispose of the relative rights and obligations[16]. Regulating in essence the core elements of the process, the first MAwas accompanied by secondary legislation, which provided for specific details of its application[17].

B. Content of the first MA

Repeating the EU Mediation Directive, the first MA stipulated that the parties might in principle agree to have recourse to mediation before or during lis pendens (mediation ex voluntate) or be invited by the court to do so during the pendency of a suit upon their agreement (mediation ex juditio). Mediation might further be ordered by another EU court or be imposed by another provision of law (mediation ex lege)[18]. Despite this provision, neither an EU court nor a piece of legislation imposed mediation under this regime, the recourse to the process remaining, thus, purely voluntary.

Mediation clauses do not entail procedural effects as those arising in case of an arbitration clause and, therefore, could not prevent recourse to state justice once a dispute arose[19]. When a case was brought directly to court despite the existence of an agreement to mediate, either party could raise an objection under substantive law referring to the legality of the claim (and not to the admissibility of the filing of the lawsuit or the hearing). According to the prevailing opinion at the time, given that the agreement to mediate entailed an obligation to renegotiate the dispute, the parties should at least appoint a mediator and attend the first meeting. However, once the mediation process had started, they were free to withdraw at any time and without justification[20].

Voluntary recourse to mediation interrupted the statute of limitations and the prescription period for as long as the mediation procedure lasted. Limitation and prescription period that had been interrupted, restarted once the report of failure was drafted or a party serveda statement

abandoning the mediation on the other party and the mediator, or the procedure was in any other way terminated[21].

The mediation process was regulated in a spirit of flexibility, given that the relative details were to a large extent determined by the mediator after consultation with the parties: the parties were free to agree with the mediator on the manner in which the mediation was to be conducted either by reference to a set of rules or otherwise. The principles of independence and impartiality of the mediator and the principle of confidentiality of the process were also regulated by the first MA and constituted fundamental elements of the mediation process.

After recourse to mediation, the process equally remained a voluntary affair in the way that no negative consequences were linked to the decision of a party to stop and withdraw from mediation[22]. The mediator should in such case proceed immediately to the termination of the procedure, drawing up and signing the relevant record alone[23]. On the other hand, after the successful conclusion of the mediation process by, the mediator, the relevant record embodying the mediated agreement should be signed by the parties and their attorneys. Once filed with the clerk of the court of first instance, it constituted an enforceable instrument[24].

The adoption of the first MA admittedly contributed to the creation of a strong ADR movement in Greece, as shown by the increased number of mediation centres, training sessions, publications and conferences. In practice, on the contrary, the application of mediation in civil and commercial matters remained extremely limited, despite its undisputed benefits[25]. Such disconnect between the

benefits of mediation and its current use, known as the "Mediation Paradox"[26], could be explained through various factors, such as the fear of the unknown, the reluctance of lawyers or even features of the Greek judicial system. In fact, given the relatively low court costs, claimants have not been prevented from commencing court proceedings even when the possibilities of winning the case are limited. Similarly, significant delays in the administration of justice, at both the stage of hearing a case and the stage of executing judgments, prevent defendants from agreeing to submit a dispute to mediation, particularly after this has arisen. In this context, for a long period of time mediation appeared to be preferable in cross-border disputes where an arbitration clause already existed.

III. …TO A QUASI-MANDATORY MEDIATION REGIME

A. The innovation of the mandatory mediation scheme: the second MA

Almost eight years after the enactment of the first MA, a radical reform of the mediation regime took place by the promulgation of the second MA, which replaced the first MA as well as the secondary legislation accompanying it. It repeated and enhanced the pre-existing legal framework (e.g. concerning the principles of the process, the enforceability of the mediated agreement etc.) whereas, at the same time, it introduced a significant innovation: a mandatory initial mediation session (hereinafter: MIMS) for limited categories of cases[27].

Specifically, submission to a MIMS with the mediator was for the first time introduced for specific disputes enumerated in the second MA[28].This requirement was

fulfilled if all parties appeared before the mediator, even if they agreed not to proceed to mediation. Disputes subject to submission to a MIMS were: a) disputes between landlords; disputes between the administrators of condominium and landlords; disputes concerning neighbouring properties; b) disputes relating to compensation claims resulting from road traffic accidents, as well as claims arising from motor insurance contracts, unless the harmful event resulted in death or personal injury; c) disputes concerning professional fees; d) family law disputes (care of child, maintenance, participation in acquisitions etc.); e) disputes arising from medical malpractice; f) disputes concerning trademarks, patents and industrial designs; and g) disputes concerning stock exchange contracts. The selection of these categories of disputes, which admittedly have little in common, for submission to mediation was not objectively justified, and clearly showed that mediation was primarily used as a tool to reduce court workload.

The reform of the Greek mediation regime was not without critics, including many legal practitioners and members of judiciary, which demonstrated the cultural hurdles mediation still faced. In this context, it is worth mentioning that Areios Pagos'[29]Administrative Plenary Panel issued opinion no. 34/2018 (with a marginal majority of 21-17 votes) holding that the mandatory mediation scheme introduced by the second MA was contrary to the Hellenic Constitution and the European Convention on Human Rights. The mediator's fee[30] and the mandatory attendance of the parties' lawyers at the mediation were considered to give rise to high costs and obstruct access to justice. Even though the opinion does not constitute a "court judgment" and is not binding, it is, however, indicative of how the new mediation scheme was perceived at that moment. In this

context and as a consequence of consecutive suspensions, the provisions of the second MA concerning the MIMS were never applied.

B. The implementation of the mandatory mediation scheme: the third MA

Almost two years after the enactment of the second MA, the third MA was published on 30 November 2019, replacing all former legislation and now constituting the sole legal instrument regulating mediation in Greece. The third MA exhaustively deals with all issues pertaining to mediation in both cross-border and domestic civil and commercial disputes. It contains detailed provisions on the regulation of the institution of mediation, the principles of the process (good faith, honesty, fairness, impartiality, confidentiality etc.), the enforceability of the mediated agreement, the qualifications of the mediator, the code of conduct and the disciplinary law of mediators, as well as issues concerning the mediators' training accreditation. To a great extent, it repeats and enhances the pre-existing legal framework, but it also provides for the practical implementation of the MIMS scheme, which now applies to a broader category of cases.

In principle, civil and commercial law disputes can be voluntarily submitted to mediation as long as the parties have the authority to dispose of the subject matter of the dispute, namely, where the law does not require a court judgment for its resolution[31]. At the same time, a MIMS requirement is provided for the following categories of disputes:

a) family disputes (concerning lawsuits filed as of 15 January 2020);

b) disputes under the standard civil procedure falling within the jurisdiction of the Single-Member Court of First Instance –when the value of the subject-matter of the dispute exceeds the amount of EUR 30.000,00– and the Multi-Member Court of First Instance (concerning lawsuits filed as of 1st July 2020); c) disputes arising from contracts which contain a valid mediation clause (concerning lawsuits filed as of 30 November 2019)[32].Disputes where the State or public entities are parties are excluded from the MIMS[33]. Also under this regime, mediation is primarily used as a tool to reduce court workload; it appears, however, that it further takes account of the value of the subject matter of the dispute, so that small claims are not excessively burdened with procedural requirements that effectively prohibit access to justice.

In the above enumerated disputes, the mediator shall be appointed by mutual consent of the parties or the claimant shall submit a request for recourse to mediation to an accredited mediator included in the register of the Ministry of Justice. If the respondent does not agree with the mediator, the latter is appointed by the Central Mediation Committee of the Ministry of Justice. The mediator shall notify the other party (or parties) of the request and arrange the date and place of the MIMS. This session takes place no later than twenty days from the day following the claimant's request to the mediator, extended up to thirty days when any of the parties resides abroad. The requirement of the MIMS is fulfilled if the parties and their lawyers appear before the mediator, even if they agree not to proceed to mediation. In such case, the record of the session is drawn up by the mediator and shall be filed with the submissions of the parties before the court, constituting a condition for the admissibility of the hearing of the case. If the parties eventually agree to

proceed to mediation, they draw up the agreement to mediate and shall complete the mediation within forty days, unless they agree on a later date[34].

The summons to the MIMS and the agreement to mediate in case of voluntary mediation suspend the statute of limitations, all deadlines regarding the exercise of the claims and rights in question as well as procedural deadlines during the mediation process. All deadlines continue running again after the drafting of the record proving the failure of the mediation, or the provision of statement withdrawing from the mediation proceedings by any of the parties to the other party and the mediator or from the completion or annulment in any way of the mediation process[35].

If a party who has been invited fails to attend the MIMS, the mediator will draft the relevant record and the other party shall submit it to the court. The court may then, in addition to its ruling on the merits, impose fines on litigants who were summoned to a mediation process but opted not to attend (ranging from EUR 100,00 to EUR 500,00), taking into account the overall behaviour of the party and the reasons for their non-attendance at the mediation session[36].

CJEU preliminary reference rulings in the *Alassini*[37] and *Menini*[38] cases served as the basis for providing compatibility of the MIMS provisions with the protection of the fundamental right of the parties to have effective recourse to justice. The ability of the parties to leave the mediation process at any time and to seek judicial recourse, the limited costs related to the MIMS[39], the provision of a short period within which mediation shall be concluded as well as the suspension of prescription periods of all rights pending the mediation process

confirm such compatibility. The right of recourse to justice might be affected by the introduction of mandatory mediation; the restriction in question, however, was considered by the Greek legislator as permitted, since the aim sought by the relevant provisions, namely the speedier and less expensive settlement of disputes and the lightening of the burden on the judicial system, to the benefit of the general interest, was considered proportionate to the restriction imposed on fundamental rights. Arguably, a particular feature of the mandatory mediation regime in Greece providing that the parties are required to attend the mediation process with their respective lawyers gives rise to costs together with the additional mediator's fees and may constitute a barrier to access to justice[40]. The exclusion of small claims from the scope of the requirement of a MIMS as well as the exclusion of both consumer disputes and small claims from the scope of the requirement to attend with a lawyer appear to speak for the compatibility of the Greek mediation regime with the case law of the CJEU[41].

IV. CONCLUSION

The above mentioned provisions, to the extent that they contain mandatory elements and, in effect, particularize the process, signal a further step towards institutionalization of mediation in Greece. Following the current international trends, mediation is thereby transformed from an inherently voluntary and informal process to a pure regulatory tool aiming at saving resources in the administration of justice. The middle way introduced by the third MA scheme bridges the gap between mandatory and voluntary mediation in an attempt not to excessively obstruct the parties' right to access to justice. And, indeed, even if one accepts that mandatory elements in mediation may erode aspects of

voluntariness and autonomy, there is no doubt that such elements can be a useful tool to encourage mediation on a wider scale. In this respect, the Greek quasi-compulsory scheme could be considered as a temporary expedient to encourage wider use of mediation in general so that it eventually becomes a "complementary" dispute resolution means[42]. To date, there is no statistical data concerning the progress made within the last year. It appears, however, that parties and lawyers are gradually gaining awareness about the advantages of mediation as an innovative tailor-made process that allows the parties to discover the core of their conflict and reach solutions that satisfy their interests, but could not be obtained in a courtroom. It remains to be seen whether it will fulfil its goal, i.e. to be seen by the parties and their lawyers as an opportunity to effectively resolve their disputes out of court, rather than a mere procedural formality.

[1] Vassiliki Koumpli, The regulation of mediation in cross-border disputes: The model of Greece, in: Marianne Roth & Michael Geistlinger (eds), Yearbook of International Arbitration and ADR – Volume V, 269, 270 (Dike/NWV 2017), with further references.

[2] See, for instance, Articles 116A, 208, 209 et seq., 214A, 233, 524 and 667 CCP.

[3]Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 25.05.2008, 3-8.

[4]Law 3898/2010. Mediation in civil and commercial matters, Government Gazette A 211.

[5] Articles 178-206 of Law 4512/2018. Provisions on the implementation of the structural reforms of the economic adjustment program and other provisions, Government Gazette A 5.

[6]Law 4640/2019. Mediation in civil and commercial matters – Further harmonization of the Greek legislation with the provisions of Directive Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 and other provisions, Government Gazette A 190.

[7] In parallel, Article 214B CCP provides for a judicial mediation procedure for private law disputes, which is voluntary and conducted by judges. Recourse to mediation may take place before filing a suit or during lis pendens, either upon suggestion of the court or on the parties' initiative. The court shall adjourn

the case for a hearing on a short date, which shall not exceed six months. The procedure of judicial mediation contains separate and joint meetings among the attorneys of the parties and the mediator judge, who may offer the parties non-binding suggestions for the resolution of the dispute. The process shall be conducted in such a way as to respect confidentiality, unless the parties agree otherwise. It is to be noted that this provision has only limited application to date.

[8] For a thorough analysis, see, instead of others, Carlos Esplugues, Civil and Commercial Mediation in the EU after the Transposition of Directive 2008/52/EC, in: Carlos Esplugues (ed), Civil and Commercial Mediation in Europe. Cross-Border Mediation – Volume II, 485, at 501 et seq. (Intersentia 2014).

[9]Recital 8 of the EU Mediation Directive.

[10] Article 1 of the EU Mediation Directive.

[11] Article 3(a) of the EU Mediation Directive.

[12] Article 3(a) of the EU Mediation Directive.

[13] Article 7 of the EU Mediation Directive.

[14] Article 8 of the EU Mediation Directive.

[15] Article 6 of the EU Mediation Directive.

[16]Article 2 of the first MA.

[17]Presidential Decree 123/2011.Determination of terms and conditions for the authorization and operation of training bodies for mediators in civil and commercial disputes, GovernmentGazetteA 255; DecisionoftheMinisterofJustice, TransparencyandHumanRightsNr. 109088 οικ./12.12.2011. Procedure for recognition of mediators' accreditation – Adoption of Code of Conduct for Accredited Mediators and Determination of sanctions for infringements thereof, Government Gazette B 2824; Decision of the Minister of Justice, Transparency and Human Rights Nr. 1460/ οικ./27.1.2012.Determination of mediator's fees, Government Gazette B 281; Decision of the Ministers of Finance and Justice, Transparency and Human Rights Nr. 85485 οικ./18.9.2012. Determination of administrative fees for mediation, Government Gazette B 2693.

[18] Article 3 of the first MA.

[19] Explanatory Report to the first MA (Article 2).

[20] See among others Georgios Diamantopoulos&Vassiliki Koumpli, On mediation law in Greece, RHDI, 361, at 374-375 (2014); Georgios Diamantopoulos&Vassiliki Koumpli, Mediation: The Greek ADR Journey Through Time, in: Carlos Esplugues&Louis Marquis (eds), New Developments in Civil and Commercial Mediation, 313, at 321-323 (Springer International Publishing 2015).

[21] Article 11 of the first MA.

[22] Article 8(3) of the first MA.

[23]Article 9(2) of the first MA.

[24] Article 9(2) of the first MA.

[25] See European Parliament – Directorate General for Internal Policies, 'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU (2014), http://www.europarl.europa.eu/RegData/etudes/etudes/join/ 2014/493 042/IPOL-JURI_ET(2014)493042_EN.pdf.

[26] Id.
[27]Vassiliki Koumpli, A further step towards institutionalization of mediation in Greece: Recent developments after Law 4512/2019, in: Marianne Roth & Michael Geistlinger (eds), Yearbook of International Arbitration and ADR – Volume VI, 267, passim. (Dike/NWV 2019), with further references.
[28] Article 182 of the second MA.
[29]Areios Pagos is the Hellenic Supreme Civil Court.
[30]The mediator's fee was freely agreed by the parties by written agreement. If there was no written agreement Article 194 of the second MA set the mediator's minimum fee at EUR 170,00 for providing his services up to two hours whereas for service of more than two hours the minimum fee was set at EUR 100,00 per hour (no maximum was set); at the same time, even lower fees regarding maintenance disputes, small claims etc. were provided.
[31] Article 3(1) of the third MA.
[32]Articles 6(1) and 44 of the third MA, as amended.
[33]Article 6(2) of the third MA.
[34]Article 7 of the third MA.
[35]Article 9 of the third MA.
[36]Article 7(6) of the third MA.
[37]CJEU, *Rosalba Alassini v Telecom Italia SpA*, C-317/08, *Filomena Califano v Wind SpA*, C-318/08, *Lucia Anna Giorgia Iacono v Telecom Italia SpA*, C-319/08, and *Multiservice Srl v Telecom Italia SpA*, C-320/08, judgment of 18 March 2010, ECLI:EU:C:2010:146.
[38] CJEU, *Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa*, judgment of 14 June 2017, C-75/016, ECLI:EU:C:2017:457.
[39]The mediator's fee in MIMS is in principle freely agreed by the parties by written agreement. If there is no written agreement, Article 18 of the third MA set the mediator's minimum fee for conducting the MIMSat EUR 50,00.
[40]See in this respect Panayiotis Yiannopoulos, The attempt of extrajudicial dispute settlement through mediation as a condition for the admissibility of the hearing under Law 4512/2018, 27-30 (Sakkoulas Publications 2018) [in Greek].
[41]Vassiliki Koumpli, Greece: Institutionalizing Mediation Through Mandatory Initial Mediation Session (Law 4640/2019), Kluwer Mediation Blog (January 20, 2020), http://mediationblog.kluwerarbitration.com/2020/01/20/greece-institutionalizing-mediation-through-mandatory-initial-mediation-session-law-4640-2019/.
[42] Id.

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CHAPTER - III

Mediating Online: among the Praises and Diatribes

Author's Profile

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Abstract

The development of the internet and modern technologies has created various opportunities worldwide. Many industries such as medicine, business, and entertainment by technological evolution are expanding. The justice system or the legal sector is not an exception. In early generations, people used to resolve their disputes through courts. Today we see that technology has changed the way we resolve disputes. Technology also changed the way we communicate with each other. This article aims to examine the advantages and drawbacks of dispute resolution in an online environment. Specifically, this article focuses on Online Mediation – one of the most popular forms of Online Dispute Resolution.

I. Introduction

Disputes are inevitable, part of our lives – whether individuals, businesses, or governments. Courts are not always the best solution to handle disputes today. Many acknowledge the effectiveness of Alternative Dispute Resolution (ADR), which eliminates the obstacles apparent in litigation. ADR has been an effective response to the insufficiencies in settling disputes through courts and grown rapidly over the past two decades. Similarly, after the growth of technology and internet communications there was a need to establish a new tool that would meet the needs of modern business. As Rule noted, "At the same time ADR is growing, businesses worldwide are rapidly integrating information technology into the ways they do business."[1]

Information technology and dispute resolution together created a new field, called Online Dispute Resolution (ODR), a form of dispute resolution with the potential to be more efficient, cost effective and flexible than the traditional approaches.[2]Early ODR attempts were mainly aimed at resolving disputes arising from the internet, however, now ODR methods have been successfully applied to disputes arising from outside, the offline world of human conflict.[3]The recent COVID-19 pandemic situation significantly promoted ODR. Because of social isolation caused by Coronavirus, the demand for Online Mediation has risen sharply.

Considering its spread throughout the world, many acknowledge that ODR is not just an "Online Dispute Resolution" but rather "Only Dispute Resolution" during the pandemic.[4]Dr. Tom Clarke noted: "I find it immensely ironic that the Coronavirus crisis will do more for virtual courts than decades of work by the National Centre for State Courts (NCSC). I am glad to see it come, even if this is not the way I would wish it to happen."[5]

Online Mediation, a form of ODR is the "subject of many praises and diatribes."[6]This article addresses the main concerns of Online Mediation, i.e. drawbacks such as the lack of face- to-face interactions and issues around confidentiality and security. On the other hand, the apparent advantages will be discussed in this article, such as time/cost saving, flexibility, the more limited perception of bias and improved access to justice. This article does not intend to assert that online mediation is better than offline mediation or supports the replacement of it. Rather it intends to underline main issues that would be useful for lawyers, businesses, mediators, or parties in a general online dispute resolution procedure.

II. *Defining Online Mediation*

Online Mediation is any dispute resolution process where a neutral third party (in general, a human mediator) assists the parties to resolve their dispute through internet communications.[7] Online Mediation is usually a voluntary and extrajudicial dispute resolution method of resolving disputes which enables parties to use opportunities provided by the internet and conduct the process online instead of through physical appearance.[8]However, communication still has a vital role in the process[9].

In the same fashion as in-person proceedings, Online Mediation encourages the parties to find an amicable solution to their disagreement.[10] Similarly, online Mediation completely mirrors the offline world by the mediation strategies and, styles deployed, and the provided services.[11]Online Mediation as an integral part of the Online Dispute Resolution (ODR) movement enables parties to resolve disputes with the assistance of technology outside the courtroom.[12]Technology plays such an essential role in Online Mediation - even considered as a "fourth party."[13]

While discussing the virtual nature of Online Mediation, it is interesting to ascertain whether the process should be only partly or fully online. So far, many researchers and practitioners have tried to answer this question. Colin Rule argues that the differentiation between online and offline is a false contradiction as "we constantly navigate back and forth between our online and offline channels, sometimes in the space of just a few minutes."[14] Similarly, in the case of ODR, the process may start with an online filling and transfer to telephone calls and then to physical meetings before completing the agreement

online. Blended approaches to online mediation – with some parties together physically in a room and others participating remotely can render operation of the mediation more complex for the mediator, however.

III. *Advantages and Drawbacks of Online Mediation*

Advantages of Online Mediation:

(a) Cost and Time savings

Online Mediation is less costly and time-consuming compared to the offline setting.[15] Normally, the costs for private dispute resolution services compose of the cost of the dispute resolution venue, neutral fees, and the cost of the parties, including their legal fees. In the case of ODR some of these costs are removed or remarkably reduced. For example, parties and neutrals do not need to travel.[16]

The characteristic tools of online dispute resolution such as e-mail, chat conference rooms, instant messaging, or videoconferencing significantly mitigates the costs related to travel.[17]Equally, there is no need to rent a neutral facility to administer the process, and appropriate documents or materials are also readily accessible online and do not require transportation for lengthy distances.[18]"The mediator does not have to rent an office and bear associated costs. With a laptop as his or her main tool, there are no geographic limits to offering the corresponding services."[19]

Online Mediation thus suggests significant cost savings compared to other fields of ODR. In addition, Online Mediation service fees are convenient for the parties and are usually calculated on an hourly basis or may also be a

fixed fee arrangement. The cost of the Online Mediation process may depend on several factors such as the nature of the dispute, the provider, the complexity of the given matter and required time for the resolution. However, the Online Mediation process is generally perceived as less costly than a traditional one.[20]

One of the greatest advantages of Online Mediation is that parties do not have to travel far to resolve disputes.[21]Disputes, including those in cross border commercial matters, can emerge between parties located in different countries. Traditional Dispute resolution mechanisms, such as courts in many cases require huge expenses and are time-consuming, which often leads to unsatisfied disputants, Online Mediation has the potential to reduce these tensions. Online Mediation may be time efficient and allows participants to engage in the process through their computers remotely. Individuals living in remote areas could avoid traveling a hundred miles to a court or administrative office with the aim of resolving a matter.

Time-saving in Online Mediation- is an obvious advantage, "since ODR allows for the early intervention, the prevention of escalation and the addressing of grievances before they evolve in formal conflicts."[22] Indeed, the majority of ODR providers aim to quickly settle disputes. For instance, "in case of low-value manufacturer-supplier disputes, the ODR program created for the American Arbitration Association (AAA), called "ODR-M-S," is able to resolve disputes between parties in an average of 54 days."[23]Speed is one of the main advantage in mediation which further increases in an online setting, where parties do not have to meet but rather connect at their convenience. As Rabinovich-Einy notes, "this avoids some troublesome interruptions and

intervals and also corresponds to the online culture of informality, flexibility, innovation and bottom-up regulation."[24]

Speed is a widely recognized benefit and almost a fundamental characteristic of ODR, however, some stakeholders assess speed differently. In general, governments and business organizations support the speedy resolution of disputes, while consumer organizations focus more on consumer right's protection. Nonetheless, Consumers International (CI) and Global Business Dialogue (GBDe) reached an agreement that values speed and other factors for efficient dispute resolution rather than the protection of the rights of consumers through national law.[25]In this context, the resolution must be faster than court proceedings except when the dispute is very complex.[26]

(b)Flexibility

Mediation is flexible and user-friendly, which can be obvious during the process. Flexibility is consonant with the assistance of technology that offers numerous communication methods. Also, parties can participate in mediation at more convenient times with the help of asynchronous communications- options.[27] Many forms of online mediation entail individuals being encouraged to resolve the dispute by reaching an agreement, without recourse to lawyers.[28] The flexibility of technology also appears during the resolution process, where parties are entitled to research and verify any information received and share their findings with the other parties. Besides, parties can use information processing tools such as electronic document management or information-retrieval systems that can lead to faster information processing, and reduced delay and costs.[29]

In similarity to in-person mediation, the flexibility and user-friendliness of Online Mediation also depends on its voluntary character and informal nature.[30] The informal nature of ODR builds a reliable environment that encourages settlement and praises honesty, where parties are ready to reach an agreement to their dispute and therefore have a better chance of voluntary compliance.[31] Parties and the neutral third party are entitled to choose forms of communication more adaptable to the circumstances and they are also not limited by the need to reach any specific type of agreement.[32]While the process is online the parties communicate virtually rather than face-to-face which can be helpful in diminishing any fear and discomfort in communicating negative feelings or critical concerns.[33] The flexibility of Online Mediation may in particular appear well placed to deal with e-commerce consumer transactions while the probability of small transactions makes the internet attractive medium for e-commerce. As the transaction costs are small in value, parties (buyers and sellers) prefer to purchase and sell units in lower costs rather than in physical markets, that usually require higher transportation related expenses. Consumers may also prefer resolving disputes online, because of the purely electronic relationship.[34]

The inherent nature of online communication encourages both synchronous and asynchronous relations. Parties can read and respond to messages any time via asynchronous communications. Moreover, parties can modify messages before sending them.[35] As Bary notes, "an asynchronous process of Online Mediation can occur twenty-four hours a day, seven days a week, at the parties and mediator's convenience."[36] Besides the possibility to choose the most convenient procedure, parties can also select the most convenient third – party neutral based on

their experience in the specific field. It has been stated that parties should not worry about the competence of mediators in the online environment.[37]

(c)Access to Justice

Online Mediation is accessible irrespective of the time zone and location of the parties. Specifically, Online Mediation allows parties to participate in the process even if they live in different countries or in different time zones.[38]Online Mediation increases the accessibility of dispute resolution by reducing barriers of financial background, disability, geographical distance, shyness in a physical context, and other potential obstacles to accessing justice. Also, some believe that traditional dispute resolution give priority to those individuals who are "articulating, well-educated, or members of a dominant ethnic, racial or gender group."[39]Parties and the mediator focus on the main elements of dispute resolution rather than the individual characteristics of each participant. Therefore, the notion – who is behind the screen in the process - is non-essential.[40]Contrary to the prohibitive costs in traditional dispute resolution, ODR lowers the cost of access to dispute resolution.[41] For those with disabilities or language barriers, the more informal and flexible nature of ODR services suggest a better and accessible way to participate in court proceedings and/or other forms of dispute resolution.[42]

(d)Less Perception of Bias

Online Mediation provides less perception of bias. A mediator from the International Chamber of Commerce mentioned he does not make notes during mediation process for three main reasons: first, to express he is listening, secondly, to show he is equally attentive to both of the parties, and, thirdly, to entitle parties to recognize the mediation as confidential. However, the mediator is not obliged to consider these in online procedures.[43]

According to Katz (1998), "When dealing with cross-border disputes only a consensual process may offer the parties a truly neutral forum, free of any suggestion of bias by local laws."[44] Online Mediation creates an environment where building an agreement between parties is possible without bias since it is not immediately obvious in an online interaction whether the other party or neutral is male or female, black and white, gay or straight, old or young.[45]In any case, parties are free for self-representation, i.e. they decide what to make public about themselves or what to hide: "It is even possible for the parties to misrepresent themselves, or to leave certain characteristics unaddressed."[46]Online Mediation removes the probability of unconscious bias which can increase the chances of resolving disputes on the basis of what is said, rather than how it is said, or who says it.[47]

Drawbacks of Online Mediation:

(a) Lack of face-to-face interactions

The well-known criticism of Online Mediation is that mediation – a human process of interaction and face-to-face communication is not entirely online replicable.[48]"The great paradox of Online Mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution

designed to involve participants in direct interpersonal contact."[49] Eisen argued that Online Mediation is an unwise idea because "cyberspace is not a mirror image of the physical world. There is no comparable sense of 'getting away' in Online Mediation, as the parties create a new environment without leaving their familiar space."[50] Participants may connect electronically but remain where they are.

In general, ODR systems may impair communication which diminishes the possibility of expressing emotions and feelings. Without face-to-face interactions, effective and important communication between parties may seriously be questioned. This is especially true if the parties choose an e-mail or any other written method for communication. The mediator has to properly examine how the mediation process operates while e-mail-correspondence complicates to ability to grant any weight to emotion. If the parties are unable to see each other, it is almost impossible to guess the same emotional messages by way of body language as they could in a case where they were sitting in the room together. Therefore, the virtual environment is considered as cold, because a wide range of contextual information, e.g. body language and emotions, is not properly converted and received by parties.[51]

There is richness in face-to-face interactions because of the quick and spontaneous communications, often on a non-verbal level. It is also difficult for the third-party neutral to see the possible solutions from written texts rather than from face-to-face. Therefore e-mail is deemed to be a drawback because of it relies on text. Similarly, lack of face-to-face interactions, such as body language makes it difficult for the neutrals to provide suggestions and help parties find a direction where a resolution may

be possible.[52] The mediator may not manage the temper and tone of the communications without sounding controlling and judgmental, which is an essential element for the creation of a sustained problem-solving environment.[53] Mediation online with the use of video-conferencing facilities may eradicate some of these concerns however.

Negotiations are certainly more efficient if parties communicate with each other fully. Specifically, for negotiations to be successful parties need to listen to each other, express and receive the other's emotions which are important issues in mediation.[54] Online Mediation may lose the dynamics of traditional mediation as it is conducted remotely, using computers, rather than face-to-face communication. Even if ODR provides audio-visual aspects, for example, video-conferencing, it does not exclude the possible obstacles with emotional expressions and body language. Video systems may be unable to provide harmony and cooperation between parties in the same way as the face-to-face meeting does because the nuances of non-verbal communications are harder to pick up.[55]

(b) Confidentiality and security

Confidentiality is considered to be one of the main concerns of Online Mediation. Indeed, confidentiality is an essential mechanism of ADR that promotes trust between the parties. A mediator in Online Mediation needs to be greatly sensitive to the issue of confidentiality and to realize the challenges to this inherent online communication.[56]For example, in Online Mediation and the ODR systems overall, it is possible to easily print-out emails used in the process and make them public without anyone's knowledge or permission. Also, online

communication cannot exclude cyber-attacks and hackers may break into the system if there is no strong digital security against illegal access or other actions regarding confidentiality.[57] Accordingly, confidential information may be unlawfully obtained and then used for different purposes. Moreover, it may be difficult to certify the identity of the party in a text-based ODR dispute. Even if identities of the parties are verified, ODR can still provide the risk that already shared documents can be shared with another party without the consent or knowledge of the provider. Therefore, it is difficult to control an electronic document shared during a mediation session.[58]

Confidentiality in mediation has always been considered the main attraction. For some consumer online consumer mediation schemes, agreements reached in Online Mediation are public, while the process itself remains confidential. However, usually, parties agree to keep confidentiality regarding resolutions. In any case, the general public does not have access to resolutions in traditional mediation, especially for commercial disputes. And, generally, no mechanism has existed for the publication of mediation resolutions. This is not the case with Online Mediation as the internet provides a suitable means to communicate such resolutions to a large audience. This could increase many concerns about the confidential aspect of mediation.[59]Confidentiality can be guaranteed through encryption. Specifically, ODR systems should provide security of exchanges, such as digital signatures, encryptions, and firewalls for the secure environment.[60]Otherwise, people are afraid to share private information through the internet, i.e. using credit cards for online purchases, because of possible misuse and lack of availability in resolving potential disputes.[61]

IV. **Conclusions**

Overall, Online Mediation has its drawbacks and advantages. It is not credible to analyze which counts more as the list of advantages or drawbacks set out in this piece is not exhaustive. Until now many authors or researchers have described ODR (including Online Mediation) in the negative or positive context. Instead of this dogmatic approach, it is considered that many diverse and controversial points of view apply, of course, this is not surprising. Also, the advantages and drawbacks of Online Mediation can apply differently in different spheres of practice. For example, many consider that a lack of face-to-face interaction is a disadvantage of Online Mediation. However, the lack of face-to-face interaction may remove bias and other obstacles – such as interpersonal animosity existing in face-to-face meetings. This approach can also be known as a "cooling distance"[62] because online communication helps parties to cool hot tempers and keep disputes from escalating.

Many scholars have historically criticized Online Mediation through communication via e-mail. However, technology has changed the way we communicate and improved the ability to use other communication methods rather than simply e-mail. For example, virtual face-to-face meetings through ZOOM and other similar technologies are not a novelty, using voice and visual communication technologies which far better replicates the face-to-face, traditional mediation environment. It is also considered that confidentiality and security is a disadvantage in Online Mediation. Steps have been taken in this area, however. For example, WebMediate

(an Online Mediation platform) provides exhaustive confidentiality clauses on its website that bind the parties, legal representatives, or mediators. Generally, the process of Online Mediation is confidential as traditional mediation. In sum, therefore, it can be said that Online Mediation can work properly with the assistance of technology and it's future seems reassured.

Considering the successful development of Online Mediation, resolving disputes are feasible and realistic today.

[1]Colin Rule, Online Dispute Resolution for Business: B2B, E-commerce, Consumer, Employment, Insurance, and other Commercial Conflicts (2002) 11-15
[2]Ethan Katsh, Symposium: Legal Regulation of the Internet, Dispute Resolution in Cyberspace, Connecticut Law Review (1996)
[3]Colleen Getz, Closing the Distance with Technology, Report on Phase I of the Technology- Assisted Family Mediation Project, British Columbia Mediator Roster Society16 (2007)
[4]Michael（xuhui）FANG – Has Covid-19 Turned "ODR" into the "Only Dispute Resolution" Available?
[5]JTC Quick Response Bulletin, Judicial Perspectives on ODR and Other Virtual Court Processes (2020)
[6]Pedro Miguel Freitas, Pablo Galain Palermo, Restorative Justice and Technology, Interdisciplinary Perspectives on Contemporary Conflict Resolution, IGI Global, 25 (2016)
[7] Pablo Cortés, Online Dispute Resolution for Consumers in the European Union, 144 (1st ed. 2011)
[8] Lekkas Zissis, Disputes in the Digital Era: The Evolution of Dispute Resolution and The Model ODR System, 183 (Université de Tolouse, 2015)
[9] Id, at 144
[10] Llewellyn Joseph Gibbonsand others, Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message 32 NML Rev 27 (2002) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=315964
[11] Gabrielle Kaufmann-Kohler & Thomas Schultz, Online Dispute Resolution: Challenges for Contemporary Justice, International Arbitration Law Library, KLI, 22 (2004)
[12] Victor Terekhov, Online Mediation: A Game Changer or Much Abo about Nothing, 2019 Access tO Just. E. EUR. 33 (2019)
[13] Ethan Katsh & Janet Rifkin, Online Dispute Resolution: Conflict Resolution in Cyberspace (1st ed, 2001)

[14] Golann Folberg, Mediation: The Roles of Advocate and Neutral, 287 (3rd ed, 2016)
[15]Kohler & Schultz, supra note 10 at 55
[16]Id, at 55
[17] Zissis, supra note 8 at 223
[18] Gibbons and others supra note 9
[19]Terekhov, supra note 11 at 43
[20] Kohler & Schultz, supra note 10
[21]Joseph W. Goodman, The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites [8] Duke Law & Technology Review (2003)
[22] Zissis, Supra note 8 at 220
[23] Charlotte Austin, An Introduction To Online Dispute Resolution (ODR), and its Benefits and Drawbacks [11] Victoria University of Wellington (2017)
[24] Orna Rabinovich-Einy, Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age [7] Virginia Journal of Law and Technology (2002) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=905217
[25] Kohler & Schultz, Supra note 10 at 114; see also ADR Guidelines – Agreement reached between CI and GBDe, 59 (2003)
[26] Id, at 59
[27]Cortés, Supra note 6 at 150
[28] Id, at 150
[29]Rule, Supra note 1
[30] Lide Casey, ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation [12] OHSJDR, 193, 208,
(1996) https://kb.osu.edu/bitstream/handle/1811/79766/OSJDR_V12N1_193.pdf?sequence=1&isAllowed=y
[31] Zissis, Supra note 8 at 230
[32]Karim benyekhlef & Fabien Gelinas,Online Dispute Resolution [10] 87 (2005)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1336379
[33]Epiphany Azinge, Chinyere Ani, Principles of Negotiation and Mediation, Nigerian Institute of Advanced Legal Studies, 32 (2012)
[34] Henry H. Perritt, Dispute Resolution in Cyberspace: Demand for New Forms of ADR, [15] OSJDR 698 (2000)
[35]Goodman, Supra note 24 at 8
[36]William Barry, Appropriate Dispute Resolution, Wolters Kluwer 188 (2017)
[37]Pablo Cortés, The Potential of Online Dispute Resolution as a Consumer Redress Mechanism, 5 (2007)
[38]Freitas & Palermo, Supra note 5 at 85
[39] Melissa Conley Tyler & Mark McPherson, Online Dispute Resolution and Family Disputes, U of Melbourne Legal Research Paper 11 (2006) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1032743
[40] Terekhov, Supra note 11 at44
[41] Robert J Condlin, Online Dispute Resolution: Stinky, Repugnant, or Drab, Francis King Carey School of Law Legal Studies Research Paper, University of Maryland
(2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2873918

[42] Roland Troke-Barriault, Online Dispute Resolution and Autism Spectrum Disorder: Levelling the Playing Field in Disputes Involving Autistic Parties, Western Journal of Legal Studies, 6 (2015)
[43] Cortés, Supra note 6 at 149
[44] Id, at 149
[45] Rule, Supra note 1 at 68
[46]Ibid
[47] Condlin, supra note 46
[48]Katsh, Supra note 2
[49] Joel B. Eisen, Are We Ready for Mediation in Cyberspace? BYU Law Review, 1310 (1998)
[50] Id at 1310
[51] Freitas & Palermo, Supra note 5 at 86
[52] Manevy, Supra note 23 at 31
[53]Katsh and others, Supra note 25
[54]Goodman, Supra note 24 at 10
[55] Condlin, Supra note 46
[56] Katsh, Supra note 58
[57]Hang, Supra note 62 at 860
[58] Austin, Supra note 27 at 19
[59]Rabinovich-Einy, supra note 28 at 38
[60]Faye Fangfei Wang, Online Dispute Resolution -Technology, management and legal practice from an international perspective, (Chandos Publishing: Oxford England) 2009
[61]Ibid
[62]Rule, Supra note 1

CHAPTER - IV

Comparative Analysis of the Mediation Regimes in Greece and Germany

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Abstract

The Chapter focuses on mediation and it contains an overview of the relevant national provisions in Greece and Germany. In those two countries, where recourse to the ordinary courts has traditionally been the only available way of resolving disputes, the effort to integrate and reform the mediation process has intensified in the course of the last decade. The first half of the Chapter analyzes the very recent changes in the Greek mediation law and provides historic analysis of the most important amendments and its case law. In the second half, the authors analyze the legal regime for mediation in Germany and focus on certain critical points in light of the Covid-19 pandemic. The authors, apart from analyzing briefly the procedural framework from a

comparative perspective to present ambiguous issues, and criticisms, referring mainly to the need for expansion of the mediation procedure as well as its possible contradiction with the right of judicial protection and constitutional provisions. The Chapter concludes with findings on those two jurisdictions and suggestions for the future.

A. Mediation in Greece

1. Introduction

The Greek legal system has observed over the years an intensified effort to integrate out-of-court dispute resolution mechanisms such as mediation. Typical examples which reflect this effort include Law 1867/1990, envisaging the establishment of the Mediation and Arbitration Organization for the alternative settlement of labor disputes[1], as well as the establishment of a mandatory pre-trial attempt to settle disputes between the parties with the introduction of Article 214 A of the Greek Code of Civil Procedure pursuant to Law 2298/1995 as amended by Law 2915/2001.[2] Especially in recent years, the legislator's effort to institutionalize out-of-court dispute resolution seems more systematic. Initially, Law 3898/2010 incorporated Directive 2008/52/EC on mediation issues in civil and commercial disputes into national law, while at the same time, under special provisions, extrajudicial dispute resolution procedures were established, such as Article 15 of Law 4013/2011 (Dispute Settlement Committee for Commercial Leases), Article 2 para. 1 of Law 3896/2010 as amended by Law 4161/2013, and Article 11 of Law 2251/1994 (Consumer Dispute

Resolution Committee). Furthermore, Law 3869/2010 envisaged an extrajudicial mechanism related to over-indebted household debt arrangements, Law 3994/2011 abolished the mandatory nature of the attempt to settle disputes amicably, since the latter was receptive to compromise, while Law 4055/2012, added a special provision for judicial mediation (Article 214 B).[3]

1.1 Law 4512/2018 - Compulsory mediation

In 2018 a new Law, namely Law 4512/2018, brought radical changes, as the inclusion of specific categories of disputes in the mediation process was defined as mandatory. In fact, in case of disregard of the aforementioned obligation to attempt mediation, any relevant filed lawsuit was automatically inadmissible and could not proceed to a hearing by the competent Court. This provision on compulsory mediation was subsequently suspended for nine months following the publication of this law.

1.1.1 Case Law - Decision No. 34/2018 of the Administrative Plenary Session of the Supreme Court

Decision No. 34/2018 issued by the Administrative Plenary Session of the Greek Supreme Court is very crucial in this regard. In particular, the compulsory nature of mediation provided for in Law 4512/2018 was deemed unconstitutional. The court acknowledged that “the EU legal system in principle unreservedly accepts voluntary mediation as a form of alternative dispute resolution. It is not however contrary to a possible introduction of a

compulsory mediation regime by national law provisions, even as a condition of the admissibility of the legal aid concerned, provided that i) the process is cost-effective with minimum costs and ii) it does not require mandatory representation of the parties by a lawyer". It was stated that the obligation of Mediation is incompatible with Article 20 of the Greek Constitution as well as with Articles 6 and 13 of the ECHR in conjunction with Article 47 of the Charter of Fundamental Rights.

It was further recognized that all the legal consequences envisaged in case of non-conformity, violate the parties' right of access to Justice, since citizens are further burdened financially whereas the party is indirectly led to the obligatory acceptance of the Mediator's solution. Consequently, the party is finally deprived of the natural judge guaranteed by the Constitution and the ECHR.

1.2 Law 4640/2019

Despite the existence of the above case law on unconstitutionality, compulsory mediation has recently returned by virtue of Law 4640/2019. The new law abolishes the regulations that were deemed unconstitutional and restructures the framework for the integration of mediation into the Greek legal order. Its provisions were ratified unanimously. By virtue of Decision 56/2019 issued by the Administrative Plenary of the Supreme Court the harmonization of its provisions with the fundamental right of access to justice was acknowledged.[4]

2. Analysis of the New Provisions

2.1 Scope of Application

Pursuant to the new legal regime, existent or future civil and commercial disputes of national or cross-border nature, can be subject to the mediation process, provided that the parties have the power to dispose off the subject matter of the dispute, in accordance with the provisions of substantive law.[5]

Under the regime of Law 4512/2018 (Article 182) and in proportion to the provisions of the Code of Civil Procedure on arbitration, an issue arose in cases where the parties did not have the power to dispose off the subject matter of the dispute. Relevant examples include disputes concerning future alimony.[6] Following the introduction of Law 4640/2019, and in particular according to Article 6, compliance with the above-mentioned mediation condition is unnecessary in such cases. It is consequently accepted that the conduct of a preliminary mediation hearing[ma1] [SB2] is not mandatory.

2.2 Stages of the Procedure

The procedure consists of two distinct stages:

- The first imposes a duty on the party's representative to notify their client about the possibility of resolving the dispute through mediation (Article 3 para. 2 Law 4640/2019), while it covers all civil law disputes.

- The second concerns specific cases listed in Article 6 para. 1 Law 4640/2019, for which a mandatory initial

mediation session is scheduled prior to the hearing of the lawsuit.

Regarding the first stage, according to Article 3 para. 2 of Law 4640/2019, prior to the filing of a lawsuit before the regular competent courts, the authorized attorney is obliged to inform the client in writing about the possibility of mediation of the dispute, as well as about the mandatory conduct of an initial mediation session and the procedure to be followed.[7] The aforementioned document is completed and signed by the client and its attorney and submitted at the time of the filing of the lawsuit or later with the submission of the pleadings, or during the hearing of the case at the latest. If such an obligation is not taken into account, the lawsuit is inadmissible. The State and any legal entities associated with it, should also be informed in writing about the possibility of a resolution through mediation of the disputes in which they are involved. Specifically, the relevant legal provisions explicitly exempt them solely from the obligation to participate in the mandatory initial session but not from the duty to complete and sign the information document analyzed before,

The obligation to submit the form refers to all private disputes, i.e. any civil or commercial dispute concerning the existence, extent, content or subject of a private right. Thus, the information duty is further extended to disputes over public work contracts governed by private law. A completed form should be also submitted in case of filing of main interventions, counterclaims or appeals provided that requests for independent legal protection are introduced. On the contrary, when applications for interim measures are submitted or even if a dispute falls within the limits of an arbitration clause, no form is required.

The second distinct stage of the process comprises the mandatory initial mediation session. The disputes falling within this category are: i) specific categories of family disputes such as disputes over parental responsibility and child support or disputes referring to the relations between spouses[8], ii) disputes brought in ordinary court proceedings where either the single-member court of first instance, (provided that the amount of the dispute exceeds the amount of 30.000,- Euro or the multi-member Court of First Instance has jurisdiction in accordance with the provisions of the Code of Civil Procedure; and iii) disputes for which, the parties have already previously incorporated a mediation clause in their written agreement.

In particular, regarding the last issue, Law 4640/2019, deviates from the previous law[9], as it explicitly prescribes requirements relating to the mediation clause. The prerequisites for the contractual introduction of the compulsory mediation pre-trial according to Article 6 para. 1(f) of Law 4640/2019 are the following: i) a mediation clause must have been included in a written agreement between the parties; ii) the clause should not be abolished in between while; iii) the dispute should be occupied by the subjective as well as the objective limits of mediation.

It is noteworthy that, according to Article 6 para. 2 of Law 4640/2019 the only exception from the mandatory mediation procedure concerns the disputes in which the party is the State, the local authorities or a legal person under public law.[10] This exception concerns only the obligation to participate in the mandatory initial session, but not the obligation to complete the information form provided for in Article 3 para. 2 of Law 4640/2019.[11]

2.3Compulsory Initial Mediation Session Procedure

2.3.1 Appointment of the Mediator

The exact procedure for appointment of the mediator is set out in Article 5 para.2 Law 4640/2019. Particularly, the party who wishes to initiate mediation proceedings, may either contact the other party to the dispute in terms of an endeavor to find a commonly accepted mediator, or address a mediator of his choice. The above stage does not require the involvement of an attorney, and from a legal perspective no procedural sanctions are envisaged in case of its omission. If the parties do not reach an agreement regarding the person who will mediate, a record of failure is not drawn up, nor does the failed attempt at mediator selection replace the obligation to attend the initial meeting.

In the context of the appointment of the mediator the Central Mediation Committee assumes the procedure and has a binding Jurisdiction.[12] If the pre-session of the compulsory mediation is accelerated after the filing of the lawsuit, the Central Mediation Committee selects the mediator from those residing in the district of the court, where the lawsuit is pending. Should the pre-session proceedings be expedited before the lawsuit is filed, the delimitation of the "locally competent court" as a prerequisite for the selection of the mediator presents serious problems, when more cases are joined.[13]

If the mediator does not accept his/her appointment within a period of 3 working days, his refusal is presumed. The legal framework for the appointment of an ombudsman

has been criticized by the Central Mediation Committee as it is alleged to have two serious gaps:

i) there is no mechanism for displaying the reasons for the ombudsman's exclusion and
ii) ii) it does not regulate the starting point of the deadline as well as the type of notification to the mediator of his/her appointment.[14]

2.3.2 Submission of the Request

Following the appointment of the mediator by the parties or the Central Mediation Committee, the party which wishes to mediate submits a "request for initiation of the mediation process". The request must include a description of the subject matter of the dispute, albeit a brief one. Article 7 para. 2 Law 4640/2019 does not threaten procedural sanctions in the case of provision of an incomplete description and facts of the lawsuit. Otherwise in case that new claims are mentioned in the lawsuit submitted before the competent courts which were not included in the request for the mediation process, the discussion of the lawsuit[ma3] [SB4] for those claims should be declared inadmissible,

2.3.3 Service of the Request to the Mediator

The request including the description of the subject matter, shall be notified to the mediator electronically or by any appropriate means. The submission of the request starts the deadline for the obligatory initial session. The suspensive effect of the limitation period, the

amortization period and the procedural deadlines arises from the further notification of the mediator to the other parties.[15]

Regarding the place and time of the mediation session, the legislator gives priority to their contractual determination. If it is not possible to determine a place and time of common acceptance for the holding of the mandatory initial meeting, this element shall be specified by the mediator. Furthermore, if the parties agree only on time or place, the mediator's power is limited to those elements for which no mutually acceptable solution has been found. Both the parties and the mediator are bound by the time of the mandatory initial meeting and therefore the procedure must be completed within 20 days of receipt of the request by the mediator. This period is extended to 30 days if one of the parties resides abroad.[16] The parties are summoned by the mediator at least five days before the mandatory initial meeting.

2.3.4 Information Duty

During the mandatory initial mediation session, the mediator shall inform the parties about the details of the mediation process, namely the basic principles governing it, as well as about the possibility of resolving their dispute extra judicially on the basis of its particularities and nature.[17] After the end of the initial session, a report is drawn up by the mediator, signed by him/her and all the participants. In case the parties decide to continue the mediation process, a document is drawn up incorporating an agreement that the dispute will be resolved by the mediation process.[18]

The parties also have to monitor the information provided by the mediator. According to Article 7 para. 6, a fine is imposed solely in the case of non-attendance, while pursuant to Article 7 para.4 the imposition of the sanction of inadmissibility of the discussion occurs exclusively in the case that the claimant fails to initiate the obligatory initial session.

2.3.5 Confidentiality Duty

The mediation process as well as the mandatory initial session shall be kept confidential. If following an unsuccessful mediation session, the dispute is brought before the competent courts, parties, attorneys and any third-party present at the mandatory initial mediation hearing are initially excluded from being considered as witnesses[ma5] [SB6] . The aforementioned rule is not taken into account in case of the existence of elements of public policy.[19]

2.3.6 Inadmissibility of the Court Hearing

In case the formalities of the previous articles are not observed, the legislator threatens as a sanction the inadmissibility of the court hearing which is taken into account ex officio.

2.3.7 When the Initial Session of the Mediation Procedure is Declared Closed

In accordance with Articles 7 para. 4, and 15 para. 4 of Law 4640/2019 the obligatory initial session must be declared closed: i) if the mediator finds that it is impossible for the continuation of the mediation to lead to settlement of the dispute; ii) if it is found that the only possible settlement of the dispute would be contrary to

good morals or public policy; iii) if any of the summoned parties does not attend the proceedings or arrives without proper representation, since in this case the drawing up of a mediation agreement is excluded; iv) if none of the summoned parties appears; and v) if the summoned parties appear but make a statement of early departure.

2.3.8 Consequences of the Outcoming Agreements

If the mediation, process is successful, a corresponding report is signed by the mediator, the parties and their attorneys. Each party is entitled to receive a valid report, which can be submitted at any time to the registry of the competent court in which the case is pending or "the trial of the case is to be introduced".

The mediation report, if it includes provisions subject to enforcement, is declared by the legislator in an enforceable title (Article 8 para. 3 Law 4640/2019) and becomes an enforceable title from its submission to the secretariat of the competent court. Finally, in accordance with Article 8 para. 2, the filing of the lawsuit for the same dispute is excluded, any relevant pending litigation is cancelled, while if a lawsuit for a subject matter covered by the mediation Agreement is filed it is declared inadmissible.

3. Conclusion

Taking everything into consideration, it seems that the new regime attempts the compulsory establishment of mediation as a method of alternative dispute resolution in

Greece. Since the provisions were recently introduced, considerable implementation time is required before the practical benefits can be objectively evaluated.

B. Mediation in Germany

1. Introduction

In Germany, Article 92 of the Constitution awards judicial power to the judges and the monopoly of jurisdiction to the state and the federal courts. In parallel, "party autonomy" is defined as the right of the parties to shape their private relations according to their own decisions. It certainly corresponds to the ideal of acting responsibly and obeying the law but also to have the right to express your free will in terms of how to solve your disputes, in which way and method. However, this is not permitted in all legal fields and there are certain limitations and exceptions, e.g. in criminal law, where deviations from the court system is not permitted. Under constitutional law, private autonomy in Germany is part of the general principle of human self-determination and is essentially protected by the fundamental Article 1 of the Constitution[20] in conjunction with the general principle of freedom of action under Article 2 para. 1 of the Constitution. Thus, there is no prohibition in Germany on using ADR methods to solve a private dispute.

2. The German Mediation Act and the Certified Mediators' Training Directive

The German Mediation Act[21] was enacted as a federal law in 2012, with its latest amendments entering into force in 2015. In addition, the Certified Mediators'

Training Directive[22](hereinafter "the Training Directive")came into force in 2017 and was last amended in 2020.

2.1. The German Mediation Act in Detail

As for the German Mediation Act, the starting point was the European Directive 2008/52/EC of May 20, 2008. The scope of the German Mediation Act exceeds the requirements of the European Directive:- while the Directive provides only for cross-border civil and commercial disputes, the German Mediation Act covers all forms of mediation in Germany, irrespective of the form of dispute or the place of residence of the parties concerned.[23] It is rather a short legal instrument, comprising just nine Articles, and establishing only a general framework of mediation, as the parties and the mediator are considered to need wide discretion and room for manoeuvre to structure and during the process.

2.1.1 Definition of Mediation and Mediator

Article 1 German Mediation Act provides for a definition of mediation to differentiate it from other forms of dispute settlement. Mediation is described as "(..) a confidential and structured process in which the parties, with the help of one or more mediators, voluntarily and independently seek an amicable settlement of their conflict." and further, a mediator is defined as a professional, who "(..) is an independent and neutral person without decision-making authority who guides the parties through the mediation."

2.1.2 Procedural Steps and Duties

As for the process, Article 2 German Mediation Act sets out the procedural steps: i) the parties choose a mediator;

ii) the mediator ensures that the parties have understood the principles and the process of mediation and voluntarily participating in the mediation; iii) separate caucuses can be held by the mediator and each party; iv) there is provision for third-parties to join, only with the consent of all parties involved in the mediation; and v) the parties can end the mediation at any time, or the mediator can do so, especially if he/she is of the opinion that independent communication or an agreement between the parties is not to be expected. The law also refers to the duties of the mediator, which shall be the neutrality towards the parties, to ensure the voluntary character of the proceedings, to facilitate fair and effectively communication between the parties and help them to find common ground. Furthermore, Article 2 (6) German Mediation Act reads that "in the event of an agreement, the mediator works to ensure that the parties reach the agreement in full knowledge of the facts and understand its content. He/She must inform the parties who take part in the mediation without professional advice, of the possibility of having the agreement reviewed by external consultants, if necessary. With the consent of the parties, the agreement reached can be documented in a final agreement."

Moreover, the German Mediation Act deliberately avoids establishing a precise code of conduct for the mediation procedure, except it sets out certain disclosure obligations. Article 3 German Mediation Act provides for the obligation of the mediator to disclose to the parties all circumstances that could affect his/her independence and neutrality. In such circumstances, he or she may only act as a mediator if the parties expressly consent. A person who was active for one party in the same matter before the mediation may not act as a mediator. The mediator may not act for either party in the same matter during or

after the mediation. Also, a person may not act as a mediator, if another person associated with him or her in the same professional practice or office community worked for a party in the same matter before the mediation. Such other person may not act for either party in the same matter during or after the mediation. However, the latter may not apply if the parties have expressly given expressly their consent after being given extensive information and in the case that there are no legal concerns.

Furthermore, the mediator is obliged to inform the parties upon their request about his/her professional background, training and experience in the field of mediation. The German Mediation Act leaves in that sense a wide discretion to the parties and is only strict on the part where the mediator him- or herself was involved with one of the parties in the same legal matter. It is a small restriction which, however, goes beyond the mediation process and extends also to the subsequent process prohibiting the involvement of the mediator in the same legal matter for one of the parties. In this way the German legislature tries to preserve the neutrality of the mediator in all phases of the proceeding.

2.1.3 Confidentiality

Article 4 German Mediation Act explicitly establishes a confidentiality obligation. The mediator and the persons involved in the mediation process are obliged to maintain confidentiality, unless otherwise stipulated by law. This duty applies to everything that has become known to them in the course of the process. Regardless of other legal regulations on the confidentiality obligation, it does not apply to the extent that: i) the disclosure of the content of the agreement reached in the mediation process is

necessary for the implementation or enforcement of this agreement; ii) the disclosure is necessary for overriding reasons of public order (ordre public), in particular to avert a threat to the well-being of a child or a serious impairment of the physical or psychological integrity of a person; or iii) the relevant information is obvious facts or, according to their significance, does not need to be kept confidential. It is also explicitly mentioned that the mediator is obliged to inform the parties of the scope of his/her duty o confidentiality.

2.1.4 Education and Training of the Mediator

The German Mediation Act also includes a provision on the education and training requirements to be a certified mediator. The mediator is responsible for ensuring through appropriate training and regular advanced training that he/she has theoretical knowledge and practical experience in order to be able to guide the parties through the mediation in an expert manner. There are certain *non-numerus clausus* examples of what a suitable training should convey, such as: i) knowledge of the basics of mediation as well as its process and framework conditions; ii) negotiation and communication techniques; iii) conflict competence; iv) knowledge of the law of mediation as well as the role of law in mediation; and v) practical exercises, role play and supervision.

2.2 The Certified Mediators' Training Directive in Detail

The legal text also gives the Federal Ministry of Justice and Consumer Protection (hereinafter "the Ministry") the power to issue more detailed provisions on the training for a certified mediator as well as on the requirements for the training and further education of a certified mediator, by

means of a statutory ordinance without the consent of the Federal Council. In this regard, the Ministry has issued such ordinance in the form of a federal directive, referred to as the Certified Mediators' Training Directive, as mentioned above.

Apart from the above-mentioned directive for professionals conducting mediations to be entitled to use the professional title of "certified mediator", there is no legislation in Germany defining the professional profile of a mediator. Similarly, access to the profession is not restricted. Mediators are themselves responsible for ensuring that they have the necessary knowledge and experience (through suitable training and further development courses as described in the Mediation Act) to reliably guide parties through the mediation process. Any person meeting this criteria may work as a mediator. There is no set minimum age, and no requirement, for example, that a mediator must have followed a university-level course of study.

According to the Training Directive, the title "certified mediator" can only be used by someone who has completed prescribed training for a certified mediator. The training to become a certified mediator consists of a training course and an individual supervision following a mediation carried out by him/her as a mediator or co-mediator.

2.2.1 The Mandatory Attendance Hours and its Problematic Nature amidst the Covid-19 Pandemic

The training course must convey the contents listed in the annex of the Training Directive and also include practical exercises and role plays. The total scope of the training course is at least 120 hours of attendance. An interesting

fact in this regard is that the Training Directive's wording provides explicitly for attendees to be present. In light of the Covid-19 pandemic, this has raised certain questions. Does attendance mean to be physically present in one place? Or is the attendance requirement met even when attendees are there in a live virtual environment? The fact is that the concept of attendance hours (*Präsenzzeitstunden*) was not included in the original draft. It was adopted in the final version of the Training Directive at relatively short notice. In a journal article,[24] the responsible officer of the Ministry explained the reasons for this regulation at the time. The last-minute addition was supposed to prevent the completion of the training in the form of "self-study":- "The format of purely self-studying could not adequately prepare the participants for the requirements of later professional practice, which will be characterized by tense interpersonal relationships. In order to be trained to deal with such situations, personal interaction with the trainer and with other participants in the training course is essential".[25] Several commentators and scholars have argued that the opposite term to physical presence is not self-study but distance learning and since online teaching formats are typically distance learning formats, they cannot be included in the notion of the aforementioned attendance hours.[26] This seems to also be the prevailing opinion in literature and thus, anyone who completes online training to become a certified mediator, which includes less than 120 hours of physical presence at a common training location, may - in case of doubt - not use the title "certified mediator".

Finally, in terms of quality control after the initial training, the Training Directive imposes a duty on certified mediators to further educate themselves. This further educational trainings shall be of at least 40 hours

within a period of four years after the initial certification as a mediator. Also, within two years following the completion of his/her training, the certified mediator has to take part in an individual supervision at least four times, respectively following a mediation carried out by him/her as a mediator or co-mediator.

3. Conclusion

In conclusion, the fact is that the legislative regime for mediation in Germany leaves considerable leeway for the parties to structure the mediation proceeding as well as pick the person who will serve as their mediator. In terms of criticism, certain politicians have engaged into a dialogue lately about whether the German Mediation Act needs further amendments. More specifically, the Free Democratic Party (FDP) has submitted a proposal for the strengthening of the mediation regime. It is the party's position that as an alternative dispute resolution method, mediation makes a significant contribution to relieving the courts and that the German Mediation Act, which came into force in 2012, does not adequately regulate the training and certification of mediators. Changes to the regulation of the training and further education of certified mediators are necessary in order to give mediation the status it deserves.[27] According to the proposal, the Bundestag should, among other things, request the federal government to stipulate digital competence as a minimum requirement for the training of certified mediators.[28] Also, the establishment of a nationwide register of mediators is required, from which it can be seen, among other things, whether the mediator has complied with the prescribed training hours and supervision. The Federal Government should be asked to promote mediation and other procedures of out-of-court dispute settlement in the construction industry more

strongly and to make them better known among the population.[29]

It is the authors' belief that future amendments shall include the flexibility of training being conducted virtually and the insertion as a prerequisite of certification of the digital literacy of certified mediators. This pandemic has made these changes more than necessary and therefore, the legislator should act quickly in this matter.

C. The Way Forward

The judicial systems in Greece and Germany are not so different in terms of speed. Often the time required for a dispute to be settled can reach a period of several years or even decades. The mediation process as an alternative on the other hand, is a voluntary process by nature which can save time, costs and business and interpersonal relations.

Despite the criticisms referring to the newly introduced compulsory provisions in Greece and their constitutionality, it should be pointed out that the obligatory provisions concern procedural matters while there is no obligation for the parties to actually settle the dispute. In order for the effort to be successful it is indispensable that both parties and attorneys change their attitude towards this mechanism. The new Greek regime will probably constitute solely the beginning and in future, the use of this mechanism may become broader, covering a wider range of disputes even outside of the private sector.

Whilst in Germany mediation is introduced not only in the private sector but also in the public sector, the German Mediation Act certainly needs further amendment to

cover the needs revealed by and not limited to the recent global pandemic. Virtual environments and digital literacy are the future and in terms of regulating the legal regime of mediation in Germany “less is (not) more”. Instead, “more is what is needed”.

[1]Chamilothoris, enallaktikoimixanismoiepilisisdiaforon (Alternative dispute resolution mechanisms), 43 (2000).
[2]Makridou, I simvivastikiepilisi ton idiotikondiaforon kata tin prosfatidikonomikitrppopoiisitounomou 2298/1995 (the conciliatory settlement of private disputes pursuant to the recent procedural amendment of Law 2298/1995,)Armenopoulos, Arm.15 (1996).
[3]Thanou–Christophilou, Dikastikidiamesolavisi[Judicial Mediation] (Article 214 B Greek Code of Civil Procedure), Ellinikidikaiosini, [Greek Justice], 937 (2013).
[4]Giannopoulos, Diamesolavisi kai PolitikiDiki[Mediation and Civil Trials],65 (2020).
[5] Article 3 and 6 para.1 of Law 4640/2019; Explanatory memorandum of Law 4512/2018, p.69; Explanatory memorandum of Law 3898/2010, p.2; Regarding the power of disposal: Dimitriou, Ta oria tis exousias diathesis stipolitikhdiki[The margins of the power of disposal in civil trials](2008).:Ά.Plevri,Diamesolavisi se ktimatologikesdiafores (Mediation in land disputes)in:G.Diamantopoulos (Eds.),Ethnikoktimatologio kai diamesolavisi (National Cadastre and Mediation) , 75, (87) (2021).
[6]AreiosPagos [A.P] Supreme Court 620/1999, Greek Justice, 73 (2000).
[7] Giannopoulos, Diamesolavisi kai politikidiki[Mediation and Civil Trials], 299 (2020).
[8]Podimata, Diafores apo tin oikogeneia to gamo kai tin eleftherisymviosi. Genikodikastikoplaisio kai eidikesparatiriseisstisdiataxeis ton neon arthron 592-613 KPOLD [Disputes arising from family, marriage and free symbiosis. General procedural framework and specific observations in the provisions of the new Articles 592 – 613 CCP], Chronika Idiotikou Dikaiou, [CHRID], 641 (2015).
[9]Giannopoulos, Diamesolavisi kai politikidiki[Mediation and Civil Trials],.303 (2020).
[10]Stamatopoulos, Ektelestoititloi me antikeimeno kata toukratous[Enforceable securities with an object against the state],198 (2005).
[11]Giannopoulos, Diamesolavisi kai politikidiki[Mediation and Civil Trials], 303 (2020)
[12] Giannopoulos, I apopeiraexodikastikisepilisis tis diaforas meso diamesolavisisosorostouparadektou tis syzitisis kata ton N. 4512/2018 [The attempt of extrajudicial settlement of the dispute through mediation as a

condition of the admissibility of the hearing according to Law 4512/2018], 39 (2018).
[13] Giannopoulos, Diamesolavisi kai politikidiki[Mediation and Civil Trials], 303 (2020).
[14] See Article 7 para 2 of Law 4640/2019.
[15] See Articles 7 para 3 and 9 para.1 of Law 4640/2019; Kerameus /Kondylis/Nikas,Ermineia KodikasPolitikis Dikonomias (Interpretation of Code of Civil Procedure) , ErmKpolD, Article 82para 7.
[16] See Articles 7 para. 2 and 3 of Law 4640/2019.
[17] Article 2 para. 5 of Law 4640/2019.
[18] Article 7 paras.4,7 of Law 4640/2019
[19]Article 5 paras.5, 16 of Law 4640/2019.
[20]Grundgesetz [GG] [Constitution], 1949 with amend. 2020, (Ger.), https://www.gesetze-im-internet.de/gg/BJNR000010949.html (last visited March 29, 2021).
[21]Mediationsgesetz [MediationsG] [Mediation Act],2012 with amend. 2015, (Ger.),https://www.gesetze-im-internet.de/mediationsg/BJNR157710012.html (last visited March 29, 2021).
[22]Verordnung über die Aus- und Fortbildung von zertifizierten Mediatoren (Zertifizierte-Mediatoren-Ausbildungsverordnung) [ZMediatAusbV] [Certified Mediators' Training Directive], 2017 withamend. 2020, (Ger.), https://www.gesetze-im-internet.de/zmediatausbv/ZMediatAusbV.pdf (last visited March 29, 2021).
[23]European E-Justice website, https://e-justice.europa.eu/content_mediation_in_member_states-64-de-en.do?member=1, (last visited March 29, 2021).
[24]Constanze Eicher, *Die neue Zertifizierungs-Verordnung* [The new Training Directive], Zeitschrift für Konfliktmanagement [ZKM], 160-163 (2016).
[25]Ibid.
[26]Peter Röthemeyer, *Die Zertifizierung nach der ZMediatAusbV* [The Certificationaccording tot he Training Directive], ZKM, 195-197 (2016); Enrico Rennebarth, *Aus- und Fortbildung von zertifizierten Mediatoren nach der ZMediatAusbV unter Berücksichtigung des Evaluationsberichts zum Mediationsgesetz* [Education andtrainingofcertifiedmediatorsaccordingtothe Training Directive, takingintoaccounttheevaluationreport on the Mediation Act], Deutsches Steuerrecht [DStR], 1843-1845 (2017); Jürgen Klowait, in: Klowait/Gläßer, *MediationsG*, § 2 ZMediatAusbVRn. 3 (2nd ed. 2018); Matthias Kilian, in: Henssler/Prütting, *BRAO*, § 2 ZMediatAusbVRn. 13 (5th ed. 2019).

[27]Bundestag Drucksache 19/23936, *FDP will Mediation stärken*[FDP wantstostrenghtenmediation], ZKM, 240(2020).

[28]Ibid.
[29]Ibid.
[ma1]Is this a mediation hearing? mediation information session?
[SB2]I referred to the mediation Hearing

[ma3]Can we clarify this- does the law provide that the lawsuit shall be inadmissible if it does not include the description of the subject matter in the request to initiate the mediation proceedings?
[SB4]The request to initiate mediation proceedings shall include solely a brief description of the subject matter. If following an unsuccessful mediation session, at the stage of the court proceedings for instance the claimant rises new claims which were not included, in the request for mediation, the lawsuit will be inadmissible for these claims.
[ma5]I assume in the underlying proceedings?
[SB6]No, in court proceedings following an unsuccessful mediation session. I think I made that clear now.

CHAPTER - V

Industrial Dispute Settlement using Online Dispute Resolution Mechanism in Bangladesh: The new normal during the Global Crisis

Author's Profile

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Abstract

The scope of online dispute settlement (ODR) is exceptionally wide and nowadays individuals are getting increasingly engaged in this mode of dispute settlement mechanism. The financial results of COVID-19 has given rise to a large number of industrial disputes but unfortunately ADR processes are rarely used in the industrial sector of Bangladesh. For the purpose of settling industrial disputes, the Government of Bangladesh has enacted the "Labor Act, 2006 with the aim to promote peace in the industrial sectors through mediation, conciliation and adjudication. Thus, the Act intends to create an accordant and sincere relationship between the principals and their laborers. In a time of global emergencies, ODR could play a crucial role for reducing the rate of industrial disputes throughout the country.

1. **Introduction:**

Around the world, "Alternative Dispute Resolution (ADR)" offers a variety of dispute resolution mechanisms that are speedy and economically friendly[1]. The distinct characteristics of ADR has provided it a special status for the court proceedings[2]. It is mostly a non-judicial means or procedures for the settlement of disputes by amicable rather than adversarial means[3]. ADR is an all-encompassing term which alludes to different non-judicial strategies of dealing with strife between parties[4]. Dispute settlement procedures include a number of mechanisms namely: mediation, conciliation and adjudication. Apart from the traditional mechanisms of ADR, one of the emerging modes of ADR in this era of modern technologies is "Online dispute resolution (ODR)". One of the significant characteristics of ODR is

that it allows parties to participate remotely[5]. The COVID-19 pandemic has transformed the ODR into "the new normal" mechanisms for dispute settlement as circumstances often do not allow the parties to meet physically, and the "Industrial dispute settlement (IDS)" is not an exception. The global crisis has forced the courts to conduct all its activities online and IDS is also following that pathway. Although ODR has been practiced globally using video conferencing applications for a long time, the ongoing pandemic has made it more convenient and popular. In the resolution communication process, ODR can be classified into synchronous and asynchronous modes. When the process of communication between the parties and the settlor (Arbitrator/ Mediator/ Negotiator) is continuous through video conferencing platforms or messaging, that is considered as synchronous communication[6]. On the other hand communication may occur with intervals in an asynchronous communication such as through emails[7]. For the purpose of settling industrial disputes, the Government of Bangladesh has enacted the "Labor Act, 2006 with the aim to promote peace in the industrial sectors through mediation, conciliation and adjudication. Thus, the Act intends to create accordant and sincere relationships between the principal and their laborers[8]. The law has been made in order to resolve or at least minimize the dispute between the two classes[9]. ODR can be used for effective Industrial dispute settlement through mediation, arbitration, and negotiation.

2. Legal Extents of the Industrial Organizations in Bangladesh:

Section 2(61) of The Bangladesh Labor Act, 2006 defines industrial organization as a workshop, manufacturing process or other organization where an object is manufactured, adapted, processed or produced, or where any object or substance is made for the purpose of use, transport, sale, shipment or transfer. A site where work is undertaken to alter, repair, adorn, complete or perfect, or bind or wrap, or otherwise impose on the construction process is deemed to be an industrial entity for the purpose of the Act, as well as any other entity which the Government, by notification in the Official Gazette, declares to be so.[10] According to the Act, the following institutions are recognized as Industrial Organizations: road transport, rail transport services, shipping services, air transport, dock, shipyard or jetty, mines, quarries, gas fields or oil fields, gardens, factory, newspaper establishments, any house, road, tunnel, sewer, canal or bridge, shipbuilding, shipwreck, reconstruction, repair, alteration or demolition, or any work or arrangement relating to the loading and unloading of cargo, contractor or subcontractor organization, shipbuilding, ship recycling, welding, an outsourcing company or a contractor or subcontractor's organization to provide security personnel, ports (including all seaports and land ports), mobile operator company, mobile network service provider and land phone operator company, private radio, TV channels and cable operators, real estate companies, courier services and insurance companies, fertilizer and cement manufacturing companies, clinics or hospitals run for profit, paddy mill or attic, sawmill, fishing trawlers, the fish processing industry and ocean-going ships.[11]

3. **Concept and Causes of Industrial Disputes in Bangladesh:**

Section 2(62) of the Bangladesh Labor Act, 2006 defines an industrial dispute as any conflict of difference of opinion between the principal/employee and managers/workers or between managers and laborers which is associated with the business or non-employment or the terms of work or the conditions of work of any individual.[12]An industrial dispute can be raised by collective bargaining or by an employer. Section 209 of the Bangladesh Labor Act, 2006 gives the arrangements for raising an industrial debate stating that no industrial debate should be considered to exist unless it has been raised within the endorsed way by a collective bargaining agent or an employer.[13]The industrial dispute settlement procedure will set out in a written document. Section 210 of The Bangladesh Labor Act, 2006 clarified that, If at any time an employer or a joint negotiating agent finds that there is a possibility of a dispute between the employer and the workers, the owner or joint negotiating agent shall inform the other party in writing, expressing his or her opinion.[14]The industrial dispute settlement procedure is divided into three steps: (i) Negotiation (ii) Conciliation (iii) Arbitration. In respect of decision making, in many cases, the labor rights are infringed and the stakeholders don't even bother to take the opinion of the workers[15]. As a result, disputes often arise. Some of the common causes of disputes are outlined below.

a. Although the participation of women workers is significant in the industry compared to male laborers; discrimination is very common regarding remuneration, and availability of higher posts and certain positions.[16]
b. In many cases the employers failed to provide salaries within in time and show unwillingness to pay bonuses.

c. If we compare the regional and international markets, we can find an inconsistency between the regional or international and national workers' pay scale. This tendency to recruit efficient workers on lower salaries is another cause for dispute.
d. Another reason behind industrial disputes is the mismanagement of providing overtime benefits to the workers. The Act has fixed the rate of overtime at twice the average of a worker's basic wages but in most of the cases, it is paid according to the rate fixed by the owner[17].
e. Promotional disputes are also very common as the workers are seldom promoted in spite of their long tenure in the same post.
f. If a worker is injured in an accident while on the job, the employer will be obliged to compensate him[18]but such rights are often not respected by the owners and compensation or other facilities are not provided according to the prescribed legal requirements.
g. There are so many registered organizations working in Bangladesh but no satisfactory output is visible till now.

4. Settling Industrial Disputes by Bipartite Negotiation, Conciliation-Tripartite Negotiation and Arbitration:

4.1 Bipartite Negotiation

Bipartite negotiation is a means to prevent and solve disputes between management and workers. It helps develop harmonious relationships between the employers and their employees. If an employer or joint negotiating agent finds that there is a possibility of a dispute between

the employer and the workers, the owner or joint negotiating agent shall inform the other party in writing, expressing his or her opinion.[19] Within fifteen days of receipt of the letter of opinion, the parties will sit for a meeting to reach an agreement by discussing the matter raised in the letter. Any such meeting can also be held between the representatives of both the parties. [20] If the parties reach a settlement on the matter after such discussion, a settlement letter shall be written and signed by both the parties, and a copy shall be sent by the employer to the Government, the Director of Labor and the Arbitrator.[21]

There are a number of reasons behind the unsuccessful application of bipartite negotiation for settling industrial disputes, namely:

a. The officers of the trade union don't have adequate experience and skills
b. Bargaining methods are not applied properly and efficiently
c. The workers and the leaders of the trade unions hold shallow class consciousness.[22]

4.2 Conciliation-Tripartite Negotiation

If the dispute settlement is not successful in the bipartite negotiation stage, there is another available mechanism namely, industrial Conciliation. "If no settlement is reached through dialogue within a period of one month from the date of the first meeting for negotiation, or, such further period as may be agreed upon in writing by the parties, any of the parties, may, within fifteen days from the expiry of the period mentioned, report the matter to the conciliator and request him in writing to conciliate in the dispute"[23]. Within ten days of receipt of such request,

the Conciliator shall begin its conciliation proceedings, and shall call a meeting of both parties for the settlement of the dispute.[24] If the dispute is settled as a result of conciliation, the conciliator shall submit a report thereon to the Government, along with a copy of the conciliation agreement signed by both the parties.[25]However if the dispute is not settled within thirty days of receipt of the request for settlement of the dispute by the conciliator, the conciliation proceedings shall fail, or more time may be allowed with the written consent of both the parties.[26]

4.3 Arbitration

If no settlement has been reached under any conciliation proceedings, the dispute can be dealt with arbitration. After mutual agreement between the parties for taking the dispute in front of an arbitrator, the next procedure is to send a mutual resolution request to any arbitrator, who is reputed and well known by the both parties[27]. There is an option to choose any government enlisted arbitrator from the panel or the parties could select any person by mutual consent[28].The decision of the arbitrator is final and binding upon the parties[29]. The decision will be valid for any term which will be determined by the arbitrator but shall not exceed the period of 24 months[30].

5. Scope of ODR in Settling Different Modes of Industrial Disputes:

It can be argued that the industrial development and smooth economic growth of a country largely depends on efficient mechanisms to resolve disputes including recourse to online methods. ODR generally includes mediation, negotiation and arbitration, process already considered as effective alternatives for settling industrial disputes[31]. A number of difficulties like distance,

communication failure between parties and low dispute values (rendering some forms of dispute resolution too costly in a relative sense) are the most common obstacles behind successful settlement of Industrial disputes. ODR, on the other hand is arguably free from, or less affected by these limitations as focus is provided to provide efficient communication between parties, using technologies and without engaging live mediator in many cases. A human third party is assisted by a can be termed a technological "fourth party", in settling Industrial disputes by ODR[32]. ODR is convenient as the parties could choose the time for employing asynchronous communication. It enables the parties to seek out mediation expertise from persons beyond the national territory and in this age of globalization it is gaining popularity[33]. The cost of ODR is also generally lower than traditional dispute resolution methods and a number of online platforms offer free mediation to settle industrial disputes or assistance to the laborer. As there is no travel cost or fees for arranging venues, ODR is attractive to many for its cost effectiveness. The use of asynchronous methods allows the mediator to save process time by conducting simultaneous caucusing[34]. Furthermore, text communication as a method of e-mediation is capable of minimizing the advantages that more eloquent negotiators may hold over other parties and a balance can be assured in the level of fair participation[35].

Challenges remain however. The scope for parties to assess the service provider's appointed mediator is very limited and no effective alternatives are available except by relying on the local reputation mediators. In some cases online text messages, communicated between the parties may be subject to misattribution[36] and misinterpretation[37]. For a successful ODR, some preconditions must be fulfilled namely:

a. Regular access to a computer and the internet is required
b. Sound technological knowledge of both parties is crucial for a successful industrial dispute settlement
c. A shared language or adequate online translation services is required.
d. There should be a contextually suitable degree of privacy and security[38].

The normal dialect of a mediator's normal assertion to intervene must be adjusted to consolidate issues relating to the online environment, which might incorporate costs for video- or tele-conferencing, strategies of acknowledged and authoritative signature of archives, etc. According to Raines, for ODR generally, there is no need to discover any new mechanisms as ODR requires the same skills required for a face-to-face dispute settlement, augmented only by certain tweaks made necessary by technology[39].

6. **Prevention is Better Than Cure:**

To try to ensure that disputes do not arise in the first place, the employer can establish a "Participation Committee" consisting of employers' and employees' representatives[40]. Such committees should be set up with a view to developing settlement initiatives in case of any dispute or possibility of dispute arising between the employers and employee. Under the 2006 Act, only companies employing at least 50 workers can establish participation committees; they should comprise an equal

number of representatives of management and staff. Participation committees endeavor “to promote mutual trust and faith, understanding and co-operation between the employers and the workers”[41]. If the employers follow the instruction as per labor law and provide all the facilities ensured, it is contended that fewer disputes will arise.

Industrial disputes arise from a multitude of reasons although the most common cause pertains to wages. In many cases the employer has simply failed to pay and in others payment is not made in a timely manner. Industrial laborers play a vital role for the economic development of the country and growth of GDP. In our view, it is a matter of great sorrow that the conditions of laborers have not improved and their salaries are often not adequate enough to mitigate basic needs. When workers suffer injuries, their rights are often not respected by the owners and compensation or other facilities are not provided according to the prescribed legal requirements. Lack of effective policy to tackle these issues have made workers more vulnerable and it is our contention that the government should immediately pass provisions penalizing owners including confiscating their property in case of any non-payment. Equally, if we could reduce the rate of accident and injury, the scale of disputes arising will be lowered consequentially. To do that, we need to provide additional safety training and self-protection including fire drills and basic mechanical training to the workers. Disputes relating to lack of promotion opportunities are also very common as workers are seldom promoted in spite of their long tenure in the same post. In many cases industrial disputes are not raised according to the prescribed legal requirements as leaders of the unions and CBA keep a close connection with employers for gaining financial benefits in return[42].

Strict legal action should be brought in case of such deviation of duties of the union leaders and if necessary, cancellation of registration could use here as a last resort. Preventive mechanisms to mitigate these challenges and ill practices could reduce the rate of industrial disputes in Bangladesh.

7. **Conclusion:**

It can be concluded that the scope of online dispute settlement is exceptionally wide increasingly individuals have begun to engage in this mode of dispute settlement mechanism. The financial consequences of COVID-19 have been striking and some businesses have closed down with others wavering on the brink of closure. As a result a significant number of industrial disputes regarding hiring or firing workers, health and working conditions of workers and trade unions, contract workers and migrant workers and layoffs have arisen. As a result it can be seen that ODR is becoming the "new normal" for settling industrial disputes. As noted above, online dispute settlement provides the potential for greater fulfilment to the disputing parties because of the advantages it offers over traditional, in-person methods promising speedier, cost-effective, and more congenial approaches. Section 210 has been added to the existing Labor Act, 2006 of Bangladesh applying ADR to resolve industrial disputes between workers and owners and there is adequate scope to develop ODR methods further. However, the section by itself is inadequate and insufficient in this regard. Thus, in the Bangladesh Labor (Amendment) Act, 2013, section 124A has also been incorporated. The ADR formula has hitherto been seldom used in the industrial sector but rather has depended upon the arbitrary decision

of the owner. During this time of global crisis, this scenario becomes more inconvenient. Now is the time for ODR to play a crucial role for reducing the rate of numerous industrial disputes throughout the country.

[1]S. K. Rashid, Alternative dispute resolution in Malaysia (Kuliyyah of laws IIUM, 2006)
[2]PASSMAN&KALPAN, How alternative dispute resolution works, https://www.passmanandkaplan.com/federal-legal-corner/how-alternative-dispute-resolution-works/
[3]Md. Deedarul Islam Bhuiyan, ALTERNATIVE DISPUTE RESOLUTION PROCESS IN FAMILY MATTERS UNDER LEGAL FRAMEWORK OF BANGLADESH: CHALLENGES AND WAYS OUT, 87 Int. J. Law, Hum. & Soc. Sci. 3, 3 (April 2019)
[4]Alternative Dispute Resolution, LEGAL INFO. INST. https://www.law.cornell.edu/wex/alternative_dispute_resolution (last visited Jan 8, 2021)
[5]M. McBride, ODR in the Era of COVID-19, AMERICAN BAR ASSOCIATION (October 27, 2020), https://www.americanbar.org/groups/family_law/committees/alternative-dispute-resolution/odr/#aba-main-content-anchor
[6]Lodder AR & Zeleznikow J, Enhanced Dispute Resolution through the Use of Information Technology. (Cambridge University Press, 2010)
[7]Ebner, Noam, Negotiation via Email (2017). Ebner, N. (2017). Negotiation via email. In Honeyman, C. & Schneider, A.K. (eds.) The Negotiator's Desk Reference. St Paul: DRI Press , Available at SSRN: https://ssrn.com/abstract=2348111
[8]M. A. Halim, The Text Book on Labour and Industrial Law of Bangladesh (Dhaka, Bangladesh: CCB Foundation, 1st edition, 2017).
[9]N. Dhar, Labor and Industrial Laws of Bangladesh, 36 (ReMiSi Publishers, 2004)
[10]Bangladesh Labor Act § 2(61) (2006)
[11]id.§ 2(61)

[12]Bangladesh Labor Act § 2(62) (2006)
[13]id.§ 209
[14]Id.§ 210(1)
[15]M. M. Hossen & M. H. Miazee, Industrial Disputes at Ready Made Garments in Bangladesh: An Analysis 210 Int. J. Bus. & Eco. Res. 5, 6 (2016) doi: 10.11648/j.ijber.20160506.14
[16]N. U. Bhuiyan & A. Dash, The Problems of Garments' Workers in Bangladesh: A Survey, 20 THE COST AND MANAGEMENT, 47, 2 (2019)
[17]id.§ 108
[18] id.§ 150(1)

[19]Bangladesh Labor Act § 210(1) (2006)

[20]id.§ 210(2)
[21]id.§ 210(3)
[22]A. A. Faruque, Current Status and Evolution of Industrial Relations System in Bangladesh, International Labour Organization (2009). http://www.oit.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro new_delhi/documents/publication/ wcms_123336.pdf
[23]id.§ 210(4)(b)
[24]id.§ 210(6)
[25] Bangladesh Labour Act 2006, s. 210(8)
[26]Bangladesh Labor Act § 210(9) (2006)
[27]id.§ 210(12)
[28]id.§ 210(13)
[29]id.§ 210(16)
[30]id.§ 210(17)
[31]http://montyahalt.com/know-about-online-dispute-resolution/
[32]F.E.A. Sander & L. Rozdeiczer, Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach, 11 Harv. Negot. L. Rev. (2006)
[33]F, Abedi., J. Zeleznikow., & C. Brien., Universal Standards for the Concept of Fairness in Online Dispute Resolution in B2C E-Disputes. Ohio State Journal on Dispute Resolution, 34, 2 (2019
[34]C. Rule, New Mediator Capabilities in Online Dispute Resolution, 2000, www.mediate.com/articles/rule.cfm
[35]L.L. Thompson, The Mind and Heart of the Negotiator,Prentice Hall , (2nd edition, 2001)
[36]J. Nadler & D. Shestowsky, Negotiation, Information Technology, and the Problem of the Faceless Other , in L.L. Thompson (ed.), Negotiation Theory and Research, New York, Psychology Press 2006.
[37]M. Morris et al., Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations, Group Dynamics: Theory, Research, and Practice, 6, 1 (2002)
[38]S. Summers Raines, The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace, The Third Annual Forum on Online Dispute Resolution, Melbourne, Australia 2004
[39]S. Summers Raines, Mediating in your Pajamas: The Benefits and Challenges for ODR Practitioners, Conflict Resolution Quarterly, 23, 3 (2006).
[40]Bangladesh Labor Act § 205 (2006)
[41]id.§ 206
[42] Human Rights Watch, "Whoever Raises their Head Suffers the Most" Workers' Rights in Bangladesh's Garment Factories (April 22, 2015) https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment

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CHAPTER - VI

The Conundrum of the Enforcement Regime under The Singapore Convention on Mediation

Author's Profile

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Abstract

Mediation, being one of the most popular mechanisms of Alternative Dispute Resolution (ADR), has remained a preferred recourse for parties to a commercial dispute, especially on an international plane. However, due to the absence of an enforcement regime in place, an effective enforcement of an International Settlement Agreement

arising from mediation conducted among international entities, always remained a major concern.[1] However, in recent times, the arrival of the United Nations Convention on International Settlement Agreements Resulting from Mediation, famously known as the 'Singapore Convention on Mediation', which came into force last year, in September 2020, gained a huge applause from states around the globe. However, a detailed study of the provisions of the Convention reveal that it will not garner international acceptance until a number of concerns are addressed and corrected

This Chapter will review various provisions of the Convention which are extremely important but which present a challenge to the successful enforcement of International Settlement Agreements resulting from mediation. This Chapter concludes with a discussion of the ways and alternatives that may be considered to rectify the shortcomings of the Convention.

INTRODUCTION

With globalization, a new era of commercial relations among countries has emerged. With increasing trade and contractual relations, it is apparent that various rights and obligations arise out of them which hold crucial value in case of disagreements or conflicts. It is likely that the parties might not desire to enter into litigation, since it is time-consuming, expensive, and sometimes difficult to enforce judgments or other court orders or decrees such that the entire process becomes futile. This is where the Alternative Dispute Resolution (ADR) mechanism comes into picture, which includes within its ambit, concepts and processes like mediation, arbitration, negotiation and

conciliation. There has been an evident shift from the conventional approach of entering straight into the courts to the modern ways of resolving disputes, consisting of ADR mechanisms.

Mediation is one such process parties tend to rely on a lot. Mediation provides a process by which the parties agree to settle their dispute with assistance of a third-party neutral who assists the parties to reach a negotiated settlement or resolution of their dispute. An important aspect to note here is that the third neutral party, known as the 'Mediator' does not have the deciding force as to what term is 'fair' and what is not. Hence, the autonomy lies with the parties. However, the mediator has the power or tools to get the parties to forbear litigation during the mediation process. Mediation is confidential. As such, the mediator and the parties are prohibited from introducing any admission or other potentially damaging communication into evidence in the event that the mediation is unsuccessful.[2]

The concept of mediation is not new. It can be found in the pages of *Mahabharata* wherein Lord *Sri Krishna* attempted to resolve the dispute between the *Kauravas* and the *Pandavas* before the major war of *Mahabaharata* took place on the battlefield of *Kurukshetra* and *Ramayana* wherein *Angada*,, one of the foremost ministers, was sent by Lord *Rama* to the royal palace of *Ravana* to propose that he settle the conflict by way of a peaceful mutual agreement. Additionally, in the recent dispute regarding the *Ram Janmabhoomi- Babri Masjid Land dispute case*[3] in

2019, the Supreme Court of India conducted a few rounds of mediation among the parties to the dispute in order to reach an amicable solution to the satisfaction of both the parties. The recent move of the United States to attempt to resolve a dispute between India and Pakistan as a mediator can also be considered within the subject.

In comparison with other mechanisms, mediation seems more feasible, since the deciding force for negotiating rests with the parties, independent of any external factor. The mediator is a catalyst to the process. The mediator does not adjudicate the matter, but rather encourages the parties to discuss the matter civilly and peacefully for the purpose of facilitating resolution. The mediation process has great value, since it provides an opportunity for the peaceful and respectful exchange of perspectives and opinions. This creates a 'win-win' situation for the parties, providing the parties with an opportunity to restore their relationship with their counterpart, whether their dispute arises out of trade or another matter, and to avoid further conflict or disputes in the future. Thus, more emphasis needs to be put on the process of mediation, which is the focus of this chapter, by discussing the ongoing trends in mediation and their efficacy. Thus, even on an international level, when parties get into disagreement, appointing a mediator who can efficiently act as a catalyst in order to get the parties to resolve their dispute by way of mutual agreement is needed in the fast-paced international community.

HUGE DRAWBACK OF MEDIATION

It is undeniable that mediation is the one of the best and most affordable options in the event of an international commercial dispute. The parties to the dispute have complete autonomy to reach a solution by way of mutual consensus. However, on the ground level, things seem to be different. We observe that parties to a cross-border dispute often prefer litigation or arbitration. However, despite being the finest one among many in terms of being cost saving, time saving and effective, why was it that parties were still hesitant to approach for mediation? What prompted them to file a regular suit against the other party in a court instead of enjoying the advantages of exercising autonomy and free will during the rounds of mediation?

The answer lies in the latter part of the process of mediation, which is ultimately the enforcement of the 'International Settlement Agreement', the document which is the result of mediation. This can be one of its major drawbacks, due to which parties tend to shift to other ways of conflict management. It becomes crucial to mention that in case of a court's decree arising out of a suit or arbitral award arising out of arbitration, an execution petition could be directly filed by the parties or in case of breach or non-execution, contempt proceedings could be initiated against the defaulting party, that is to say, in cases of arbitration, the New York Convention and in cases of litigation, the Hague Conventions.. Therefore, without the presence of an international regime, these settlement awards were as any other 'contract' in the eyes of law and no proper enforcement mechanism was in place. This led to great uncertainty regarding the implementation of the settlement agreement reached by the parties. However, the only exception wherein the same was enforced as a court's decree or an arbitral award was when rounds of mediation were conducted within the

court proceedings or arbitration respectively.[4] Hence, we can observe that mediation independently was not enough to suffice the effective enforcement of the settlement agreement.

THE SINGAPORE CONVENTION ON MEDIATION: WHAT IT HOLDS

The previous section revealed a major loophole pertaining to the enforcement of an international settlement agreement. To resolve this issue, recently a huge step was taken in the history of mediation that would change its outlook altogether. The **United Nations Convention on International Settlement Agreements Resulting from Mediation**, also known as the 'Singapore Convention' on mediation, is a game changer in the field of mediation, since it provides a formalised framework for the enforcement of settlement agreements arising out of cross-border mediation. In other words, it can be observed that the Singapore Convention fills in the existing gap between the hectic process of reaching an agreement and the enforcement of the same, which is the goal of mediation. The convention came into force on September 12, 2020, in accordance with Article 14(1), which provides for the entry of force of the present convention which shall be done six months after the submission of the third instrument of ratification or accession or approval.[5] The agenda of the convention is to provide a streamlined framework in order to make International Settlement Agreements binding and enforceable in an effective manner. Nonetheless, it should be noted that like the *New York Convention*[6] is paramount for the successful enforcement of arbitral awards or the *Hague Convention*[7] which attempts to contribute its part in

matters of litigation, the Singapore Convention seeks to perform the same task in the field of mediation.

Applicability of the convention: The Singapore convention on Mediation is applicable to the International Settlement Agreements arising out of mediation, wherein the parties to a commercial dispute shall now have a harmonised mechanism for the enforcement of such agreements without having to incur additional time and efforts. Uniformity and harmonisation are the principal features of the Convention.[8] According to Article 1 of the Convention, the parties to an international commercial dispute must have their place of business located in different States.[9] Clarification has been made as to when one of the parties has more than one place of business, the place of business having the closest relationship to the dispute in question shall be deemed to be the place of business for that particular party.[10] Where one of the parties has no place of business, the place which is its habitual residence shall be deemed to be its place of business.[11] The Convention also states when it is not applicable. The Convention does not apply to family, probate, or employment law..[12] The Convention applies exclusively to commercial and trade disputes. The Convention does not apply settlement agreements that are enforced as a judgment or decree or to arbitral awards, since there is separate legislation providing for their enforcement[13]

Finally, the Settlement Agreement should be in writing. This is apparent from the language used in Article 4 of the Convention, which requires the signatures of the parties and the mediator.[14] Article 2 provides that a Settlement Agreement must be in writing; however, no other physical form is required. This requirement is also met in cases wherein the Settlement Agreement is in an electronic

form, if the same is capable of being accessible and reliable for subsequent usage or reference.[15]

Binding Character of International Settlement Agreements: According to the Convention, the International Settlement Agreements shall be binding in nature and be enforceable pursuant to the rationalised and uniformed mechanism provided in the Convention. The main focus of the Convention is to provide an enforcement mechanism for international settlement agreements. Without an enforceable settlement agreement, the parties' time, effort, and expense will be wasted. Therefore, with the enactment of the Convention and adoption by various States throughout the world, parties now have a legal framework for enforcing binding agreements and collecting on international awards. It is recognized that although the reality is that it is rare that international commercial mediated settlements actually require further enforcement action, the Convention may provide confidence to would-be users concerned about potential problems with enforcement.

Parties to the Convention: As of January 2021, the Singapore Convention had 53 States as its signatories. Some of them include the United States, India, Singapore, Sri Lanka, China, Haiti, Ghana, Qatar, Republic of Korea, Gabon, Georgia, Rwanda, Serbia, Turkey, Uganda, Ukraine, Uruguay, Malaysia, Maldives, Mauritius, Nigeria, Philippines, Fiji, among others.[16] However, it should be noted that some of the key nations around the globe have not yet become signatories to the present Convention, including the United Kingdom (UK) and the European Union (EU).

Obligation on Parties to the Convention: The Convention under Article 3 imposes an obligation on States who are parties to the Convention that in order to enforce any international settlement agreement, the procedure mentioned under this Convention shall be strictly adhered to by the State Parties.[17] The significance of such a provision has been discussed in the latter part of the Chapter.

CHALLENGES BEFORE THE CONVENTION

Although the Convention was enacted to enhance the reliability of mediation and to promote mediation with the international community by providing a framework for the enforcement of International Settlement Agreements. Yet, as set forth below, there are loopholes that prevent the enforcement of the Convention.

Absence of Uniform Standard of Practice

Although the Convention expressly mentions that the enforcement of international settlement agreements shall be done by the States pursuant to the procedure set forth in the Convention,[18] we see that at the ground level things turn up quite differently. A detailed framework pertaining to the functioning of such an enforcement mechanism is missing throughout the Convention. These concerns are discussed in the proceeding sections of this Chapter.

Absence of Internationally Recognised Standards of Conduct for Mediators

It is well known that the parties are at liberty to nominate and choose any person to be mediator. In other words, a mediator can be any individual whom the parties choose,

the Convention does not stipulate any standard or qualification to become a mediator. However, Article 4 mentions that one of the features to be showcased can be the attestation by the institution which administered the rounds of mediation.[19] Yet, the Convention simultaneously provides for the requirement of the mediator's signature under the same provision.[20] Therefore, we can observe that a mediator can be any individual irrespective of his or her educational or social qualifications.

In Article 5, the Convention deals with the grounds for refusal of relief by the 'Competent Authority' of the State party to the Convention. It states that in case of a breach by the mediator of the standards applicable either to him or to mediation, the settlement agreement may be unenforceable by the party seeking enforcement.[21] Article 5 does not specify what kind of breach will cause the international settlement agreement to be unenforceable, thereby creating uncertainty. For this reason, we see that the ultimate deciding factor comes in the hands of the individual State machinery. In simple words, due to the absence of an internationally accepted standard of conduct about mediators or mediations, the last say remains with the local machinery of the State wherein relief is sought.

As an illustration, the Indian Institute of Corporate Affairs (IICA) is a central government body in India which provides formal training in order to qualify as a mediator.[22] However, not every State party provides for such formalised training for this purpose. Different countries adhere to different practices with regards to providing formal accreditation to mediation training and others may not. Hence, there is a need to have a uniform standard of conduct for mediators or mediation.

Excessive Local Dependency

The Convention does not provide a standard which a mediator must comply with or by what benchmark the mediation should be conducted. Moreover, it all ultimately results in a concentration of power in the hands of the local authority of the State, which is competent to entertain such matters. Finally, the signatory States can enforce the settlement agreements pursuant to their local laws. This Creates a lot of uncertainty and ambiguity.[23]

In practice, it all comes down to the domestic laws of the signatory State parties to the Convention. Procedural rules are 'required' to be formulated in accordance with the Singapore Convention; however, concerns still remain regarding the implementation of the Convention in the country.

Key Nations Not Signatories to the Convention yet

While the list of signatories to the present convention ranges from India to the United, there remains a concern as to the reason one of the key nations such as the UK, Australia, and the EU have not become signatories to the Convention.

About 10,000 mediations are held in the UK each year which makes it clear that mediation is a well-accepted method of resolving commercial disputes in the UK.[24] Moreover, the UKcourts encourage the parties to attempt mediation so as to reach an amicable resolution of their dispute. For this reason, the UK must seriously consider becoming a signatory to the Convention and committing to have an enforcement mechanism of settlement agreements in place.[25]

MEASURES THAT MAY BE TAKEN INTO CONSIDERATION

One of the biggest loopholes in the Convention is the absence of a detailed standard of conduct for mediators. As a result, there is no minimum level of qualification and training required by the Convention to act as a mediator, which is necessary for international mediations. Certain criteria must be standardised for training mediators. A code of conduct prescribing ethical and behavioural norms. As previously noted, countries resort to different practices when it comes to who can be a mediator and who cannot. Such practices create non-uniformity among State parties. A detailed and comprehensive set of rules needs to be enacted to establish ethical and legal standards prohibiting and discipling unethical or illegal conduct on the part of a mediator.

Finally, it seems apparent that an international system must be created and implemented. Otherwise, the main purpose of the Convention will be frustrated, namely the enforcement of international settlement agreements, Despite having Article 3 in force, there may still be a lack of a uniform international standard. Therefore, in order to minimise subjectivity and arbitrariness which may arise due to different domestic laws, a detailed, uniform, and comprehensive set of rules are necessary.

CONCLUSION

The arrival of the Singapore Convention ushered in a new international enforcement regime. The Convention seeks

to encourage the use of mediation to resolve international commercial and trade disputes and conflicts. However, due to lack of detailed and uniform criteria, the Convention does not accomplish one of its main objectives, namely establishing a legislative regime for the enforceability of international mediation settlement agreements throughout the world. It is clear that a detailed and uniform legislative supplement to the Convention is required to achieve the purpose which brought the Convention into force.

[1] S I Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, [2016] 73 Washington and Lee Law Review 1973; David Weiss and Michael Griffiths, *Report on International Mediation and Enforcement Mechanisms*, (Institute for Dispute Resolution IDR (NJCU) School of Business, UNCITRAL Working Group II (Dispute Settlement) 2017).
[2] *Mediation Defined: What is mediation*, Jams Legal Solutions, https://www.jamsadr.com/mediation-defined/ (*last visited*Apr. 9, 2021).
[3] M Siddiq (D) Thr Lrs vs Mahant Suresh Das & Ors, Civil Appeal Nos 10866-10867 of 2010.
[4] Alison G. FitzGerald, *The Singapore Mediation Convention*, Norton Rose Fulbright (last visited on Apr. 10, 2021), https://www.nortonrosefulbright.com/en-us/knowledge/publications/b5906716/the-singapore-mediation-convention.
[5] *United Nations Convention on International Settlement Agreements Resulting from Mediation*, https://www.acerislaw.com/wp-content/uploads/2020/12/Status-2018-Singapore-Convention-on-Mediation.pdf (*last visited* Apr. 10, 2021).
[6] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958.
[7] Hague Convention on Choice of Court Agreements, June 30, 2005.
[8] *What is the Singapore Convention on Mediation?* Singapore Convention on Mediation, https://www.singaporeconvention.org/convention/the-convention-text/ (*last visited* Apr. 10, 2021).
[9] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 1, ¶ 1, Aug. 2, 2019.
[10] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 2, ¶ 1(a), Aug. 2, 2019.
[11] United Nations Convention on International Settlement Agreements Resulting from Mediation, art.2, ¶ 1(b), Aug., 2, 2019.

[12] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 1, ¶ 2, Aug. 2, 2019.
[13] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 1, ¶ 3, Aug. 2, 2019.
[14] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 4, ¶ 1(a), Aug., 2, 2019.
[15] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 2, ¶ 2, Aug., 2, 2019.
[16] *United Nations Convention on International Settlement Agreements resulting from Mediation*, https://www.acerislaw.com/wp-content/uploads/2020/12/Status-2018-Singapore-Convention-on-Mediation.pdf (*last visited* Apr. 10, 2021).
[17] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 3, ¶ 1, Aug., 2, 2019.
[18] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 3, ¶ 1, Aug., 2, 2019.
[19] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 4, ¶ 1(b)(iii), Aug. 2, 2019.
[20] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 4, ¶ 1(b)(i), Aug. 2, 2019.
[21] United Nations Convention on International Settlement Agreements Resulting from Mediation, art. 5, ¶ 1(e), Aug. 2, 2019.
[22] Indian Institute of Corporate Affairs, http://www.mediationiica.in (last visited Apr. 11, 2021).
[23] Riya Dani, *Singapore Convention on Mediation: Viability & Challenges*, White Coat VIA Mediation & Arbitration Centre, https://viamediationcentre.org/readnews/MzA1/Singapore-Convention-on-Mediation-Viability-Challenges (last visited Apr. 11, 2021).
[24] Jane Larner, *INSIGHT: Challenges Facing the Singapore Convention on Mediation*, Bloomberg Law (Nov. 19, 2019, 2:30 PM), https://news.bloomberglaw.com/esg/insight-challenges-facing-the-singapore-convention-on-mediation.
[25] Jane Larner, *INSIGHT: Challenges Facing the Singapore Convention on Mediation*, Bloomberg Law (Nov. 19, 2019, 2:30 PM), https://news.bloomberglaw.com/esg/insight-challenges-facing-the-singapore-convention-on-mediation.

CHAPTER – VII

The Inevitable Peace Making Approach of a Successful

Author's Profile

***Aluko Deborah Tofunmi** is a law student from the University of Ibadan, Nigeria. She is a legal enthusiast for truth, fairness and integrity. She is a strong believer of the fact that disputes can be resolved and peace can be restored outside the four walls of the courtroom. Hence, she possesses a great interest in Mediation as an Alternative Dispute Resolution technique. She is also a very creative writer (skilled in all genres of Literature) who employs the power of words to communicate essential values in the literary world.

Abstract

It is no news that the ravaging pandemic has completely changed the world in so many ways, such as the way humans think, act, work and relate with one another. The human lifestyle has been forced to adjust to the new normal. Hence, with the adaptation of human nature and the evolution of systems and practices in the global world, new modalities of conflicts are bound to occur. These conflicts can occur in the workplace, family and even in international relations. Even with the immense rise of technology in recent times, this decade is bound to experience the rise of tech-related conflicts. This has further arisen the need for diligent enquiry or examination into the peace-making approaches for an effective mediation process. This chapter broadly addresses certain techniques that can transform conflicts and foster in-depth peace-making and Peacebuilding skills in Mediation. It spans across the critical conflict analysis approach, the informative orientation approach, the equal respect approach, the conflict coaching approach, the persuasive approach vs. imposive approach, the honest communication approach, the patience approach, the emotional intelligence approach, the innovative problem solving approach, and the cooperative technique.

INTRODUCTION

Many a times, when Mediation ends up in a deadlock, it is really not about the emotions, reactions and temper of the parties, it most times points out to the kind of approach used to address the conflict during the mediation session. The attempt or manner in which a conflict is addressed usually determines not only the immediate outcome of the conflict but also the future implications. That is why choosing the right approach to foster peace during and

after a Mediation process is unnegotiable. Also, employing the right approach also reveals a lot about the personal qualities of the Mediator. According to Daniel Bowling and David Hoffman's '**Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation** It was expressed that the disputes that we deal with in mediation most times trigger feelings in us about conflicts [1]in our own lives. However, there is the notion that successful mediators have an ability to surpass those conflicts, or perhaps to discern from the knowledge derived from them, to help the parties in conflict reach a real and absolute resolution of the dispute that brought them to Mediation. Accordingly, this ability arises, in their view, not so much from a particular set of words or behaviors but instead from an array of personal qualities of the mediator that create an atmosphere conducive to resolution.

Before delving into the peace-making approaches of Mediation, it is quite imperative to understand what the concept of Mediation truly means. Mediation as a conflict resolution technique doesn't necessarily have a stereotypical definition. Several Scholars have described this age-long process based on their different perspectives and ideologies.

Moreover, in my own view, Mediation can be defined as a comfortable and considerate conflict resolution scene where parties in conflict form a germane part of their conflict resolution process, not just having someone speak up for them but having a chance to speak up and express themselves in the most convenient way, and in the presence of an ever understanding, facilitative and intelligent mediator.

It is this flexible nature of Mediation that provides the opportunity for creativity in order to figure out diverse peaceful approaches while at the Mediation table. These approaches will be discussed.

THE CRITICAL CONFLICT ANALYSIS APPROACH

This is the first step in ensuring peace as a mediator. Also, a lot of in-depth research work is required here. This is to ensure that the Mediator is fully conversant with the nature of the conflict before fixing a session with both parties at their available time. If a Mediator doesn't have the exact analysis of the conflict, he stands a chance to mislead the parties when trying to help them reach a consensus. In making a reasonable conflict analysis, the Mediator must seek answers to the WH questions - Who? What? Where? When? and Why? of the situation. The -Who, question has to do with the Mediator getting acquainted with the pioneers of the conflict and their titles, positions or roles in the conflict. The -What, question addresses the context surrounding the conflict and the dynamics of that conflict. It's all about gaining knowledge of the situation. The -Where question addresses the location or territory of the conflict or where the conflict is staged. For instance, it could be an office or a land. The -When, question largely dwells on the time each Party begins to have a sensation of the conflict. Sometimes, it is most likely that the emotionally weak party has been sensing and brooding over the conflict for a longer period of time, while the emotionally strong party has just recently begun to sense it in a shorter period of time. Lastly, the -Why question boils down to the reason the parties say they are fighting and also why they think

the issue is worth fighting for, in their own view. For instance, if two workers in an organization are fighting on -who leads a particular project, the parties may say they are fighting for competency and productivity in the best interest of the company but indeed the reason they think it's worth fighting for will likely be to increase their ego and self-respect. This conflict analysis approach can go a long way to make the conflict resolution very well peaceful and easier to manage.

THE INFORMATIVE ORIENTATION APPROACH

To foster peace and warmness and also to grease the interaction and relationship in the Mediation room, it is important to inform the parties of techniques to aid preparation for the Mediation session before the session commences. It can be done in a few days before the session commences. This is to make sure that the parties feel safe, less nervous/emotional and concerned for. It even goes ahead to build more trust in the process. The Mediator can inform the parties to stay committed to reasonable self-care, such as eating, resting and exercising well or just staying devoted to doing something they enjoy. The parties should also take time to relax, feel comfortable and get familiar with what Mediation looks like for them. The parties should also be informed of the fact that they are free to request for short breaks and caucus (private conversation with the Lawyer and Mediator) if the need arises.

THE EQUAL RESPECT APPROACH

It is imperative for the Mediator to practice fairness and equal respect in the way he addresses both parties. During the first stage of meeting with each Party, he must endeavour to spend equal time with both parties and be objective to each and every document presented by the parties. He must be unbiased, open minded and not take sides. In situations where the Mediator has to unavoidably employ the [2]Caucus technique (which involves excusing each Party for a private time with the party to gain more insight into the conflict) he must do it in a very transparent and honest manner, giving equal attention and understanding to each Party. Sometimes, there are occasions where the parties could emphatically state the order of which they want to discuss the points of conflict or certain issues they prefer not to be raised in the session in order to avoid complications. It is essential that the Mediator pays rapt attention to the likes and dislikes of each party to be effected during the Mediation process.

THE CONFLICT COACHING APPROACH

Conflict coaching can be defined as the combination of skills, techniques or practices used to inform and support people in addressing and managing conflicts properly. Conflict coaching is an indeed peaceful approach to that can lead to better outcomes in Mediation. It enables each party to open up during separate times before or during the Mediation session. It increases more awareness and understanding of the conflict and builds more course in tackling the conflict. It is usually an informative session with the Conflict coach who sometimes might be the Mediator himself. The Conflict Coaching enhances more clarity and helps to discover ideas that will not only

resolve the conflict in total but also prevent future conflicts.

Moreover, Conflict Coaching helps a lot even when a party refuses to show up for the Mediation session. It helps both parties to engage effectively in their own Conflict.

THE PERSUASIVE APPROACH VS. IMPOSIVE APPROACH

In helping the parties reach a lasting solution to their conflict, it is important that the Mediator doesn't impose any decision on the parties. While trying to creatively brainstorm and help them reach an agreement, it is only okay to get the parties aware of the potential merits and demerits of their opinions in consideration and guide them to the best agreements that suits them. Trying to impose a decision on the parties will only cause more friction and further complicate the conflict on ground. It will also post rigidity (because the parties won't feel like they're been carried along) and truncate the trust they have for the Mediator. For a Mediator to sound persuasive, his tone and composure must carry an aura of confidence, surety or possibility. This way, the parties can be able to vouch on the fact that the Mediator is informed, knowledgeable and experienced. They can also rely on his suggestion as one that they can consider and probably give a try.

Moreover, in a situation where the Mediator's suggestion isn't preferred by the parties, it is expedient for him to still maintain his peaceful mood. He must try his hardest not to show any sign of anger, displeasure or resentment. He

must maintain his composure in his words, actions and expressions.

THE HONEST COMMUNICATION APPROACH

For an effective mediation session, it is very important to emphasize an honest communication pattern that can even further lead to an unbiased dialogue. This kind of communication is usually very transparent and void of preferential treatment or taking sides. It usually encourages objectivity and it enables both parties to open up and relate their sides of the conflict without any fear of favouritism. The Mediator must be a very good listener to ensure effective communication. Asides from the listening ability, the Mediator must also ensure that he convinces the parties that he is following the narration asking them for clarifications and repeating as well as reframing points they raise in a creative and enlightening way. For instance, in a typical Mediation session with Party A and Party B, the Mediator must ensure that Party A doesn't interrupt while Party B is talking, and vice versa. This rule must have been stated before the session begins. In a case where the second party is trying to interrupt, the Mediator must politely caution such a party to delay his comments until the other party is done talking. This act is very important so that the talking party is able to maintain his self-esteem and doesn't get distracted or get his flow of thoughts and articulation altered in the process. This type of fair communication is very essential and not negotiable in times like these where people from various backgrounds have encountered bitter experiences as a result of the ravaging covid pandemic. Most people have been through a lot of trying times and a dishonest communication could add more salt to injury, affect their

temper negatively, betray their trust and lessen their cooperation.

THE PATIENCE APPROACH

It needs not to be emphasized that Mediation deals with human beings. Therefore, the human nature which comprises of emotions, perspectives, beliefs, lessons and interests can most times not be avoided in the Mediation room. It's takes a lot of process to convince someone who seems conversant with another idea to accept a new dimension. From my observations of human life in general, I've discovered over time that people tend to reason with a new perspective, only when you (like the Mediator) come to terms with their own point of view first. The need for patience cannot be overemphasized in a Mediation process. It should be a kind of Patience coupled with understanding, effective listening and empathy. [3]The Mediator should pave room for trial and improvement. Sometimes, the parties may not accept a suggestion from the Mediator based on personal and confidential preferences. However, the parties can later come to reason with this decision later, change their minds, appreciate the consistent follow up and re-schedule another session for Review and Adjustment of agreements based on more and treasured guidance of the Mediator. If there's any approach at all in this article that seems avoidable, this patience approach cannot be overlooked because it is the bedrock and backbone of every Mediation process.

THE EMOTIONAL INTELLIGENCE APPROACH

Emotional intelligence is the ability to have mastery over your own emotions, feelings and needs by balancing them with the emotions and needs of others. As much as there are benefits attached to been intellectual and cerebral, it only makes more sense when it is balanced with emotional intelligence. The reason is that, someone who is emotionally intelligent will not only think from the head but from the heart as well. Emotionally intelligent people are not usually self-centred. They care about how much their actions and decisions affect others. Hence, if a Mediator is intellectually intelligent, it is good but when he is able to combine emotional intelligence with this, it is even a plus for the Mediation process because it will help them stay out of more trouble or complications. An emotionally intelligent Mediator will first view the conflict from the perspective of the parties, in order to come to terms with it. Sometimes, he could even take the blame if the initial session ends in a deadlock, in order to avoid the parties blaming each other. He will not only rely on what he thinks or feels about the conflict but what the parties think about it as well and what their expectations look like. From doing this effectively, it'll be much easier to reach a consensus that will be favourable to both parties.

Furthermore, when Parties notice the Emotional Intelligence skills that reside in the Mediator, they are more likely to also emulate this during the Mediation process and behave more favourably towards each other. Hence, this will foster peace and yield a more positive outcome.

THE INNOVATIVE PROBLEM SOLVING APPROACH

This is often the most important approach section. It is the reason for the parties in conflict opting for Mediation in the first place. [4]If there's no innovative problem solving at the whole end of a Mediation process, then the whole essence of the Mediation is void ab initio. In order to make sure that the purpose of the Mediation session isn't defeated in the long run, it is expedient for the Mediator to help facilitate productive suggestions to proffer a solution or solutions to the conflict in question. The role of the Mediator here is to help the parties reach a consensus or agreement that will be binding on both parties. This can be done through providing necessary information, relevant insights and future implications pertaining to the decisions at stake. Whenever a suggestion is raised, it is of maximum relevance that everyone, especially both parties agree to it and put their signature on the document before it is established and made official. In my own view, before finding an innovative solution to a conflict, it is imperative to understand the needs of each Party and of course, the peculiarities of these needs. Furthermore, I personally suggest that a feasibility study should be carried out on each of these needs. Answers should be sought to questions like these: Will meeting these needs really solve this problem or will it create more problems in the future? Will approving this potential solution affect the other party negatively and spell doom for this relationship? Sincerely, the creative list of feasibility questions in Mediation is endless.

THE COOPERATION TECHNIQUE

Cooperation is very key in sustaining peace during and after the Mediation process. In order to reach substantial

agreements, it is expedient for the parties to hear each other's views and also work hand-in-hand with the Mediator in trying to reach an agreement. After an agreement is reached, documented and signed by both parties, cooperation is also highly needed in sustaining the terms of the agreement to foster peace. [5]Both parties must determine to perform their own terms of the agreement without any resentment, grudges or frictions. For instance, in a situation where a Workplace conflict of responsibility occurs between two workers sharing the same office. After the agreements have been reached at Mediation, Party A must be able to promise that he'll be opening the office on time since he is the one assigned to be in custody of the key. Party B must also cooperate to make sure she arranged the table on time and be very tidy, since she works to assist Party A. In essence, when both parties cooperate to perform their own sides of the agreement, peace will not only be restored but sustained.

In addition, the Mediator must also cooperate with these terms by ensuring adequate follow up on the terms of the agreement. If the agreement is working out, it'll be sustainable but if the agreement is not working out, another date will be fixed for a review of the agreement. This will be done in order to ensure agreements that'll be practicable.

CONCLUSION AND SUGGESTIONS

Even though there is a common saying in mediation that – *the parties decide the outcome*. It is clearly evident that the mediator plays a major role in ensuring that the outcomes help in deescalating the conflicts. I humbly suggest that potential or budding mediators and

professional mediators should make a deliberate effort to practice these skills even in their daily lives as they encounter people and their challenges. It is essential for mediators to be recognized as peacemakers and icons of change.

CITATION

Daniel Bowling and David Hoffman, Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation, 16(1), Negotiation journal (NJ), 5, 6, 2000.

REFERENCE

https://scholar.google.com (accessed March 6, 2021)

[1] Daniel Bowling and David Hoffman's (2003) 'Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation (14)
[2] The term known as caucus should be properly explained to both parties. If the term might feel too ambiguous for the parties, it is better to simplify the term and use the method only if necessary.
[3] The trial and improvement method portrays what a good mediator looks like. Successful mediators do not give up on a conflict easily. They seek to try new methods that will resolve the conflict and maintain the relationship between both parties.
[4] Innovative problem solving skills is the true essence of a typical mediation process
[5] The conflict is only officially ended once the parties perform their own part of the agreement.

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CHAPTER – VIII

The Evolution of Alternative Dispute Resolution in India

Author's Profile

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Abstract

The system of Alternative Dispute Resolution (ADR) was prevalent in India in some form or the other. India is known for its joint family system where the head of the family resolved the disputes within the family. The disputes between the traders were resolved by appointing an arbitrator or conciliator. The Chapter depicts the system of ADR prevalent during the pre-independence i.e., during British Rule and the post-independence period. The chapter portrays the evolution of various methods of ADR mechanisms like Arbitration, Conciliation, Mediation, Lok Adalats (Peoples' Court) and Negotiations.

In India Arbitration and Conciliation Act of 1996 was implemented following the Model Law of UNCITRAL. The Chapter lays down the provisions of Arbitration and Conciliation as provided under the 1996 Act. It also depicts how the system of Lok Adalat which originated in India received statutory recognition under Legal Service Authority Act, 1987. It is described as Peoples' Court and is more preferred for resolution of disputes. Besides Lok Adalat system of ADR, Mediation is another effective system of ADR mechanism which is most preferred today. The ADR mechanism has been prescribed under section 89 of Code of Civil Procedure,1908. After India becoming the signatory of Singapore Convention, mediation is now preferred over other system of ADR. The Chapter also depicts how the system of offline mediation shifts to online mediation during the period of COVID-19 and suggests for its effective implementation to ease the overburdened courts. This chapter concludes with a deliberation of former Chief Justice of India, Mr Justice Dipak Misra for making innovative use of technology as a transformational tool.

Introduction

Alternative Dispute Resolution (ADR) is not new to India. ADR has now become more favoured as parties are able to resolve their dispute which is cost effective as well as time effective. It saves time required for trial in a suit. Mediation benefits are gaining momentum today.

Ancient India

In good olden days people in India lived in joint families, when caste system was predominant. The dispute which arose in the family was resolved by the head of the family known as Karta. Similarly, when there was a dispute among the trades, they used to appoint a person as arbitrator or conciliator to resolve the dispute.

Pre-Independence: British regime

During the British regime much legislation were introduced in India. This brought a radical change in the system of administration in India. In the year 1772 the arbitration process was introduced. At the request of the parties disputes were resolved by the Courts. In 1859 The Code of Civil Procedure was enacted. The Code referred arbitration under sections 312 to 327, which was repealed in 1882. In 1899 The Indian Arbitration Act was enacted to enforce alternate dispute mechanism.

In the year 1908, Code of Civil Procedure was amended. Section 89 and second schedule of the amended Code widened the power of the Courts to refer disputes to ADR mechanism. The Indian Arbitration Act of 1899 and section 89 of Code of Civil Procedure read with second schedule were the operative legislation to tackle with arbitration.

In 1937 India was the signatory to the Geneva Convention and a corresponding legislation was introduced in the Form of The Arbitration (Protocol and Convention) Act, 1937. Later in 1940 the Arbitration Act of 1899 and section 89 of Code of Civil Procedure with second schedule was repealed. It was replaced by The Arbitration Act of 1940.

Post-Independence Era

The Foreign Awards were enforced in India as per The Arbitration (Protocol and Convention) Act, 1937. The Arbitration Act, 1940 dealt with the disputes referred to ADR mechanism. Thereafter in 1961 India became the signatory to the New York Convention. This resulted in enactment of The Foreign Award (Recognition and Convention) Act, 1961.

In 1985 India became a signatory of United Nations Commission on International Trade Law (UNCITRAL). Accordingly, India adopted the model law on International commercial arbitration. Finally, in the year 1996 The Arbitration (Protocol and Convention) Act, 1937; The Arbitration Act, 1940; and The Foreign Award (Recognition and Convention) Act, 1961 was repealed and consolidated into a single piece of legislation called The Arbitration and Conciliation Act, 1996, which followed the model law of UNCITRAL. To make the Act more forceful section 89 with Order-X (Rule- 1A to 1C) was reintroduced in Code of Civil Procedure in 2002. The Act of 1996 was amended in 2015 and further amended in 2019 to deal with ADR mechanism more effectively.

Various methods of ADR mechanisms

Arbitration

The meaning of 'arbitration' as per Cambridge Dictionary "is a process of solving an argument between people by helping them to agree to an acceptable solution".

According to Arbitration and Conciliation Act, 1996 of India, 'arbitration' means "any arbitration whether or not administered by permanent arbitral institution".

Arbitration has been a preferred mode of settlement in India specifically for commercial disputes.

Conciliation

The meaning of 'conciliation' as per Cambridge Dictionary is "the action or process of ending a disagreement, often by discussion between the groups or people involved".

The Arbitration and Conciliation Act, 1996 does not define the term 'Conciliation' rather it prescribes the procedure for conciliation.

Conciliation encourages the parties to discuss their differences and reach at an amicable solution.

Mediation

The meaning of 'mediation' as per Cambridge Dictionary is "the process of talking to separate people or groups involved in a disagreement to try to help them to agree or find a solution to their problems".

The term 'mediation' has not been defined under the Arbitration and Conciliation Act, 1996. Section 89 of the Code of Civil Procedure, 1908, refers to the term 'mediation' as one of the ways of ADR for settlement of disputes between the parties.

Lok Adalats (Peoples' Court)

Section 89(2)(b) of the Code of Civil Procedure provides provision for referring a dispute to Lok Adalat. The procedure for Lok Adalat is maintained as per the provisions laid down in Legal Services Authority Act, 1987. While resolving the disputes, Lok Adalats follow the principle of justice, equity and good conscience.

The Lok Adalats help in resolving the disputes amicably and alleviate the burden of judiciary.

Negotiations

The meaning of the term 'negotiation' as per Cambridge Dictionary is "the process of discussing something with someone in order to reach an agreement with them, or the discussions between the parties themselves".

This method of ADR aims to resolve the dispute between the parties without the intervention of a third party. Negotiation is more preferable in international matters.

ADR in India

Alternative Dispute Resolution is widely used today for obtaining speedy justice as it is inexpensive and time saving. Today Courts are burdened with huge

number of cases. The ADR mechanism can help in handling huge backlog cases. ADR mechanism cannot replace litigation but it can help the traditional courts to work effectively and more efficiently. The ADR mechanism is essential to the Indian Judiciary.

The ADR mechanism started to resolve the disputes in the family, business community and society at large as early as possible to maintain peace. ADR is based on principles of natural justice in accordance to the Rule of Law. This created a friendly atmosphere. In India the lengthy litigation process causes mental agony. Therefore, ADR has gained momentum in India.

ADR stands on the footing of Constitutional provisions of article 14 and 21 dealing with Right to Equality and right to life and personal liberty respectively. Further article 39-A of the Indian Constitution lays down the provision for Equal justice and Free Legal Aid. Basing on the Directive Principles of State Policy the mechanism of ADR has been dealt with under Arbitration and Conciliation Act, 1996 and the Legal Services Authority Act, 1987. Especially section 89 of the Code of Civil Procedure, 1908, provide for arbitration proceedings to be followed as per the provisions under the aforementioned Act.

Constitution of India mandates social, economic and political justice. But for the last fifty years the judicial system has frustrated the aspirations of the people. The Courts are over burdened with huge pile of cases.

In a populated country like India with a population of 136.67 crore, the possibility of justice delivery mechanism is an important debate. Delay in administration of justice has become a hurdle and people

are losing their faith on Courts. To handle this situation ADR is the best solution. The huge backlog of cases can be quickly disposed of. This is the purpose behind introduction of ADR in India.

The Arbitration and Conciliation Act, 1996

Basing on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and UNCITRAL Conciliation Rules, 1980, the Arbitration and Conciliation Act, 1996 was passed. To maintain the uniformity of law on arbitral proceedings United Nations, General Assembly recommended all the countries to follow the Model Law of UNCITRAL. This would bring remarkable change in formation of unified legal framework. Considering the aims and objectives of UNCITRAL, the Arbitration and Conciliation Act, 1996 has been formulated.

Arbitration Provisions

The Arbitration and Conciliation Act, 1996 deals with International Commercial Arbitration, Domestic Arbitration and also enforcement of Foreign Arbitration Awards.

Arbitration process starts between the two parties agreed upon to go for arbitration through an Arbitration Clause. The Arbitration procedure includes:

- **Arbitration Clause**

Parties enter into an agreement to resolve the dispute through Arbitration. The agreement may be a separate

agreement or the agreement may be included in the contract itself. Where arbitration clause is included in the contract, the parties mention the venue of the arbitration proceedings in the Arbitration Clause.

- **Notice for Commencement of Arbitration**

Section 21 of 1996 Act lays down the provision for the notice to the parties. The notice mentions the name of the parties and their representations, a brief description of the dispute, a statement of relief sought for, etc.

- **Appointment of Arbitrator**

Upon receipt of notice by respondent from the applicant for commencement of arbitration, both parties will appoint an arbitrator. **Section 11** of the 1996 Act provides with the provision for appointment of arbitrator.

- **Statement of Claim and Defence**

Section 25 of the 1996 Act says that after appointment of an arbitrator, the claimant places his statement of claims along with all relevant documents in support of his case. The respondent may also place his counter claim in support of his case.

- **Hearing and Written Proceedings**

As per the provision laid down under **section 24** of the 1996 Act the Arbitral Tribunal will hear both the parties and examine the evidence produced before them and proceed further.

- **Arbitral Award**

After hearing the parties and examining all the issues a final award will be given by the arbitrator. The award shall be made in writing and shall be signed by all the members of the Tribunal. This award shall be final and binding on both the parties. However, an appeal cannot be filed against the arbitral award before the Arbitral Tribunal. But an appeal can be filed before a Court. **Section 31** of the 1996 Act lays down the form and content of the Arbitral Award.

- **Enforcement of Arbitral Award**

The provision regarding finality of arbitral award and its enforcement is described under **section 35 and 36** respectively.

Conciliation Provisions

The Arbitration and Conciliation Act, 1996 provides a complete and comprehensive procedure for conciliation. **Sections 62 to 81** of the 1996 Act deals with provisions of conciliation. The Conciliation proceedings include:

- **Commencement of the proceedings of Conciliation**

Section 62 of the 1996 Act provides for the commencement of proceedings for conciliation for settling the dispute. A proposal for conciliation by one party is placed in writing for acceptance of the same. If the other party does not follow up or reply in writing within a period of thirty days it shall amount to rejection.

- **Number of Conciliators**

After the proposal for conciliation is accepted, then comes the step to have a conciliator. **Section 63** of the 1996 Act provides that there shall be one conciliator with a maximum limit to three acting jointly.

- **Appointment of Conciliators**

The 1996 Act provides two methods of appointing conciliators:

First- As per **section 64(1) –**

(a) A sole conciliator- mutually agreed upon by the parties.

(b) Two conciliators- each party may appoint one conciliator.

(c) Three conciliator- third conciliator may be appointed to act as presiding conciliator.

Second- the parties may resort to assistance of an institution for appointment of conciliator.

- **Submission of Statements**

Section 65 of 1996 Act says regarding submission of statements by the parties to conciliator.

- **Admissibility of Evidence**

Section 81 of 1996 Act deals with admissibility of the evidence which cannot be used in other proceedings.

- **Settlement Agreement**

After considering the submissions of the parties, the conciliator settles the dispute between the parties. **Section 73** of 1996 Act provides for the provision of the Settlement Agreement and its components.

Lok Adalats (Peoples' Court)

Lok Adalat is a unique method of ADR. The concept of Lok Adalat originates in India. The Legal Services Authority Act, 1987 provides statutory recognition to the system of Lok Adalat. Certain important provisions of the Act are as follows:

Organization of Lok Adalat (Section 18)

The State authority or district authority or the High Court legal services committee and Tehsil legal services committee may organize Lok Adalat at such interval and such areas as it thinks proper and fit. The Lok Adalat comprises of a sitting or retired judicial officer and other persons of repute as prescribed by the government in consultation of Chief Justice of the High Court.

Cognizance of cases by Lok Adalat (Section 19)

One of the parties makes an application to refer the case to Lok Adalat. The Court being satisfied to take cognizance of the matter gives reasonable opportunity to the parties to be heard. The Lok Adalat shall proceed and dispose of the case.

Procedure of Lok Adalats (Section 20)

Lok Adalats organized by the State or District Leal aid committees shall have jurisdiction to determine and arrive at a compromise or settlement between the

parties on the matter which was pending before a Court. Information of holding Lok Adalat is widely given through press, media, etc. Lok Adalats generally consists of retired judges, who after examining the fairness and legality of compromise, passes a decree. The compromise arrived at was by the free will and mutual consent of the parties.

Award of Lok Adalat (Section 21)

Every award passed by the Lok Adalat shall be deemed to be a decree of a civil court and is binding on the parties. No appeal lies against the award of a Lok Adalat in any Court.

Powers of Lok Adalat (Section 22)

Lok Adalat has similar powers as that of a Civil Court under the Code of Civil Procedure Code, 1908. All the proceedings conducted before the Lok Adalat is deemed to be judicial proceedings within the meaning of sections 193, 219, and 228 of the Indian Penal Code and every Lok Adalat is deemed to be a Civil for the purpose of section 195 of Civil Procedure Code.

Mediation

During COVID-19 crisis mediation was preferred over other ADR mechanisms prescribed by Code of Civil Procedure under section 89. Recently India has signed the United Nations Convention on International Settlement Agreements resulting from mediation, otherwise known as Singapore Convention. Being a signatory of Singapore Convention it is expected to boost the confidence of the

investors. This reveals India's commitment to mediation as an ADR mechanism. Looking into the ongoing crisis of rising disputes and overburdened judiciary of India, it is advisable for companies to opt for mediation for faster dispute resolution.

Mediation is an effective ADR mechanism. The author 'Avtar Singh' in his book "Law of Arbitration and Conciliation and ADR System" has described the four benefits of the process which are as follows:

"1. **Informality**- There is no fixed solutions to resolve matters and the solution rests with the parties themselves.

2. **Privacy and confidentiality**- Mediation is not a matter of public record. Its confidentiality is maintained.

3. **Time and cost savings**- Without the formalities found in litigation, mediation usually results in substantial costs savings.

4. **Control**- Mediators help parties maintain control over the negotiation that takes place."

Mediation during COVID-19

When the world is engulfed by Corona Virus (COVID-19) and World Health Organization declared it as pandemic, Courts could not function normally. The alternative method to settle the disputes was the only alternative to resolve the disputes. It is a process to settle disputes outside courts combining technology and ADR mechanism. Following the COVID-19 restrictions, lawyers could not present themselves physically before the Courts. At this point of time the only solution to the

problem was online dispute resolution to ease the pressure of Courts.

Online Dispute Resolution (ODR)

The system of Online Dispute Resolution was the only tool during COVID-19 to help the parties to resolve the disputes amicably with the help of modern technology. It is vital and important for country like India to cope up with the need of time. This system of mediation has become essential to deal with during the spread of pandemic. Considering not only the interest but also the health of the parties, ODR is the only solution to thrive under the situation of COVID-19. ODR is an efficient mechanism as it is accessible and faster means to resolve disputes and maintains transparency. ODR being the efficient means of dispute resolution mechanism, its implementation is steadily gaining recognition in India.

Implementing Online Mediation

In the recent times the usage of online mediation is preferred as one of the dispute resolution mechanism as it is party driven. The implementation of global model of online mediation is lacking due to poor infrastructure. Online mediation requires high speed internet facility. There is lack of awareness and faith among the public regarding online mediation. In spite of hurdles recently there has been remarkable change in India and a number of mediation institutions training and stimulating individuals regarding benefits and importance of mediation. India being a signatory of Singapore Convention will soon bring out new legislation recognising international and national mediation settlements alike to ensure effective implementation of the convention. It is suggested that service provider would

provide high speed internet dongles for uninterrupted mediation sessions.

Conclusion

The methods of Alternative Disputes Resolution mechanism aids to resolve disputes outside the Courts. Though the ADR mechanism cannot replace litigations, they are in addition to the general system of litigations process in Courts. There are certain matters which are to be decided through the Courts. However, the alternative methods of resolving disputes help in lessening the overburdened Courts with huge pending cases. There are various dispute resolution methods like mediation-arbitration, mini-trials, arbitration summary jury trials, etc., but in India arbitration, mediation and lok-adalats are commonly preferred among the ADR mechanisms. Presently in the era CODID-19 parties worldwide prefer to choose the system of ADR to resolve their disputes, but in India people still choose to go for litigation. There has been an effort to improve access to the system of ADR in India. Necessary awareness and legal recognition is required to be given in India. It is well said by Mr. Justice Dipak Mishra, former Chief Justice of India, in his deliberation on 'Virtual ADR World: The Journey of metamorphosing a calamity to an advantage', that "it is in challenging times like those that we can make innovations and use technology as a transformational tool. The exploration of a virtual ADR world with virtual hearings and online dispute resolution (ODR) mechanisms with the consent of the parties is essential. Although, physical hearing can never be completely dispensed with." He further added "we have to understand the concept of adaptability quotient. That apart we have to acquaint ourselves with 'dignity literacy' and 'committed

patience'". India in post COVID-19 must remove all barriers and must embrace the online ADR mechanism.

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CHAPTER – IX

Legislation and ADR practices in Developing Nations: (Zimbabwe Case Study)

Author's Profile

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Abstract

The article is to explore legislation and ADR practices in developing countries primarily from a Zimbabwean context- Zimbabwe, as a developing country situated in Southern Africa, has recently embraced ADR as a process and technique for resolving disputes that fall outside of

the judicial process (i.e. formal litigation court system). This has helped spear head the art of solving disputes into a much more confidential, less formal, less costly and less time-consuming process of solving disputes than going to court. ADR has been appalled as having greater control over the selection of the individual or individuals who will decide on a particular dispute and this process significantly has the outcome of tailor made specific result or needs. The immense support of such tides of change has been fully embraced through the Constitution of Zimbabwe Amendment [N0.20] Act 2013 and the Arbitration Act [Cap 7:15] amongst other types of legislation to be discussed. The article is to also capture through case law the impact of the legislation steering ADR practices, outlining the strengths, weaknesses and key areas of improvement. Objectively one is to explore and give an overview on the impact and scope of legislation and ADR practices in Zimbabwe.

Introduction

Zimbabwe has recently tapped and embraced the use of ADR practices in resolving disputes. This lucrative stance is blatantly unveiled through the promulgation of various statutes that advocate for the use of a neutral third person to help the parties come to agreement. ***The degree of influence*** depends on the type of ADR you choose. Zimbabwe has adopted five (5) forms of alternative dispute resolution method. These include (a) **Negotiation** (b) **Mediation** (c) **Facilitation** (d) **Conc iliation** and (e) **Arbitration.**

a. *Negotiation* – This is an informal bargaining process that takes place directly between the people in dispute, but can be assisted by others e.g. lawyers. It is initiated when the people involved in the dispute communicate directly to try and reach an agreement. Such communication may be written or spoken and may take some time. Effective negotiators know that it is hard to reach an agreement unless everyone feels they get some benefit (i.e. a 'win-win' situation). This form of dispute resolution method is a good first step for almost any type of dispute, including family, neighbourhood, commercial, and consumer disputes. If negotiation fails, the parties might benefit from other more formal types of ADR.

b) *Mediation* - Mediation is a process in which a neutral person (the mediator) helps people to negotiate with each other and resolve their dispute. For it to be effective the mediation process should be: (i) confidential, (ii) inclusive whereby everyone involved in the dispute comes together for a face-to-face meeting; (iii) led by the mediator who *runs the process* and *helps the parties to identify the issues and possible options*; (iv) embracing, where the people in dispute work out a solution with the help of the mediator; (v) owned by the parties to the dispute, where the mediator does not impose a decision but enables the parties to come up with a decision. This form of dispute resolution mechanism can be used in conflicts involving business, social and family disputes and even labour related matters and (vi) can only work if everyone is prepared to work towards a resolution.

c) *Facilitation* - **Facilitation is like mediation, but is used for groups that are in conflict. A neutral person (the facilitator) helps the people involved negotiate with one another and come to some agreement**. With facilitation: (i) everyone involved comes to one, or several meetings, run by the facilitator; (ii) the facilitator helps to identify problems to be solved and tasks to be accomplished; (iii) facilitators don't impose a decision; and (iv) the people at the meeting make a group decision on actions and outcomes.

This form of dispute resolution can be used to avoid a dispute by providing a forum for different points of view to be discussed. **It can be used for complex planning and environmental matters. It can also be used where people are having difficulty working together, e.g. in: Clubs; Body Corporate; Workplace & Community Organisations**

d) *Conciliation* - Conciliation is a process by which people in dispute try to reach an agreement with the assistance and advice of an impartial person (the conciliator). The conciliator **usually has some experience on the subject of the dispute and can advise the parties what their rights and obligations are**. Discussions are confined to the subject matter of the dispute. Some of the key elements of conciliation include the following: (i) conciliation can only work if both parties are prepared to work towards a resolution; (ii) It should be confidential; (iii) the conciliator may advise on how the conciliation process should take place; (iv) a conciliator can advise on what people's legal rights and responsibilities are and what a reasonable outcome might be; (v) a conciliator may act as a ‘go-between’ by talking to each person separately and relaying offers or proposals between them; and (vi) ultimately the outcome is up to the

individuals involved i.e. the conciliator does not impose a decision. This form of dispute resolution can be used for disputes where issues of rights and responsibilities should be protected e.g. labour matters; consumer disputes etc.

e) Arbitration – Arbitration is a formal process in which the people in dispute present their case to an independent third person (the 'arbitrator'), and are bound by that person's decision. The key elements depicting how it works include the following: (i) although the parties may agree to arbitration, and on their choice of arbitrator, more often than not however one person will have to apply for arbitration and the other person is obliged to participate; (ii) parties to the dispute present their case and evidence to the arbitrator; (iii) the arbitrator makes a determination/decision; (iv) the parties to the dispute are bound by the arbitrator's decision. Sometimes a dispute put forward for arbitration will be referred to mediation or conciliation.
Arbitration is usually used (i) when a contract specifies it be used if a dispute arises; (ii) in industrial/labour relations/union disputes; (iii) in tenant vs landlord disputes. Sometimes arbitration is used when other methods of ADR haven't worked.

Legislation

Constitution

The Constitution of Zimbabwe is the Supreme Law of the country and any law ultra vires to its provisions is rendered null and void in the country. [1] Section 251 (4) of the Constitution outlines that: *Members of the National Peace and Reconciliation Commission* - a body

mandated for reconciling the burdens of the past volatile conflicts and build national and sub-national capacities that guarantee a future of harmony and cordial co-existence between the various ethnic tribes in Zimbabwe. The Commission has a key role of placing institutional frameworks and mechanisms for preventing the recurrence of violent conflicts in the future - *must be chosen for*

their integrity and their knowledge and understanding of, and experience in, ***mediation, conciliation, conflict prevention and management, post-conflict reconciliation or peace building.[2]*** Furthermore section 252 (1) of the Constitution states that *The National Peace and Reconciliation Commission has the following functions—*

(a) to ensure post-conflict justice, healing and reconciliation;

(b) to develop and implement programmes to promote national healing, unity and

cohesion in Zimbabwe and the peaceful resolution of disputes…

(i) to ***conciliate and mediate*** *disputes among communities, organisations, groups and individuals;****[3]***

These Constitutional provisions endorsed by the supremacy clause create a mandate on the state to utilize various types of ADR practices, to neutralize hostile disputes between parties. The promulgation of such provisions in the 2013 Constitution show a modern stride towards legislation in Zimbabwe embracing the use of

less costly and time consuming forms of dispute resolution.

Arbitration Act [Cap 7:15]

The second and most utilized source of ADR in Zimbabwe to be discussed is the Arbitration Act [Cap 7:15]. The scope of this legislation applies to arbitration proceedings in Zimbabwe. Section 6 (2) states thus: '*This Act shall apply to every arbitration agreement, whether made before, on or after the date of commencement of this Act'.****[4]*** Section 6 (4) states thus: '*This Act shall apply to every arbitral award whether made before, on or after the date of commencement of this Act'*.[5] In essence this Act regulates all arbitration processes in Zimbabwe, **subject to variations provided for specific arbitration processes contained in other enactments**. Section 5 (2) of the Arbitration Act states that: '…Where an enactment provides for the determination of any matter by arbitration, the provisions of that enactment, to the extent that they are inconsistent with this Act, shall prevail'.[6] The scope of the Act has actually broadened with regards to what matters are subject to arbitration in Zimbabwe. This is a modification of the scope of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration that the Act domesticates. The UNCITRAL Model Law is in essence intended to implement the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (i.e. the New York Convention) of 1958.

In as much as the scope of the Act has been heightened, sometimes it is inapplicable. For example:

Section 4 of the Act states that:

*'(1) Subject to this section, **any dispute** **which the parties have agreed** to submit to arbitration may be determined by arbitration.*

*(2) The following matters shall not be capable of determination by arbitration — (a) an agreement that is **contrary to public policy**; or (b) a dispute which, in terms of any law, may not be determined by arbitration; or (c) a **criminal case**; or (d) **a matrimonial cause** or a matter relating to status, unless the High Court gives leave for it to be determined by arbitration; or (e) a matter affecting the interests of a minor or an individual under a legal disability, unless the High Court gives leave for it to be determined by arbitration; or (f) a matter concerning a consumer contract as defined in the Consumer Contracts Act [Chapter 8:03], unless the consumer has by separate agreement agreed thereto.*

(3) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration.' ***[7]***

A key challenge of this type of ADR practice in Zimbabwe is establishing, the essential elements of an arbitration clause/ arbitration agreement. It is a requirement that an arbitration agreement be in writing; and this is evidenced either by: a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement as long as the contract is in writing and the

reference is such as to make that clause part of the contract.

The case of ***Capital Alliance (Pvt) Ltd v Renaissance Merchant Bank & Others*** **HH 108/2006[8]** pointed out that Clause 11 of the Security Sharing Agreement suffices as an arbitration clause. The clause provided that:

'…any dispute between the lenders amongst themselves should, if it cannot be resolved within 21 days, be referred to arbitration in terms of a written agreement and may, failing such agreement, be dealt with by litigation in a court of competent jurisdiction.

In a nutshell this legislation domestically regulates when and how arbitration is turned to when a dispute between parties arises. This is the most crucial domestic statute that deals with the most commonly used type of ADR practice.

Arbitration (International Investment Disputes) Act [Chapter 7:03].

With regards to international disputes amongst states the guiding legislature in Zimbabwe is the Arbitration (International Investment Disputes) Act [Chapter 7:03]. This Law applies to arbitration proceedings concerning investment-related disputes that arise between the Government of Zimbabwe and Nationals of Other States. It essentially domesticates and facilitates the implementation of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* that Zimbabwe ratified on the 20th of May 1994. Section 2 of the Act, which is the Act's schedule; re-states provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of

Other States. As such, the Act allows for arbitration proceedings to be held under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) currently based in Washington DC, in the United States of America (USA). It also allows for arbitral awards handed down by the ICSID to be registered and enforced in Zimbabwe.

The 2009 ICSID case of ***Bernardus Henricus Funnekotter & Others v Republic of Zimbabwe ICSID Case No. Arb/05/6[9]***, amongst other things, illustrates the importance of an arbitration agreement in reflecting the consent of the parties to have disputes resolved through the ICSID arbitration process. In deciding on its jurisdiction over the matter, the ICSID arbitration tribunal noted that:

They [the Claimants] invoke the Tribunal's jurisdiction over these claims under the terms of the Article 9(1) of the [Bilateral Investment Treaty] BIT and Article 25 of the ICSID Convention. Article 9(1) states that '[a]ny legal dispute between a Contracting Party and a national of the other Contracting Party arising directly out of an investment of that national in the territory of the former Contracting Party . . . [if not] settled within six months of the date when it is raised by one of the parties to the dispute, . . . shall, at the request of the national concerned, be submitted for settlement by conciliation or arbitration.' ***[10]*** *Article 25 of the ICSID Convention extends ICSID jurisdiction to 'any legal dispute arising directly out of an investment, a Contracting State ...and a national of another Contracting State'.* ***[11]***

After considering arguments from both parties, the tribunal went on to state that:" *It is the Tribunal's judgment that jurisdiction under the BIT and ICSID Convention has been established: all three requisites for jurisdiction have been met. First, the Claimants have established that they are Dutch nationals and, thus, are within the provisions of both the BIT and ICSID Convention as nationals of a Contracting Party (BIT) or Contracting State (ICSID)… Second, the subject matter of the dispute before this Tribunal clearly arises directly out of an investment by the Claimants in the territory of the Respondent… Finally, the Claimants have brought claims within the appropriate time frame."* ***[12]***

Because the State (Republic of Zimbabwe) involves many constituent components (e.g. government departments, parastatals, agencies etc.); the consent that is envisaged by the arbitration agreement should ordinarily be officially approved by the State. The adoption of such international legislation illuminates how the state values ADR and seeks to harmoniously solve disputes in a uniform and accepted manner in the international community.

Labour Act [Chapter 28:01]

This Law applies to, amongst other things, arbitration in labour-related disputes in Zimbabwe. The Act envisages compulsory arbitration to be one of the dispute resolution mechanisms for labour disputes. The other dispute resolution mechanisms that exist are **conciliation and litigation**. Arbitration under the Labour Act is undertaken under the auspices of the Labour Court. Section 89 (1) (d) of the Act states that: 'The Labour Court shall exercise the following functions: …appointing an arbitrator from

the panel of arbitrators…to hear and determine an application'.[13] However such arbitration proceedings are also expected to be regulated by the Arbitration Act, at least to the extent that it is not in conflict with the Labour Act. Section 98 (2) of the Labour Act provides that: 'Subject to this section, the Arbitration Act [Chapter 7:15] shall apply to a dispute referred to compulsory arbitration'. The importance of the Arbitration Act [Chapter 7:15] is yet again highlighted by such clauses. This means that the Arbitration Act is an important source of law in labour disputes that are subjected to compulsory arbitration proceedings. However, in the event that there are inconsistencies between the Arbitration Act and the Labour Act, the Labour Act prevails, but only to the extent of the inconsistency. This is aptly captured under Section 5 (2) of the Arbitration Act which states that: '*…where an enactment provides for the determination of any matter by arbitration, the provisions of that enactment, to the extent that they are inconsistent with this Act, shall prevail'.****[14]***

There have been cases that demonstrate the situation envisaged by s 5 (2) of the Arbitration Act in labour-related disputes. A significant number of such cases have been centered on the application of s 34 of the Arbitration Act which requires the High Court to set aside an arbitral award based only on clearly specific grounds in terms its provisions. However, the Labour Act does not contain specified grounds for setting aside an arbitral award issued through compulsory arbitration. The question of law therefore becomes: which law prevails?

Chiweshe JP, in deciding a similarly related matter in the case of ***Samudzimu v Dairiboard Pvt Ltd HC 5560/10[15]***noted that:

Section 98 [of the Labour Act] provides for inter alia the referral of matters to compulsory arbitration, the appointment of arbitrators, appeals against decisions of arbitrators, reviews and other remedies. These provisions are detailed and comprehensive. Clearly it could not have been the intention of the legislature that parties aggrieved by the decision of an arbitrator in a labour dispute seek remedy in terms of s 34 or 36 of the Arbitration Act.

The Labour Act takes precedence over the Arbitration Act and any other enactment. The intention of the legislature was to have all labour matters initiated and resolved to finality in terms of the Labour Act… Sections 34 and 36 of the Arbitration Act are not applicable in cases where the award sought to be challenged relates to a labour dispute. The mechanisms for challenging such awards are provided for in the Labour Act and may be accessed through the medium of the Labour Court. No other court has jurisdiction to entertain such matters.

Section 98 (10) of the Labour Act provides that: 'An appeal on a question of law shall lie to the **Labour Court** from any decision of an arbitrator appointed in terms of this section'. Section 92F (1) of the same Act goes on to state: 'An appeal on a question of law only shall lie to the **Supreme Court** from any decision of the Labour Court'. These provisions clearly establish the position that no other court besides the Labour Court can hear an appeal on a question of law with regards to an arbitral award. Furthermore, no other court besides the Supreme Court can hear an appeal on a matter of law from the Labour Court.

Although the above-cited provisions may appear clear, the reality in practice can be murky particularly if one considers the application of the Arbitration Act. It will be

recalled that the Arbitration Act relies, to a significant extent, on the High Court for review and executory functions. In cases of review, Article 34 of the Act for example, requires the High Court to decide on the validity of an award including whether or not to set it aside based on clearly defined grounds. This is starkly different from labour arbitral awards which are only appealable to the Labour Court. In such circumstances therefore, the question that is usually posed is whether the Labour Court in hearing an appeal on a matter of law regarding an arbitral award is bound by the provisions of the Arbitration Act viz. Article 34?

Sandura JA, in the case of ***Mbisva v Rainbow Tourism Group Limited t/a Rainbow Hotel and Towers SC 32/09***, noted that:

In my view, it is quite clear, from a careful reading of Article 34, that the Article only deals with and limits the power of the High Court to set aside an arbitral award, and does not in any way deal with or limit the power of the Labour Court to set aside an arbitral award challenged in terms of s 98(10) of the Act.

This position appears to be buttressed by Section 89 (6) of the Labour Act, which states that: 'No court other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1).

Recognition and Enforcement of an Award

The Labour Act provides for the registration of arbitral awards issued through compulsory arbitration, with either

the Magistrates Court or the High Court (depending on the jurisdictional threshold of the award). This is done for the purposes of ensuring enforcement and execution of the awards, because the Labour Court does not have executory powers. Once an award is registered it is deemed to have the same effect as a civil judgment of either the Magistrates Court or the High Court. Sections 98 (14) and (15) of the Labour Act states that: '(14), *Any party to whom an arbitral award relates may submit for registration the copy of it furnished to him …to the court of any magistrate which would have had jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the High Court. (15) Where arbitral award has been registered…it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court*'.[16]

Having said this, the recognition of an arbitral award can be challenged by a disgruntled party based on Article 36 of the Arbitration Act. Such a challenge is made to the High Court based on the fact that it has jurisdiction to register and enforce an arbitral award under s 98 (14) and (15) of the Labour Act. (See Article 36 of the Arbitration Act for the grounds for challenging recognition of an award in terms of Article 36 of the Arbitration Act). However, the challenge must ordinarily be made at the time when registration of an award is being sought, and not after.

In the case of ***National Foods Limited v Godfrey Ngwaru et al HC 4410/11[17]***, the High Court was asked to decide on an application to deny recognition of a registered labour arbitral award that was pending execution. The applicants in this case sought to set aside a writ of execution, although they had not challenged the

registration of the award. **Mtshiya J**, in deciding the matter noted that:

The applicant was served with an application for the registration of the award on 22 February 2011. The applicant knew very well that registration of the award was meant to facilitate execution. I find no legal or logical basis for the applicant to hide behind the provisions of s 36 of the Act. The reasons, if any, for resisting the execution of the registered order must have existed prior to its registration.

Conclusion

Zimbabwe has taken huge strides towards the use of ADR practices in resolving disputes. The promulgation of legislation in the form of the Constitution of Zimbabwe Amendment [N0.20] Act 2013, the Arbitration Act [Cap 7:15] and the Labour Act [Chapter 28:01] has helped the developing country to domestically thrive in solving disputes through methods that are less formal, confidential, less costly, less time-consuming than going to court and promote greater control over the selection of the individual or individuals who will decide their dispute. The Arbitration (International Investment Disputes) Act [Chapter 7:03] has been detrimental as to how the state as an actor can solve disputes through ADR methods and enforce such judgments. More can be done to improve what has already been established but the progress so far is commendable.

[1] Section 2 Constitution of Zimbabwe Amendment [N0.20] Act 2013
[2] Section 251 (4) Constitution of Zimbabwe Amendment [N0.20] Act 2013
[3] Section 252 (1) Constitution of Zimbabwe Amendment [N0.20] Act 2013
[4] Section 6 (2) Arbitration Act [Cap 7:15]
[5] Section 6 (4) Arbitration Act [Cap 7:15]
[6] Section 5 (2) Arbitration Act [Cap 7:15]

[7] Section 4 (1),(2)&(3) Arbitration Act [Cap 7:15]
[8] *Capital Alliance (Pvt) Ltd v Renaissance Merchant Bank & Others* HH 108/2006
[9] Bernardus Henricus Funnekotter & Others v Republic of Zimbabwe ICSID Case No. Arb/05/6
[10] Article 9(1) of the Bilateral Investment Treaty 1995-2006
[11] Article 25 of the International Center for Settlement of Investment Disputes (ICSID) Convention of 1966
[12] Bernardus Henricus Funnekotter & Others v Republic of Zimbabwe ICSID Case No. Arb/05/6
[13] Section 89 (1) (d) of the Labour Act [Chapter 28:01] Act
[14] Section 5 (2) of the Arbitration Act [Chapter 7:15]
[15] Samudzimu v Dairiboard Pvt Ltd HC 5560/10
[16] Section 98(14) & (15) Labour Act [Chapter 28:01]
[17] *National Foods Limited v Godfrey Ngwaru et al* HC 4410/11.

CHAPTER – X

Comparative perusal of ADR And ODR Mechanisms in India and The United Kingdom.

Author's Profile

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Abstract

Alternative Dispute Redressal (ADR) is a conflict resolution system commonly used in the United Kingdom. If applied on a large scale in India, it will help reduce the pressure on Indian courts. More than 20 million cases are pending in Indian courts, and ADR will help to alleviate the stress on the courts. Online Dispute Redressal (ODR) is a mechanism where the ADR mechanism is facilitated through cyberspace on a virtual platform. The principal focus of this paper is on the ADR mechanisms prevalent in India and United Kingdom. More specifically, the paper is concerned with drawing comparisons between the ADR and ODR mechanisms available in both the countries and their legal aspects. Furthermore, this paper provides recommendations for the advancement of ADR and ODR mechanisms in these countries.

Introduction

Disagreements have always existed and will continue to exist in human socio-legal life. Individual rights, duties, viewpoints, wants, comprehension, and worries, as well as the conflicts that arise from them, have all played a part in the evolution of society and law. To settle disputes between people, states, and individuals and states has been a legitimate role of the legal system. In theory, these disagreements arise from differences of opinion on legal or factual issues, depending on the circumstances.

Individual disputes consume our time, deplete our emotions, and push us to deal with individuals we would rather not. Furthermore, dispute resolution might squander time and draw our attention away from the task at hand. A quarrel is sometimes regarded as an expensive event by society.[1] As a result, fast and effective conflict resolution becomes the shared goal for everybody involved in a disagreement.

Even though arguments are inescapable, there is an urgent need to discover a quick and straightforward settlement approach. These disagreements or disputes limit growth and impair the physical strength and mental calm of human existence. Human beings must be conflict-free to enjoy a flourishing reality. Is it, however, a viable option? The person wants litigation and pursues the courts for everything. Several lawsuits are pending as a result of rising case arrears and case submissions.

[1] "Michael L Moffitt and Robert C Bordone, 'Perspective on Dispute Resolution: An Introduction' in Michael L Moffitt and Robert C Bordone, *The Handbook of Dispute Resolution* (1st Edition Jossey Bass 2005)"

According to a rough estimate, all pending cases in India worth more than two crore cases will take at least 324 years to resolve, assuming no new suit or proceeding is filed.[2] As a result, there is a pressing need to develop quick and straightforward conflict resolution solutions. Finally, a conflict resolution mechanism outside of the official legal system will be formed; this is known as alternative conflict resolution.

The emergence of Alternate Dispute Resolution-

"Alternative Dispute Resolution" ("ADR") is a system that is gaining traction to resolve disputes in society across many parts of the world. As shall be discussed below, there are many different forms of ADR. In general, they involve a shift away from court adjudication and seek to provide quicker, cheaper, and sometimes more harmonious dispute resolution states. While ADR is sometimes integrated into the legal system, this is not always the case. Equally, in some jurisdictions, ADR activity is heavily regulated by the State through, for example, legislation and governing codes of practice. ADR provides a way to resolve all types of disputes, including civil, commercial, industrial, and familial concerns, where people cannot begin any form of dialogue and achieve a solution. A neutral third party is used in ADR to aid the parties in communicating, debating differences, and settling the dispute. It is a method that helps people and groups to maintain

[2] Dr. Madabhushi Sridhar: "Alternative Dispute Resolution, Negotiation and Mediation"

cooperation and social order while also allowing for the reduction of hate.

ADR has a rich history, origin of ADR can be traced back to 500 BC when India used an ADR system called the Panchayat System, and around 1000 BC, European law merchants had their system for mercantile disputes. In 1400 BC, the Ancient Egyptian Amarna regime employed diplomacy in foreign affairs. With Siete Partides in 1263, ***"King Alfonso the Wise of Spain***" used a binding arbitration system. The Irish, on the other hand, made the first formal provision for arbitration in 1632. In 1770, the first president of the United States of America included an arbitration clause in his will.[3] General Howard introduced an arbitration provision in employment arrangements between former slaves and former owners in 1886.[4] In 1888, the United States passed the first act of ADR, which was intended to resolve specific railroad labor conflicts.[5]

Furthermore, People's frustration with the court system was evident at the "*Pound Conference"* on the "***Causes of Common Dissatisfaction***" with the Courts in 1976[6].

[3] "Jerome T. Barrett and Joseph P. Barrett, *A History of Alternative Dispute Resolution The Story of a Political, Cultural, and Social Movement* (Jossey-Bass 2004) xxv."
[4] "*ibid*"
[5] "The need of ADR and ODR system in India with a comparative analysis with The United Kingdom. - Indian Legal Solutions, available at: https://indianlegalsolution.com/the-need-of-adr-and-odr-system-in-india-with-a-comparative-analysis-with-the-united-kingdom/ , (last accessed on 26th May 2021)."
[6] "Leading the alternate dispute redressal field, available at: http://franksander.com/leading-the-alternative-dispute-resolution-field/,(last accessed on 26th May 2021)."

The rise in the litigation system and its cost and lack of prompt resolution of disputes caused discontent. According to the two-school theory, one school argued that ADR is essential because it can minimize over-litigation and high costs. The other school believes that alternative dispute resolution (ADR) will improve access to justice by speeding up the process. Furthermore, the "***National Institute for Dispute Resolution"*** was established in 1982 in response to the increasing demand for an alternative dispute resolution mechanism. These schools gave the civil system a new lease on life, resulting in a social reform process known as the dispute resolution movement, which eventually led to establishing an ADR structure.[7]

Kinds of ADR mechanism

Mediation-

Mediation is a decision-making process in which the parties are assisted by a third party attempting to resolve the problem and help the parties achieve a mutually beneficial solution. The procedure entails clarifying the situation between the parties, assisting them in establishing dialogue, identifying the parties' needs and desires, and helping them make decisions by presenting a conflict resolution model. This form of ADR is a cooperative process in which usually the parties agree to

[7] "Pattrik Fn'Pierre and Linda Work, 'On the Growth and Development of Dispute Resolution' (1992-1993) 81 Kentucky Law Journal 959."

go to mediation and choose their mediator[8]. A neutral, impartial individual who serves as a mediator for the conflict is a mediator. The decision reached has the consent of all parties and may be formalized into a legally binding agreement. [9]

Negotiation-

Negotiation is a means of settling a conflict in which a third party is involved.[10] The two disputing parties attempt to communicate with each other by various means to establish some kind of contact, set their goals and agendas, and work together to resolve the matter at hand.

After negotiations, both parties can sign an agreement and is generally enforceable in a court of law as a contract. Negotiation is a beneficial type of ADR since it allows the parties to negotiate and maintain their positions on the conflict, to resolve the dispute taking precedence over who made the error in the dispute.

Arbitration-

Arbitration cannot take place without a binding arbitration agreement in place before the occurrence of a

[8] "Although in some context's mediation participation may be compulsory and/or may involve the imposition of a particular mediator on the parties."
[9] "Laurence Boulle and Miryana Nesic, *Mediation Principles Process Practice* (Butterworths 2001) 3"
[10] "Simon Roberts and Michael Palmer, *Dispute process ADR and the Primary Forms of Decision- Making* (first published 2005, 2nd edn, CUP)"

dispute. Parties to a dispute assign it to one or more arbitrators in this method of dispute resolution. The arbitrator's ruling is binding on the parties, referred to as an "Awar.". Arbitration aims to reach a fair resolution of a conflict outside of court, saving time and money.

Understanding Online Dispute Resolution

"Online Dispute Resolution" ("ODR") is a technique that combines technology and alternative dispute resolution ("ADR") procedures to resolve conflicts outside of the courtroom. ODR refers to online conflicts started in cyberspace but resolved with a source outside of it, i.e., offline. Originally designed as an alternative to going to court for many disputes, arbitration has evolved into a complex and costly process. Many industries, particularly those with a high number of low-value cases, can benefit from ODR since it is a speedier, more transparent, and more accessible way to handle disputes online.

ODR is an online version of ADR in which problems are resolved through negotiation, mediation, or arbitration.

In the last few years, the number of online conflicts has risen dramatically, and using informal means to settle a conflict is no longer acceptable. When such disputes occur on a large scale, it is necessary to determine whether adequate standards, legal statutes, and governing bodies exist to regulate or resolve the disputes.

The number of conflicts in cyberspace will continue to rise as the scope of cyberspace interactions expands. The approach to conflict resolution is also crucial because it depends on the context of the conflict and how it can be

resolved. People can access and engage in the virtual world regardless of where they are or who they are, so artistic and commercial practices increase in cyberspace as the virtual world overcomes physical barriers. [11]

In "**April 1994, the Federal Trade Commission"** filed the first Internet fraud lawsuit, which resulted in the first spam case**.**[12] ODR was established with the assistance of the "***United Nations Commission on International Trade Law"*** ("UNCITRAL"). It contains all of the necessary documents, ties, and reports for national and international schemes. It has defined the guidelines for using online ADR. "**The National Centre for Technology and Dispute Resolution,"** founded in 1998, is another organization working on ODR.[13] Over the last decade, the ODR has increased in popularity, emphasizing resolving e-commerce business disputes. As a result of the advancement of ODR, the following forms of online dispute resolution are now available: Assisted Negotiation and Online Mediation.

ADR and ODR: Need of the Hour

The world is in the grip of a pandemic, and the following years will be anything but ordinary. The current state of affairs is dreadful since social isolation and lockdown are the only options for combating Covid-19's proliferation.

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[11] "*ibid*"

[12] "Katsh, Ethan, 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace', (2007) 21.2 International Review of Law, Computers & Technology 97"

[13] "Blake S, Browne J and Sime S, *A Practical Approach to Alternative Dispute Resolution* (1st Edition Oxford University Press 2011)."

The administration of justice in India has a long history of being delayed, and the coronavirus has only added to the problem. Despite the Supreme Court's approval of online filing and hearings, the judiciary is overburdened and overworked due to enormous filings. An innovative and effective alternative is necessary to relieve the strain on the courts, and "***Online Dispute Resolution***" may be the answer.

However, as the world's judicial systems became increasingly overburdened, there was a strong need for an alternative dispute resolution mechanism. As a result, alternate conflict resolution mechanisms have been developed all over the world. The need for this process emerged because alternative dispute resolution is a quicker and more effective form of resolving disputes.

ADR refers to *"methods by which a society with a formal, state-sponsored adjudicative procedure avoids, manages, and resolves conflicts without utilizing that process."*[14] In general, the phrase refers to any dispute-resolution technique to minimize the cost and time of litigation, reduce court congestion, offering a *more "effective"* or constructive resolution between disputants, increasing community engagement in the process of resolving conflicts, and enabling access to justice.

Benefits of Alternate Dispute Redressal:

[14] "Dr.Petikam.Sailaja, *Alternate Dispute Resolution: The need of the hour*, avaliable at: http://ijlljs.in/wp-content/uploads/2016/04/4.pdf , (last accessed on 26th May 2021)"

1. Less time-consuming: As compared to trials, individuals solve their disagreements in less time.
2. Cost-effective method: going through the arbitration process saves a lot of money.
3. It is free of judicial procedures, and informal means of resolving conflicts are employed.
4. Neither party is afraid of legal ramifications for expressing oneself. They don't have to tell the truth to a judge.
5. Efficient method: When parties confront their issues in the same venue, there is always the prospect of restoring a relationship.
6. It prevents more conflict and protects the parties' positive connection.
7. It looks out for the best interests of the parties.

Henceforth, the ADR mechanism is often voluntary, informal, confidential, quick, and affordable to promote these aims. They tend to de-emphasize the adversarial approach by encouraging party engagement, discouraging lawyer and court engagement, and applying substantive law.

ADR mechanism in India

To begin with, there is a precise legislative and regulatory mechanism in place in India for alternative dispute resolution. However, there has been a significant development in recent decades, especially in the last decade, which has been pushed and pulled by popular demand and desire to use ADR as a method of conflict resolution. The growing culture of settlement, especially outside of court, has fuelled demand all over the world. The whole concept is arguably founded on the current lack of infrastructure in judicial adjudication and an

inadequate regulatory system to compensate for the overwhelmingly negative consequences.

Some ADR phrases and implementations can be found in the family law and labor law systems. In "***Salem Bar Association v Union of India,"*** the supreme court developed the most prominent formal structure for ADR. Furthermore, in its report titled "*Need for Justice-Dispensation by ADR and Other Means*," the **Government of India's Law Commission** made several recommendations.[15] Finally, India has a fantastic opportunity to align its ADR program with the core principles of international dispute settlement.

Although there is no ADR law in India, the courts accept it in the field of arbitration. "**The Indian Arbitration Act of 1940"** was the first act passed, but it was no use. The show did not provide any provisions for resolving disputes between Indian and non-Indian companies, and the resolution of disputes was also delayed. In such a crisis, India has implemented numerous reforms, including enacting the "**Arbitration and Conciliation Act of 1996"** to address this problem. India has adopted the "**United Nations Commission on International Trade Law"** to reduce the role of the courts in the arbitration process. However, it still lacks the primary forms of alternative dispute resolution.[16]

ADR plays a significant role in India by using various approaches to deal with cases pending in Indian courts.

[15] "Government of India Law Commission Report No. 222 (2009)."

[16] "K Ramkrishnan, 'Scope of Alternative Dispute Resolution in India' (2005) 1 JV 1."

The Indian judiciary receives scientifically proven strategies through the Alternative Dispute Resolution process, which helps to reduce the pressure on the courts. Arbitration, conciliation, mediation, consultation, and Lok Adalat are all forms of alternative dispute resolution. Negotiation refers to self-counseling between the parties to settle a conflict, but it is not recognized by law in India.

*"It is well established that free legal aid to indigent persons who are unable to defend themselves in a court of law is a constitutional mandate under '**Articles 39 A**[17] **and 21'**[18] of the Indian Constitution". "**Article 21** guarantees the right to life*."[19] The law must assist the poor who lack means, i.e., economic means, to fight their causes.

People's justice is at the heart of good governance. As a result, our Constitution emphasizes three aspects: economic justice, political justice, and social justice. This necessitates a cutting-edge dissemination infrastructure and human resources; it requires new judicial technology and models, necessitating remedy-oriented jurisprudence.[20]

[17] "Article 39 (A) provides Free legal aid to the citizens is a Directive Principle of State Policy."
[18] "Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty, except according to procedure established by law."
[19] "*ibid*"
[20] "Justice P.N.Bhagawati: 'Social Justice - Equal Justice', p.33."

Significant legal provisions associated with ADR in India-

- People have a right under "**Section 89 of the Civil Procedure Code, 1908"**. Suppose it appears to the court that there are elements of a settlement outside the court. In that case, the court formulates the proposed settlement terms and refers it to Arbitration, Conciliation, Mediation, or Lok Adalat.[21]
- **The 1996 Arbitration and Conciliation Act** also has provisions for conciliation in mutual disputes arising from legal relationships. Arbitration and conciliation are the most widely used ADR procedures. The parties to commercial contracts almost always have an arbitration provision that refers their disagreement or disagreements to an arbitral tribunal for resolution.[22]
- Another field of law where ADR has been accepted in India is family law. The Government is expected to work with social welfare organizations to resolve a family dispute and find a peaceful solution by negotiation **"under section 5 of the Family Courts Act, 1984".**
- **The Legal Services Authority Act of 1987** is another statute that emphasizes the value of alternative dispute resolution. This act has recognized a new way of settling disputes in India, namely Lok Adalats. "**The State**

[21] "Inserted by the Code of Civil Procedure (Amendment) Act, 1999."
[22] "SC Tripathi, *The Arbitration and Conciliation Act 1996* (5th Edition Central Law Publication 2010)."

Authority, under section 7", "**The District Authority under section 10"**, and "**The Taluka Legal Services Committee, under section 11B of the Act"**, will administer the Lok Adalat's.

Recognition of the Potential of Online Dispute Resolution in India

ODR is still in its early stages in India, but it is only a matter of time before it is widely adopted. The electronic form of conflict resolution tries to provide previously unattainable possibilities, such as the simultaneous virtual presence of all parties without the necessity for human attendance at a specific location and time. With 4.5 million cases outstanding in high courts, 31 million cases pending in district courts, and 350,000 backlogs in the top five central tribunals, we need more and more ODR systems to assist us.[23]

In other cases, the courts have even acknowledged the need of having ODR systems in place across the board. According to **Justice Ramana**, alternative dispute resolution (ADR) may be utilized to successfully address

[23] "Karan Singh, "*Online Dispute Resolution (ODR): A Positive Contrivance To Justice Post Covid- 19",* available at: https://www.mondaq.com/india/arbitration-dispute-resolution/935022/online-dispute-resolution-odr-a-positive-contrivance-to-justice-post-covid-19 (last accessed on 26th May 2021)."

consumer, family, business, and commercial problems...[24] He noted the need to limit paper consumption, which has long been a component of the system. Initially, the method relied on the e-filing of digital print books rather than hard copies.

In India, the discussion about establishing a formal ODR system has already begun. In 2019, the Nilekani panel advised implementing online dispute resolution procedures to resolve digital payment problems.[25]

At a stakeholders' meeting titled *"Catalyzing Online Dispute Settlement in India,"* "**Justice Indu Malhotra"** spoke on the advantages of ODR as a quick and cost-effective alternative for dispute resolution**.***"*[26] organized by NITI Aayog. She noted its potential for commercial disputes, particularly those involving Micro, Small, and Medium Enterprises, as well as those involving the "**Insolvency and Bankruptcy Code of 2016"**. At the same conference, "Justice D.Y. Chandrachud" emphasized the value of ODR as a tool for gaining justice and thereby leveraging technology to foster a feeling of fairness. He also suggested that ODR might aid in the

[24] "Justice N.V. Ramana, Delay reduction at different tiers of the court system, pre-trial settlement (use of conciliation procedures for dispute resolution) – The experience of the Supreme Courts of Shanghai Cooperation Organization (SCO) countries."

[25] "Nandan Nilekani and others, 'Report of the High-Level Committee on Deepening of Digital Payments' (2019) 97 last accessed on 26th May 2021".

[26] "NITI Aayog, 'Catalyzing Online Dispute Resolution in India' (12 June 2020), available at: https://niti.gove.in/catalyzing-online-dispute-resolution-india, (last accessed on 26st May 2021)"

containment and avoidance of disputes. Furthermore, while discussing the nationwide implementation of ODR**, "Justice Sanjay Kishan Kaul"** acknowledged the potential of ODR to address COVID-19 pandemic-related conflicts as well as other personal and commercial disputes.

In another **NITI Aayog** stakeholder meeting titled *'Unlocking Online Dispute Resolution to Enhance the Ease of Doing Business,'*[27] **Justice (Retd.) B.N. Srikrishna** stated that ODR systems would prevent court cluttering by resolving a large number of disputes.

Even dispute resolution centers that have traditionally provided ADR services have expressed an interest in expanding their modes to include ODR processes. For example,

a) The "**Indian Institute of Arbitration and Mediation"** has developed *"an ODR platform called Peacegate, which aims to integrate all aspects of ADR, ranging from filing to back-office support*."[28]

b) Since 2013, the "**Bangalore Mediation, Arbitration, and Conciliation"** Centre have provided online arbitration, conciliation, and mediation services.

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[27] "NITI Aayog, 'Unlocking Online Dispute Resolution to Enhance the Ease of Doing Business' (8 August 2020), available at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1644465 ,(last accessed on 26th May 2021)".

[28] "IIAM, 'PeaceGate App', available at: PeaceGate App (arbitrationindia.com) , (last accessed on 26th May 2021)."

c) The "**Mumbai Centre for International Arbitration"** provides video conferencing services to allow online arbitration proceedings.

(d) In 2020, "**The Delhi Dispute Resolution Society"** will launch a new initiative called SEHMATI, which will focus solely on ODR.[29]

Judicial Precedents catalyzing ODR mechanisms in India

The Apex Court of India played a critical role in laying the groundwork for implementing ODR in the country. The case of "***State of Maharashtra v Praful Desai"***[30] upheld the validity of video conferencing as a mode of taking evidence and witness testimony. It went on to call 'virtual reality the actual reality'. In "***Grid Corporation of Orissa Ltd. v AES Corporation"***[31], the court decided that if electronic media and distant conferencing could accomplish consultation, persons didn't have to sit together in the same physical area. Similarly, in the case of "***M/S Meters And Instruments Pvt. Ltd. vs. Kanchan Mehta"***[32], it was noticed that there was a need to explore categories of cases that can be partially or wholly finished "online" without the actual presence of the parties and

[29] "DDRS, 'Sehmati', available at: sehmati.org , (last accessed on 26th May 2021)."
[30] "State of Maharashtra v Praful Desai (2003) 4 SCC 601."
[31] "Grid Corporation of Orissa Ltd. v AES Corporation (2002) 7 SCC 736."
[32] "M/s Meters and Instrument Private Limited v Kanchan Mehta 2017(4) RCR (Criminal) 476."

advised the settlement of fundamental issues such as traffic challans and check to bounce.

Furthermore, in "***Shakti Bhog v Kola Shipping"***[33] and "***Trimex International v Vedanta Aluminium Ltd,"***[34] the court recognized the legality of online arbitration. In all of these cases, the court determined that an online arbitration agreement is legitimate if it complies with **Sections 4** and **5** of the "**Information Technology Act" ("IT Act"), 2008**, as well *as* ***"Section 65B** of the **Indian Evidence Act, 1872,** and the requirements of the **Arbitration and Conciliation Act, 1996**"*. The concurrent trend to incorporate technology in dispute resolution and dependence on ADR methods indicates that India is preparing to migrate to ODR rationally.

Analysis of ADR mechanism in the United Kingdom (UK)

The **Civil Procedure Rules of 1999** were enacted as a result of the **Woolf Reforms (CPR**). However, the ADR process was introduced and standardized into the UK legal system in 2006. The CPR expressly states that "*the courts believe that litigation should be a last resort."* [35]

'*Mediation frequently succeeds where prior efforts to settle have failed*,' Lord Justice Dayson wrote in the "***Appeal decision in Halsey v Milton Keynes General***

[33] "Shakti Bhog v Kola Shipping (2009) 2 SCC 134."
[34] "Trimex International v Vedanta Aluminum Ltd 2010(1) SCALE574."
[35] "Moss P and Oddy A, *Alternative Dispute Resolution in Practice* (The Insurance Institute of London 2011)."

NHS Trust"[36]. Lord Justice Jackson's Analysis of Civil Litigation Costs: Final Report, published in January 2010, emphasized the importance of ADR in the civil justice system.[37]

In the civil justice scheme, the ADR system has many benefits. In the UK landscape, the development of ADR has seen conflicts resolved by mediation, arbitration, and conciliation, and the courts are not overburdened with proceedings. Only certain situations in which the conditions for resolving disputes by the ADR process cannot be met are brought before the courts. ADR is used in any case in the UK, and it is a requirement under the CPR to use it if the conflict can be settled by it.

The CPR has established stringent rules known as pre-action protocols, emphasizing that it must be done as a last resort for resolving the dispute if a dispute occurs and is being litigated. There are currently ten protocols that guide the conflict resolution requirements. Where there are no protocols, Pre-Action Conduct outlines the steps that the parties can take to settle the conflict before the proceedings begin. Before going to court, the parties must observe a protocol outlined in this Pre-Action behaviour.[38]

Even after the case has started, they must complete an allocation questionnaire. The parties and their legal representatives must confirm in person what actions have been made to resolve the issue through other means. The

[36] "Halsey-v-Milton-Keynes-General-NHS-Trust.pdf (lexiswebinars.co.uk), last accessed on 26th May, 2021."
[37] "*id at* 44"
[38] "*ibid*"

legal counsel has informed their clients about the necessity to settle by alternative ways and the alternatives and opportunities accessible. The parties may use alternative dispute resolution (ADR) at this point of the process, and the court may order a one-month stay if it finds it necessary.[39] This is how the CPR allows the parties to a dispute to use an alternative dispute resolution (ADR) process so that they have a better understanding of the essence of the dispute and the alternative means to resolve it; if they do not use the alternative means, the legal costs and other considerations relevant to it must be considered. The Solicitors' Professional Conduct in the United Kingdom has made it mandatory for solicitors to advise their clients of alternate dispute resolution options. They should notify their clients about the various ADR options available to them for resolving their disputes.

ODR mechanisms in The United Kingdom

Over the last decade, "**Information and Communication Technology** (ICT)" in online dispute resolution has grown significantly. The "**Internet of Things"** (IoT) has a lot to offer to resolve minor conflicts online. People now use email instead of letters, and using a laptop to purchase anything from necessities to luxury products is available thanks to ICT. ICT can be used to supplement current ADR mechanisms like mediation. Online Dispute Resolution is the process of resolving disputes through the internet. Three causes have fuelled the growth of ODR. Firstly, there is an increasing need for speedy and low-cost conflict settlement techniques. Second, ODR helps settle minor conflicts. In this case, a consumer-to-consumer disagreement can be resolved

[39] "*ibid*"

electronically, and a buyer-to-consumer dispute can also be determined online. Third, it can be advantageous when the parties are separated by distance and are unable to meet. In this instance, ODR may be pretty beneficial, and the disagreement may be handled online.[40]

The Mediation Room in the United Kingdom has the technology to enable all types of disputes to be resolved electronically. They sell licenses for their software as well as other required tools. They also offer ODR training as well as mediators from their panel. Many applications of information and communication technology (ICT) have emerged in relation to ADR online. Similarly, the Bar Council of the United Kingdom has released an article to assist those who wish to hold meetings online.[41] The ODR system has been officially released on the internet and is being used by the public.

Comparative overview of ADR and ODR mechanisms in India and United Kingdom

In India, ADR and the ODR mechanism are new concepts. Judges and lawyers are unfamiliar with the process, and this lack of understanding limits its use. "***Section 89* C.P.C**." could be incompatible with the provisions given in this section, and the courts are searching for a legislative structure with guidelines for an ODR mechanism.

[40] "Blake S, Browne J and Sime S, *A Practical Approach to Alternative Dispute Resolution* (1st Edition Oxford University Press 2011)"
[41] "Brown HJ and Marriott A, *ADR Principles and Practice* (Sweet & Maxwell 2011)"

The lack of a court impact evaluation mechanism, the low compensation of attorneys who choose mediation, and litigants' inexperience of the ADR procedure are significant roadblocks to ADR. Lawyers see their short-term interest in settling conflicts by litigation and avoid using ADR approaches that are inexpensive and outside the courtroom. The problem exists on two levels: alternative dispute resolution (ADR) in particular legal disputes and ADR as a national mechanism for conflict resolution.[42]

The ADR mechanism in India lacks legal protection; it lacks a legal statute relating to ADR. The approval of ADR under the CPC lacks the support of the judiciary and lawyers. The general public is unaware of such a mechanism. However, India has a Lok Adalat scheme similar to a people's court where people can settle their conflicts by communication rather than hiring lawyers and resolving the dispute themselves. On the other hand, Lok Adalat is for minor cases and includes a small amount of money or problems. People are also unaware of the shortage of facilities in Lok Adalat. While India's laws have been processed, they are still fragmented, and they need to be regularised so that they can be put to good use. In the case of ODR, India, on the other hand, lacks legal structure.

The use of ADR may not be necessary for the United Kingdom under the CPR 1999, but it is required at the outset. When writing a letter to the defendant, the complainant must specify the type of ADR that is appropriate for resolving the dispute; if the defendant agrees, the dispute is resolved by ADR; if not, he may

[42] "ibid"

recommend another method of ADR for resolving the dispute; if he says no, a justification for the refusal to ADR must be given.

Furthermore, solicitors and barristers are bound by a code of ethics that requires them to warn their clients about ADR and to clarify it in person in court if the case proceeds to trial. In addition, the court investigates the reason for the non-acceptance of ADR to resolve the conflict, and if the cause is not sufficient, the court can criticize the decision. However, a party may use ADR during the trial, and the court may place the proceedings on hold.

In the United Kingdom, the ADR system is prevalent, and it is observed that people resolve their issues via ADR. The online dispute resolution (ODR) system is well-established, and people use it to resolve their disputes. However, the mechanism is not yet wholly established to settle all types of disputes.

ADR regulations govern the National Centre for Technology and Dispute Resolution's procedures and services[43]; the difference is that although ADR provides it on paper, ODR is attempting to offer it by electronic and communications technology. If ODR continues to evolve at its current rate, many conflicts between people in various parts of the world can be resolved online via this Online Dispute Resolution mechanism. In contrast to the United Kingdom, India lacks legal statutes. The use of

[43] "National Centre for Technology and Dispute Resolution, available at: http://odr.info/mission/ , (last accessed on 26th May 2021.)"

ADR is even more mandatory in the UK than in India due to the encouragement of the judiciary and lawyers.

In the United Kingdom, ADR is integrated into the legal system, and strict adherence to the guidance helps encourage ADR to settle conflicts. The legal education system in the United Kingdom is much more advanced because it teaches students how to mediate disputes in school, while in India, legal studies are based on the "**Arbitration and Conciliation Act 1996"**, which is now obsolete and needs to be revised because it does not cover all aspects of ADR.

Furthermore, India lacks the same legal structure as the United Kingdom. In the United Kingdom, the claimant will send a letter to the defendant with a form of ADR that the claimant wishes to settle the dispute with; if ADR does not resolve the dispute, the court will ask why the dispute is rejected ADR process during the questionnaire. This practice is not practiced in India, which leads lawyers to prefer litigation to alternative dispute resolution.

Conclusion

The future is global, and "**Alternate Dispute Resolution**" has evolved into a worldwide idea that has aided in resolving various international conflicts between parties. When we talk about Alternate Conflict Settlement being a worldwide notion, we should also consider the benefits that "**Online Dispute Resolution"** offers in making the entire dispute resolution process more accessible and practical from a global viewpoint. If India and Indians, in general, become aware of these ways of Online Dispute Resolution, even if just as a result of the current COVID-

19 shutdown scenario, such a presence will ultimately make its mark on society as a whole. As individuals get more familiar with Online Dispute Resolution methods, it may be helpful in both the general public and Indian courts. Online Dispute Resolution is the way of the future, and encouraging its usage during the lockdown period will significantly influence the judicial system after the lockdown. One of the critical reasons why Online Dispute Resolution is not a favoured platform is because individuals are not content until and until their conflicts are resolved in court, and their cases are heard. Such a mindset will have to evolve gradually. Another issue is that individuals are unaware of the numerous benefits of the various ADR and ODR processes. If such methods are encouraged, a significant amount of burden can be moved from Indian courts to ODR processes. In India, these methods are not regarded as successful as courts. People should become accustomed to using them because it will benefit these systems and the Indian judicial system. As a result, it is correct to state that Online Dispute Resolution is a feature that should be prioritized in the current situation and considered a general-purpose method for the future.

Moreover, law students should be taught about the ADR process in the same way as students in the United Kingdom are taught about the dispute resolution program in school. Students may pursue their interest in the ADR process while learning and choose to become a mediator, negotiator, or conciliator. This process would aid in the dissemination of information about India's ADR scheme.

Future research should focus on how an ADR framework can be effectively implemented in India. Every district should provide a mediation centres for conflicts that can

be settled outside the courtroom. If the judiciary approves a new case, ADR should be offered as a choice, and the client should be told about it so that he or she can choose an alternate method of resolution.

Furthermore, pending cases in India should be permitted to turn to the ADR system between trials. The burden on courts will initially be relieved as a result of this. If it has a large-scale effect and adopts the guidelines implemented in the UK, ADR is the most outstanding alternative for lessening the strain on Indian courts.

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CHAPTER - XI

Online Dispute Resolution Need of the hour

Author's Profile

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Online Dispute Resolution (ODR) – An Introduction

The world today can be viewed as a "Global village". Technologies have brought people together across the globe in integrating different economies and societies making the world very small. The advancement of this global village has been accelerated due to various changes that took place internationally due to the introduction of UNCITRAL rules in the areas of international commercial transactions and trade[1]. The emergence of **ICT (Information and Communication Technology)** and its proliferation and advancement has had a tremendous impact in all regions of the globe in diverse socio-legal, economic, cultural and political fora. ICTs are fundamentally changing institutions in every country including in the sphere of ADR (Alternative Dispute Resolution) where we have witnessed an emerging trend in online dispute management or dispute redressal systems. When ICT or Online Technology is applied to Alternative Dispute Resolution, it is called an

ODR or Online Dispute Resolution. Hence it is pertinent to know how this revolution in technology has altered the standard of human relationships and interactions and their conduct of dispute management and resolution.

The acceleration of change, increasing complexity of relationships and transactions and lower costs of online accessibility are all characterized by the potential for disputes and in response, there is a growing need for different kinds of creative technology including IT-assisted dispute resolution processes. The rapid growth in cyberspace, deployment of new technologies, increased speed and mobility, decreasing costs, free access, communication tools such as texting, electronic mail, message posting, electronic discussion groups, web-based conferencing, video conferencing have facilitated people to virtually communicate from any place across the world. According to J.Naisbit "instantaneous global communications have given us a window on the world through which can be seen both the wonder of it all and the things that make us wonder about it all."[2]

The application of these new means of telecommunications, information processing and data storage have facilitated online interactions and e-commerce and m-commerce transactions that take a mere fraction of a second to be completed. This requires virtual, efficient and adequate systems of dispute resolution that addresses a range of possible disputes, and promotes trust and confidence in doing business online. The utilization of ICT is more prominently seen in e-governance (Electronic-Governance) which enhances the speed, access, service, transparency etc., to benefit citizens, business partners and employees. One government service in particular that has much to gain from e-governance is the court service, because courts in most

jurisdictions continue to have backlogs and delays. With the application of ICT into administration of justice the quality of the output can be improved significantly, for example, in streamlining and automating information practices such as court documents, and court procedures such as scheduling, posting etc., In other words we can say ICT has influenced the judicial system so much that we can say that "reengineering of delivery of justice" has become more viable.

Negotiation, Mediation, Arbitration are the modes of ADR that are part of ODR. ODR in redressing consumer disputes has become very popular especially in USA and European Union (EU). In 2014, the American Bar Foundation's Rebecca Sandefur released a major research report, "Accessing Justice in the Contemporary USA,"[3]that describes how middle-class and low-income clients, despite having increasing legal needs and high level of trust in lawyers and courts, are nevertheless side-stepping lawyers and finding other ways to resolve disputes.

Recently the legal profession has begun to accept the notion that the traditional mode of expensive legal fees and the courts is not the only way to resolve disputes, that online tools can play a significant role and moreover, that the legal profession can embrace these tools. The lawyer who is familiar with online tools and techniques that can be deployed for the benefit of his or her clients will be able to offer more services to more clients. As an additional benefit, the lawyer will be able to leverage time and accomplish more because the technological tools will perform some parts of the job previously done manually by the lawyer.[4]

The most well-known book on dispute resolution, "Getting to Yes" by Roger Fisher and William Ury, published in 1981, stressed the need for a new approach to dispute resolution, because "conflict is a growth industry" and courts are inadequate and inefficient in responding to disputes.[5] The year 1981 was also important in the area of technology as IBM (International Business Machines) introduced the PC (Personal Computer), which became the most important contributor to the growth of computers. If we consider ADR has contributed to moving dispute resolution out of courts, the PC contributed to moving technology into the home, the workplace and indeed every possible place. This in turn has contributed to economic growth and as mentioned above, conflict becoming a growth industry generating a need for new approaches to dispute resolution.

ODR Definition:

There are a number of definitions of Online Dispute Resolution.

Online dispute resolution refers to the settlement of disputes in an electronic environment using information technology.[6]

"Online Dispute Resolution is Information and Communication Technology (ICT) or Online Technology applied to Alternative Dispute Resolution".[7]

"ODR grows its main themes and concepts from Alternative Dispute Resolution (ADR) processes such as negotiation, mediation and Arbitration. ODR uses the opportunities provided by the Internet not only to employ the processes in the online environment, but also enhance

these processes when they are used to resolve the conflicts in the offline environment". – Katsh / Rifkin.[8]

Besides the above definitions, there are some alternative terms and acronyms which can be used: Internet Dispute Resolution (IDR), Electronic Dispute Resolution (EDR), Electronic ADR (e-ADR), Online ADR(O-ADR).

What is ODR?

From the above definitions, we can see that an Alternative Dispute resolution method is considered as online one when it is conducted in total or at least in its largest part by using the Internet and electronic means in general. ODR thus includes all methods used to resolve disputes, which are conducted mainly through the use of Information and Communication Technology (ICT).

Technology is transforming the landscape of the dispute world. As noted above, conflict resolution is a growth industry. Consumers may face problems with transactions, citizens may be concerned about preserving their identity, businesses may face threats to their reputations, social networks can foster anti-social behavior, governments may struggle with security, patients encounter new health care choices and every one experiences imperfectly functioning websites. The merger of the physical world with the virtual world has resulted in novel complex, unique transactions, giving rise to the need for newer dispute resolution and prevention process.[9]

Evolution of ODR:

It can be argued that Online Dispute resolution is nothing but implementing ADR methods using the Internet. The

assistance of ICT (or Internet) has been named by Katish and Rifkin as the "fourth party". Thus, in addition to the two disputing parties and third neutral party (arbitrator, mediator etc.,) there is now a 'fourth party' in this process, which is technology. In other words, the fourth party (Internet or ICT) is used by the neutral third party as a tool for assisting the process.[10]

The internet has had an impact on many areas of public life, including law. Its expansion has caused computerization of certain areas of law like administration of the legal framework in certain areas like non-compliance and intellectual property rights. The internet's global character has changed approaches with regard to access to information, impacting on copyright and press law. The absence of territorial limitations has made countries realize that the provisions in the area of private international law may be outdated, requiring reform. So it can be seen that the dynamic growth of the internet in national and international commerce has created a need to look at the statutory frameworks. Moreover, new methods of communications have improved many areas of law including processes for out of court settlements of disputes, online dispute resolutions.

The publication of the first volume of the International Journal of Online Dispute Resolution marked a critical milestone in the evolution of ODR. Now, with the advent of comprehensive ODR schemes and service providers IJODR stands out as the first dedicated global forum for discussion, disputation and theory in the complex combination of the traditional and technically advanced modes of resolution. Nonetheless challenges remain. Even today in this technological era, some people deem ODR as a threat to the principles and values of ordinary

dispute resolution.[11]Rainey in his article entitled "Third Party Ethics in the age of Forth Party", outlines the profound nature of impact of technology on the ethics of third-party work and adds that such impact is not revolutionary but evolutionary. Technology may affect ethical considerations and also raises questions of confidentiality and self-determination.

As time passed has and ICT has paved its way deep into the society far beyond e-commerce, another more contemporary definition of ODR as 'Fourth party' has emerged. This definition of ODR includes the intelligent application of ICT to any one of the processes of ADR that make up the universe of the conflict engagement practice. Conflict engagement requires the facilitation of communication among the parties, assistance in the handling of information and data and managing group dynamics.[12]

The reasons why ICT has become an integral part of conflict engagement by the practitioners are:

- ICT opens new communication channels
- Offers new ways to handle information
- Creates new ways to manage group dynamics,

The Influence of "Fourth Party" or "Technology" on neutral third party:

The fourth-party influence can rightly be seen anytime a third party uses technology to communicate with or share information with parties. And every time a third party uses the 'fourth party' technology, there are ethical issues either raised or altered. These practitioners are expected to consider the customs, cultures, expectations and demands of the clients in the international scenario [13].

Part of the evolutionary program of technology involves the development of technology that is specifically designed for use in the practice of conflict engagement. There are applications and platforms designed for more general communication or information – handling purposes which have now been extended into the conflict resolution realm. To quote an example, commercial products like WebEx, ZOOM or Central Desktop were developed to enhance group work and communication across geographically dispersed groups but they are now being used for online ADR processes

Such use can cause ethical concerns. For example, if, in a process of mediation, a party says something to a mediator in a caucus, it is assumed to be 'confidential. But practically the very act of passing the information over an online communication channel is "publication". In such a situation fourth-party considerations are very important. There is hence a growing body of guidance related storage of information. For example, according to the New York State Bar an attorney may use an online storage system provided that attorney experiences care to ensure that confidential information will remain secure.[14]

Hence it is incumbent on the third-party to get educated about the realistic risks of data loss before using various tools and applications like Google docs, Google Drive, Amazon Cloud space which offer open applications and data storage and protection. A third-party is also required to constantly engage in self – development related to the use of technology before he presents himself to the public for competency. The challenge for the third parties is to seek opportunities to learn from colleagues, and to teach colleagues, in subjects related to ODR.

ODR in action:

As noted above, online dispute resolution constitutes an implementation of existing forms of ADR that enables its use on the internet in ODR. According to Lodder and Zeleznikow, ODR systems may be divided according to form such as whether synchronous or asynchronous communications are used. In the synchronous type, entities (parties) may communicate with each other in real time by using real-time messenger or through video conferencing. In the asynchronous form, the communication is not conducted at the same time but through E-mail. In first form of system the third party may use video meetings or online conversations (Chat) during which possibilities for dispute resolution are discussed and analyzed in real time. In the second form of system, the parties (disputants) agree to resolve, without the need to meet directly. Electronic arbitration, which refers to amicable proceedings conducted via the internet, may take either synchronous or asynchronous forms.

ODR and consumer Disputes:

The resolution of consumer disputes arising from commercial transactions by means of electronic communication is a common form of ODR techniques in practice. Online trading benefits consumers in providing more buying options, but may leave them with no remedies when disputes arise. Despite the concern, the proportion of consumers who participated in cross-border e-commerce increased 20% in 2004 to 45% in 2013, with the effect of increasing the number of complaints in this area.[15] The creation of a system that enables the conclusion of disputes between a consumer and trader using the same medium over which the purchase or sales transaction was made on the internet, is thus a logical extension of e-commerce.

E-commerce disputes are non-personal, so ODR techniques free from direct interactions can be seen as tools that allow effective dispute resolution. As a result, consumer disputes constituted have traditionally been the main focus of services provided by portals such as "Square Trade" and "Cyber Settle". Today certain disputes that arise on the basis of transactions made using the eBay portal are settled by external entities such as "Modria.com" or on autonomous systems created within eBay(eBay's resolution Centre).

ODR and E-governance:

The word e-governance involves "the use of technology to enhance the access to and delivery of government services to benefit citizens, business partners and employees"[16]. One particular government service of relevance here is "the court of services"[17]. This is because of the problems of backlogs and delays the courts across the globe have experienced and continue to experience. With the injection of Information and Communication Technology (ICT) into the administration of justice, efficiency in delivery of court services can be improved. This results in streamlining and improving the delivery of court services in the areas of automating and information practices. To be more specific, ICT may enhance practices such as distribution of court documents, the performance of court procedures and the management of the court in general. It can also result in reengineering the delivery of justice, i.e., finding new and more expeditious ways of dispute resolution in the area of litigation or ADR processes delivered online.

Though the use of ICT by governments to improve access to justice is on the rise, there is a 'digital divide' existing between developed and developing countries. This digital

divide may be reduced by the developing-countries adopting strategies like efficiency, transparency, accountability and public participation. Different e-government policies can be introduced which aim to transform internal management and administrative programs. These programs may use a variety of electronic channels to deliver custom centered services and transform the relationship of government within its ambit i.e., across its ministers, providing new information links.[18] The information links drive fundamental shifts in the way public services are delivered, establishing a two-way communication between government and citizens and supporting e-business.

Judges, for instance, can be equipped with supporting technologies that will allow them to access information quickly, make notes during the trials, and prepare their judgments. Court procedures are also being conducted virtually i.e., online. In a similar way, components of the justice system, such as court annexed ADR procedures can be carried out by administrative agencies in place of judges, and can also utilize the internet. The courts today have integrated case management systems, electronic databases, personal computers, network connections, electronic data interchange, video and audio-conferencing equipment. Some governments of advanced countries have gone a step further and tailored court resolution services to be carried out online. To quote an example the English courts are offering a service called “Money Claim Online”, for claimants located across the country accessing the provision remotely [19]. Entering a name online form is equivalent to signing a document and payments are made by debit or credit card. This service has proved to be very successful and “Money Claim” is now dealing with more claims than local courts in UK.[20]

ODR and Negotiation:

Today's technology has communication solutions which give negotiations a new electronic dimension. Orders for products and services worth of millions are conducted online between companies. Deals are made remotely without the parties ever having met. When disputes arise, the parties have a choice of synchronous and asynchronous ways to resolve them. Smart technology, advanced software and artificial intelligence are the tools of ICT.

Automated negotiation:

This process is commonly used to settle small monetary claims and may be referred to as 'blind bidding' services. There are two forms of automated negotiations, one is 'double blind bidding" which is a method for resolving simple monetary issues between two parties, the second one being "visual blind bidding", which can be applied to negotiations with any number of parties and issues.

Automated negotiation has proven to be successful in paying insurance claims, and in respect of commercial activities.

Assisted negotiation:

Here technology, which has a similar role to that of the mediator, assists the negotiation process for the disputant parties. The role of technology provides the parties with (evaluative) advice regarding formulating the agenda, identifying and assessing possible solutions and reaching an agreement.[21]

Online mediation:

Among the ADR methods that are used online, mediation is most frequently used form i.e., 74% of the ODR providers use online mediation.[22]

How it works: The typical model for the process of online mediation starts when an e-mail is sent to the parties, containing the basic information on proceedings. Meetings may be conducted via "Chat rooms" on virtual mode. These can be carried out separately with each party or simultaneously with all the parties. The use of video conferencing through platforms such as ZOOM has greatly enhanced this way of resolving disputes allowing or online negotiations to occur with the mediator present in real time. Online mediation enables new possibilities that were previously unavailable, such as simultaneous presence of many parties without personal attendance at a specific place and time thus potentially rendering the process more efficient than in-person variants, online mediation is not appropriate for all types of disputes. The internet tools may affect the rules of communication, undermine or diminish the human element and make mutual understanding more difficult. A lack of direct contact results in reduced personal dynamics in the overall process and may result in lack of will to settle it amicably. Hence, it is important to build trust in mediators and the IT tools used by them, for an effective outcome.

Online Arbitration (Electronic Arbitration):

Online Arbitration is less popular than mediation, i.e., 40% only,[23] even though it is allowed on the basis of the convention on the "Recognition and Enforcement of Foreign Arbitral Awards" and directive on electronic commerce, 2000. The amended regulations of the United

Nations Commission on International Trade Law (UNCITRAL) entered into force on 15 August, 2010. These provisions also take into consideration the impact of the internet on the reality of conducting arbitration proceedings in the area of international trade.

Internet domains are potent areas which can be subjected to online arbitration. The most important organization that settles these types of disputes in Europe is "World Intellectual Property Organization Arbitration and Mediation Centre", which was established in 1994 and has conducted electronic arbitration proceedings since 2010. A complaint is submitted through electronic means, and is confirmed by feedback sent by WIPO. A formal examination of the complaint is then carried out including with regard to paying the relevant fee, dependent on the number of domain names included in the complaint and types of panelist (a compliant compliance review) – for up to three days. If there are deficiencies, the complainant must remove them within five days. After confirmation of the correctness of the compliant, the relevant procedure starts in the form of formal administrative proceedings – about which the other party is informed via electronic means of communication. Within 20 days the aggrieved party can submit a response. If this is not submitted, the panel dealing with the dispute will make a decision based on the evidence provided by the complainant. After a 20 days response period, the center will appoint a list of members of an administrative panel, consisting of one or three people. The panel will send its decision on the complaint within 14 days to the center, which then delivers the decision to the parties, the registrar and ICANN ("The Internet Corporation for Assigned Names and Numbers"), the institution responsible for granting the names of internet domains. Within ten days after a decision is made the registrar will transfer the domain

name, in accordance with article 4(k) of UDRP, ("Uniform Domain Name Dispute Resolution Policy") which was adopted by ICANN.

ODR and Standards of Practice:

ICANN, the Internet Corporation for Assigned Names and Numbers – an institution responsible for granting the names of Internet domains - is a non-profit organization responsible for coordinating the maintenance and procedures of several databases related to the namespaces of the internet. It ensures the networks's stable and secure operation. ICANN's primary principles are to ensure the operational stability of the internet, to promote competition; to achieve broad representation of the global internet community, and to develop policies appropriate to its mission through consensus-based processes. ICANN adopted the Uniform Domain Name Dispute Resolution Policy (UDRP). This was set out in two documents.

- The uniform domain name dispute resolution policy, which consisted of a collection of substantive rules for resolving domain-name disputes.
- The rules for uniform domain name dispute resolution policy, which constituted the rules of procedure before arbitration courts.

The introduced rules related to specific domain addresses, such as .com, .org and .net being applicable in relation to entities that have unlawfully registered an Internet domain, endangering or infringing the rights to protection of trademarks of third parties. The UDRP sets the rules for concluding agreements on registration and administration of domains, including regulations that

oblige disputes to be settled amicably and then avoid problems involving the jurisdiction of courts.

Standards of Practice recommended by NCTDR:

The standards of practice are recommended by the Advisory committee of the National Centre for Technology and Dispute Resolution (NCTDR) which was founded in 1998 by University of Massachusetts professors of legal studies, Ethan Katish and Janet Rifkin. It supports and sustains the development of Information Technology applications, institutional resources, and theoretical and applied knowledge for better understanding and managing conflict. NCTDR believes in using networked information technology to leverage, expand and improved conflict management resources and expertise.

ODR Service Providers:

There are many online companies who are service providers in the ODR area as Modria.com, Resolve Now, Smart Settle, Square Trade, Ujaj, Private Judge, Rocket Layer etc., The list includes, the World Intellectual Property Organization (WIPO), American Arbitration Association (AAA), Consensus Mediation, Electronic Consumer Dispute Resolution (ECODIR), Chartered Institute of Arbitrations and International Chamber of Commerce etc.

ODR in India:

Globalization has been a significant reason for integrating economies and different countries across the world. It removed economic barriers and made the world a global market for trade. As the international commercial trade

has increased enormously, dispute redressal mechanisms also have changed. A shift has been made from litigation in general towards alternative dispute resolution methods. 'Disputes' are now a 'growth industry' and are increasing at a greater pace than ever before entailing even greater complexities due to their cross-border and cross-cultural nature.

ODR is in nascent stage in India and growing in prominence day by day. The enactment of Information Technology Act, 2000, Arbitration and Conciliation Act of 1996, which has incorporated the UNCITRAL model law has seen e-governance and e-commerce given a formal recognition in India legally.

The UNCITRAL rules are incorporated to the Arbitration and Conciliation Act of 1996 in 2015, by India. Online Dispute Resolution has not developed at the speed expected, though the Perry 4 Law Organization (P4LO) has been advocating the use of ODR in India since 2004. The Techno Legal Centre of Excellence for Online Dispute Resolution in India [TLCEODRI] has been present since 2012. The main objective of TLCEODRI is to promote and use ODR in India for various dispute resolution purposes. TLCEODRI has also drafted an "ODR clause" that parties may use in their agreements. TCLCEODRI has also launched a dedicated blog for "ODR training" along with an "ODR discussion form" – the first of their kind - where technological aspects can be discussed. TLCEODRI has also launched the first ever techno legal ODR portal of India that covers vast dispute resolution fields. This Portal is known as "Online Dispute Resolution and Cyber Administration Portal" of TLCEODRI where ODR is used to resolve disputes involving national and international stakeholders.

India has been witnessing an e-commerce boom and increased amounts of foreign direct investments (FDI). Hence an effective speedy online dispute redressal system should be adopted, to tackle international commercial arbitration disputes. Indian laws must also be suitably modified to accommodate an international platform for online dispute resolution.

The Supreme Court also approved and acknowledged the use of video-conferencing to record witness statements in State of Maharashtra vs Dr. Praful Desai[24] case. The apex court is in favor of technology. In its previous decision in 'Grid Corporation of Orissa Ltd., vs AES Corporation",[25] it was held that "when effective consultation can be achieved by resort to electronic media and remote conferencing it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties". In this case the contention was that the two arbitrators appointed by the parties should have met in person to appoint the third arbitrator.

Recently a site has been launched by the Govt. of India called "National Judicial Data Grid" [NJDG], a portal for public access. This grid will give the statistics, and the status of the cases pending in District Courts across the country. This 'e Court' project has now completed 95% of Phase-I. Laptops have also been provided to judicial officers. Case Information System (CIS) software has been developed and made available for deployment at all computerized courts. This has made available online, data in respect of over 3 crore cases. Single window for filling petitions and applications, training of judicial officers and courts staff in CIS software and video conferencing facilities in courts and jails has been provided for in Phase

II. This phase is also supposed to provide for e-filing of cases, e-payment of court fees, process service through e-mail and receipt of digitally signed copies of judgements. , Court libraries will be computerized and service delivery will be enhanced through cloud computing.

Phase II of the project will further aim at attaining the full coverage of case data of courts across the country with gradual shift to an auto pull mechanism to ensure smooth updation of data on NJDG.

The e-courts Integrated Mission Mode Project has been conceptualized on the basis of the "National Policy and Action Plan for Implementation of Information and Communication Technology in Indian Judiciary - 2005**",** by the "e-committee" of the Supreme Court of India. The Patron in Chief cum Ad-hoc Chairman of this committee is the Chief Justice of India. As part of the ongoing implementation of Phase II of the e-courts project, the government has decided to allocate a unique identification number to all judges in the country, to aid the Supreme Court in tracking their performance and making their judgements available on the National judicial Data Grid., The NJDG would consist of details such as the quality of judgments, number of adjournments allowed in different cases, time taken for delivery of judgments and case disposal rate.

Other measures are also in train. Looking at the benefits that ODR has to offer, the Supreme Court is considering setting up e-courts based on Singapore's model.[26]

Also, during the Covid-19 pandemic, the Supreme Court in Suo motu writ (civil) No.5/2020 passed comprehensive guidelines on 6thApril, 2020, for court functioning through video conferencing.

Conclusion and recommendations:

Information technologies are playing an important role by operating across geographical distances, processing and collecting data in novel ways, opening up opportunities, to lower costs and efficiently and effectively address problems. They are creating newer dispute resolution processes, relying on automation, and freeing dispute resolution from the shackles of the problems inherent in traditional methods.

The reason for replacement of ADR by ODR could be attributed to intelligent software that provides tools that were hitherto not available. The advantages of the applications of ODR tools for ADR include increased accessibility, low-cost, and speed of communication. These tools are useful for conducting automated negotiation, online mediation, and technology assisted arbitration.

Though originally ODR systems were developed for online disputes that arose in the context of online communities (e-commerce etc.), the goal today is to combine resolution with prevention. For example, eBay has not only provided solutions for repetitive types of conflicts, but also uncovered broad areas of conflict and managed to identify problems in advance and to structure information and services on its site, so that those difficulties do not recur. [27] Thus organizations such as eBay and Wikipedia have enhanced trust in their sites and improving their content and performance.

Over the years, ODR has gradually become accepted as part of ADR field, with its use, covering both offline and

online disputes. Legal practitioners have come to understand that software applications can enhance their skills and provide new opportunities, processes for effective and efficient intervention.[28]

Covid-19 has impacted the dispute resolution pace, often forcing parties to adopt either one or a combination of ADR methods in the context of rebuilding their business relationships, renegotiating contracts and dealing with such legal concepts as force-majeure and frustration and their interpretation according to local laws and their contractual obligations.

Despite the progress in India of late, in its report "ODR: The Future of Dispute Resolution in India", the Vidhi Centre, for Legal Policy has proposed for an urgent incorporation of an ODR network to propagate and create awareness and to build capacity by involving private players in the efforts of the Ministry of Law and Justice.

Other recommendations include those found in the recent, discussion paper entitled "Designing the Future of Dispute Resolution: The ODR Policy Plan for India", published by NITI Aayog along with Ministry of Finance and Ministry of Electronics and Information Technology[29].

Other potential models that could be adopted include Italian 'opt-out' model mediation, where the parties with their counsel are required to attend a mediation session at the pre-litigation stage. Later the parties can continue or any party can choose to quit (opt-out of) the proceedings. This model has proved to be successful in many countries and may also suit Indian requirements.[30]

Justice delayed is justice denied. The greater and effective use of technology is inevitable as Covid-19 has triggered digitization at a faster momentum, using ODR platforms with online courts and AI being the tools for the future administration of justice. At the time of writing (April 2021) ODR week 2021 is happening. This event seeks to explore the possibilities, opportunities and potential for the ODR ecosystem in India. It is now the right time for governments, courts, advocates, litigants and all other stakeholders to utilize the benefits of ODR to its fullest potential, not only during these pandemic times but also in the future.

[1] United Nations Commission on International Trade Law, a subsidiary body of UN General Assembly, established in 1966, to promote the progressive harmonization and unification of international trade law through conventions, model laws and instruments that address key areas of commerce and dispute resolution. Uncitral.un.org
[2] J.Naisbitt, Global Paradox, New York, William Morrow and company 1994, p.192
[3] Rebecca Sandefur, "Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study, 8th August,2014, www.americanbarfoundation.org
[4] Jeff Aresty, Daniel Raineg, Robin Page West: Expand your Practice with Online Dispute Resolution Technology, Vol. 32 No.1, January/February 2015, American Bar Association, https://www.jstor.org/stable/i24632511
[5] R. fisher and W.Ury, Getting to Yes, New York, Penguin Books, 1981, p.xvii
[6] Mirèze Philippe, "ODR Redress System for Consumer Disputes", International Journal of Online Dispute Resolution, Issue 1, 2014
[7] P Cortes, A European Legal Perspective on Consumer Online Dispute Resolution, (2009)15(4) Computer Telecommunications Law Review, pp 90-100
[8] E Katsh and J Rifkin, J "Online Dispute Resolution Resolving Conflicts in Cybersspace", San Francisco, Jossey-Bass,2001
[9] Orna Rabinovich, Ethan Katsh, "Digital Justice", International Journal of Online Dispute Resolution 2014 (I) 1
[10] Katish and Wing - "Ten Years of Online Dispute Resolution (ODR): Looking at the past and connecting the future" 38 (200 w U.Tol.L.Rev p.35) – something looks wrong with this reference
[11] Orna Rabinovich, Ethan Katsh, "Digital Justice", International Journal of Online Dispute Resolution 2014 (I) 1

[12] Daniel Rainey, Third-party ethics in the age of the Fourth Party", International Journal of Online Dispute Resolution 2014(1)1
[13] J.Podgers, 'Closing Act' : ABA Journal, January 2013, p.21
[14] New York State Bar Association Committee on Professional Ethics, opinion no: 842, Dated: 10/09/2010
[15] Karolina Mania, "International Comparative Jurisprudence, Volume 1, Issue 1, November 2015, p.76-86
[16] Deloitte and Touche, At the dawn of e-government: the citizen as customer, page 1, Deloitte Consulting, 2000, ISBN 1892383586, 9781892383587
[17] Susan Schiavetta, Online Dispute Resolution, E-Government and Overcoming the Digital Divide, BILETA, Apr,2005, Queen's University of Belfast
[18] Hisham Tahat, "Factors affecting e-commerce Contract of Law", 20th BILETA Conference, April 2005, Queen's University of Belfast
[19] For more detail on this scheme see Money Claim Online user guide - GOV.UK (www.gov.uk)
[20] For more detail on this scheme see Money Claim Online user guide - GOV.UK (www.gov.uk)
[21] Schultz, T; Kaufmann-Kohle, G; Langer, D; Bonnet,V, "Online Dispute Resolution: The state of the art and the issues", University of Geneva: Geneva, Switzerland, 2001, Available online: https://ssrn.com/abstract=899079
[22] Karolina Mania, "Online dispute resolution: The future of justice, International Comparative Jurisprudence, Volume1, Issue 1, November 2015, pages 76-86
[23] Karolina Mania, "Online dispute resolution: The future of justice, International Comparative Jurisprudence, Volume1, Issue 1, November 2015, pages 76-86
[24] (2003) 4 SCC 601
[25] 2003, 45 cc 601, 2002, AIR, (S.C) 3435
[26] Shalini Seetharam and Sumathi Chandrasekharan, "E-courts in India from Policy formation to Implementation", Vidhi Centre for Legal Policy, July-2016, www.vidhilegalpolicy.in
[27] Rabinovich – Einy and Katsh, 2012, Pages 169 to 175
[28] M.C.Tyler, "Online Dispute Resolutions: in M.MALKIA and A Anttiroiko (Eds), Encyclopedia of Digital Government, 2007 pp(1268 to 1274)
[29] Niti Aayog Expert Committee on ODR, Oct,2020, https://niti.gov.in/sites/default/files/2020-10/Draft-ODR-Report-NITI-Aayog-Committee.pdf
[30] Deepika Kinhar, Tarika Jain, Vaidehi Misra, Aditya Ranjan, "ODR: The future of Dispute Resolution in India", 28thJuly,2020, VidhiLegalpolicy.in

CHAPTER - XII

The shift from Alternative Dispute Resolution to Online Dispute Resolution

Author's Profile

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Abstract:

This chapter explores the shift from alternative dispute resolution (ADR) to online dispute resolution (ODR) in India. ADR has gained ground in India over the past few years as an alternative to litigation, yet despite demand it has not received the support required to be a success in India. The Covid pandemic brought about changes. Travel was restricted and many were confined to their homes. The Indian Supreme Court had to turn to virtual hearings to hear cases. Courts in India have a huge backlog of cases, which has further increased during the pandemic. This is where ADR came into picture previously as it had the capability to resolve disputes in a swift and cost effective manner. Due to the pandemic ADR has started taking place online. However, although ODR has the potential to be a success in future if it gains wider acceptance, it has not yet gained sufficient

recognition in India. This paper will explain what ODR is, explore the issues hindering its success and discuss what can be done to make it a genuine alternative to litigation in India.

Introduction

“Has the email been sent to both parties?”, “Have the parties joined the meeting?”,“Did the parties receive the meeting link?”,“Moderator, can you please see whether the parties have joined the meeting or not”,“Is any party waiting in the waiting room?”,“The parties are requested to keep their mikes on mute when they are not speaking”.

You may have heard these sentences used regularly in online meetings. The same phrases have been uttered by those participating in online dispute resolution (ODR) sessions. Due to the Covid-19 pandemic many people have been working from home. The use of ODR has been on rise since Covid came into picture, helping parties who did not want to delay proceedings to resolve their disputes.Such parties chose to proceed by participating in virtual hearings or other forms of technology-assisted dispute resolution, popularly known as ODR.

The more widespread the use of ODR and the more accessible and affordable the technology used, the greater the awareness that ODR processes are more user-friendly than had been feared. With potential technology issues overcome, ODR offers certain advantages overin-person dispute resolution and physical hearings.ODR is the future of dispute resolution. During the pandemic and after it ends, ODR will be at the forefront of dispute resolution.ODR is of particular value in India where

courts are overburdened and there is a huge backlog of cases.

Defining ODR

ODR is a process of resolving disputes using technology. In its simplest form it may only require an electronic device and a stable internet connection. ODR may be applied to various techniques of alternative dispute resolution (ADR) techniques such as mediation,conciliation, negotiation and arbitration.ODR can be used to resolve various disputes ranging from consumer, marital separation and child custody cases, to court disputes and conflicts involving different states or countries, such as conflicts involving India and Pakistan.

In ODR procedures that would be completed physically in an offline setting are undertaken online, such as the initial filing of the notice of dispute or other documentation commencing a claim, the appointment of neutrals, oral hearings and so on.ODR is also known as internet dispute resolution (iDR), electronic dispute resolution (eDR), electronic ADR(eADR), online ADR(oADR) and technology-assisted dispute resolution (tADR). ODR was born from the interaction between ADR and information and communication technology (ICT).

ODR typically involves both people and computers and software. ICT has been named by Katsh and Rifkin as the ‘fourth party’ in ODR.[1] The ‘fourth party’ may facilitate online meetings and even perform the role of moderators or organizers, performing tasks such as creating meeting links, sharing meeting links with the parties involved, blocking foul language, and making sure that only the people who are authorized to enter the meeting do so.

Time for change

It is an excellent time to reconsider dispute resolution and fully explore the best possible technological solutions.Covid-19 has necessitated a serious reconsideration and rethinking of every aspect of our lives. Courts and tribunals were unable to hold physical hearings during the lockdown due to the suspension of court proceedings and the need to protect public health. Indian courts had to rely on the internet and suitable technology to hear cases online while judges and parties sat in their homes. It did not make much of a difference as the courts functioned smoothly and the cases were heard with full attention, just as they would have been in an offline setting.

The most important lesson learned from the emergence of online courts in India is that the use of video conferencing can and should continue post-pandemic. It will not hamper or bring down the quality of justice being served by Indian courtsas long as any technological challenges presented by connectivity and court infrastructure can be overcome. On the contrary, it will help by saving time for parties who live far away and parties based abroad who cannot travel because of restrictions put in place by their respective countries. It will also assist parties who may be unable to travel due to ill health.

It is necessary to review the functioning of Indian courts and explore how technology can aid the courts in a broad and comprehensive way. One need not worry that judges will be replaced by computers or robots; instead technology will facilitate and help judges solve problems and make decisions. The use of technology in all aspects

of court procedures, from commencing claims to delivering judgments will become the new norm.

Experts believe that ODR will increasingly be in demand over the next few years, as more people start to take note of its potential and consider its applications. However, in India awareness of ODR is limited at present. Many do not yet know what ODR is. In order for ODR to gain widespread recognition in India the government and judiciary will have to be active, telling people about the importance of ODR, how it works and its benefits through awareness campaigns, webinars and seminars. The government must also ensure that any concerns that people may have about ODR, such as the potential for bias, data protection implications and privacy risks are fully eradicated. This will help to remove doubts regarding its use in the future. For example, the government can issue guidelines to be followed by ODR providers address key concerns such as fairness, data protection and confidentiality.

Startups offering ODR services

The growth of ODR has fueled the development of ODR providers. This part of the chapter explores five such providers.

1. Centre for Alternative Dispute Resolution Excellence (CADRE)

The CADRE "*specializes in providing services relating to peer to peer and small/low value disputes using simplified procedures …, a technology platform …and arbitrators trained and certified … in using the simplified*

procedures as well as the technology platform."[2]The prospective claimant will approach the CADRE, initiating the arbitration process, following which the other party is informed by the CADRE. If both parties wish to proceed via online arbitration then an arbitrator is appointed. The arbitrator will clearly convey that the result will be binding on both parties.

The CADRE will communicate with the parties by email and WhatsApp. The "*robust, internet enabled, device agnostic platform*" used by the CADRE"*is accessible from anywhere, anytime.*"[3]Implicitly, the parties are forbidden from meeting unless they have the consent of the CADRE or the arbitrator. The final award will be rendered within 15 working days of the start of the arbitration, extended by a further period not exceeding 15 working days in exceptional circumstances.[4]

2. Sama

Sama's objective is to resolve issues arising between landlords and tenants, businesses and customers, clients and professionals and employers and employees in an amicable manner that is convenient to the parties, "*fully online in a fast and effective manner*".[5] Sama offers arbitration, conciliation and mediation processes to assist parties seeking to resolve their disputes.[6]Sama is supported by partners including Trilegal and the Centre for Advanced Mediation Practice (CAMP).[7]

The conciliation process uses a combination of technology and a qualified conciliator. The parties may make offers to settle and share counteroffers, including exploring potential settlement terms in a chat room. The parties' agreement is drawn up by the conciliator.[8]Sama also offers fast track arbitration, allowing parties to

upload statements of claim and evidence. If a hearing is required, the arbitrator will convene a thirty-minute phone call or video conference. The reasoned award will be available on Sama's website and the parties notified of the decision by email.[9]

3. The Centre for Online Resolution of Disputes(CORD)

CORD's focus is on offering an online one-stop-shop for parties wishing to address their dispute resolution needs. Its *"[e]nd to end digital platform ensures* [the] *entire case is resolved digitally and remotely*".[10] Services include a virtual hearing room, offering additional optional services such as a video recording of the hearing, transcription, a stenographer and the assistance of a case manager to offer a seamless experience.[11]

CORD aims to facilitate "*fair, fast and accessible dispute resolution through a secure online platform, a bouquet of modular services and a panel of expert neutrals*."[12]The founders have sought to use their experience in ADR and technology to build a user-friendly platform with technical support available to enable the parties to focus on their dispute and offer 24-7 support for cases.

4. AGAMI

Agami commenced ODR activity in 2018, when it launched its ODR initiative to "*nurture the ODR*

ecosystem by accelerating ODR startups, creating demand amongst business, society and government, and unlocking resources of all types."[13] Agami has launched a number of initiatives including the Agami Prize, the Agami Summit and Agami Challenges to promote ODR in India.

Working with NITI Aayog and Omidyar Network India, on June 6, 2020 Agami facilitated a historic meeting of senior judges and representatives of government and business to explore ways in which ODR can be progressed in India.[14]On August 8, 2020 Agami co-organised a meeting ofprofessionals from the legal and business worlds to examine how ODR can be used to improve business proficiency in India.[15]

On April 10, 2021 Agami was one of the parties involved in the launch of the ODR Handbook, which aims to encouraged businesses to use ODR.[16]This was followed by ODR Week 2021, which explored a number of ODR opportunities for India.[17]

5. Presolv360

Presolv360, owned by Edgecraft Solutions Private Limited, an Indian company, provides a platform to resolve business conflicts at practically zero expense.[18] This is done by the amalgamation of technology, human skills and knowledge, and creativity ,to provide an enforceable outcome.

It focuses on conflict settlement, dispute management, dispute settlement, coordination and interaction, negotiation, impartial appraisal, mediation, arbitration

and litigation avoidance, using an integrated tech infrastructure, cloud-based solutions, and end-to-end dispute management software.[19]

Presolv360has employed appropriate safeguards to thwart unauthorized access to a party's personal information and documents and to sustain data security. Presolv360 uses encryption to secure sensitive data. Notwithstanding, emails and other electronic communication methods may not be encoded. .[20]

Mediation and Arbitration: the key players

Mediation is an old but effective mechanism for resolving a dispute. Due to its innate advantages, the significance and use of mediation has increased greatly in India. A lot of effort has been put in to make mediation global and holistic, and settlements produced at mediation binding and enforceable.

The Delhi High Court has dispatched its own online intervention venture to give intercession administrations. Moreover, individuals can utilize online intercession administration for new court reference, prelitigation/assuagement and pre – foundation intervention as vital under the Commercial Courts Act, 2015. Justice DY Chandrachud has laid accentuation on the job of private area in ODR. He likewise prescribed deliberate ODR by urging organizations to look for recourses to ODR innovation and making motivations for the equivalent. He further said that it is the obligation of the public authority to make an ideal environment which would encourage in making on the web intercession the most reasonable method of ODR. Notwithstanding

numerous missions and measures embraced by the public authority of India and the judiciary, mediation in India is as yet seen as being like litigation. Consequently, intervention is bound to be a suitable option in contrast to mediation and case later on.

The utilization of online stages for directing discretion has additionally acquired energy. The Delhi High Court in a direction note for leading on the web intervention under the Delhi International Arbitration Center Rules has given that hearings can be led via video conference. Strangely, it likewise given that a video clasp of oral contentions be shipped off authorities to guarantee that legal counsellors don't enjoy tedious contentions during VC hearing. For legal counsellors who don't have a VC office, they can send the video clasp of their contentions from their versatile through email or Instant Messenger Application like WhatsApp.

Advantages of ODR

More efficient pre-hearing preparation

The efficiencies that ODR provides at the pre-hearing stage can be important. Using an online document management system makes document management more efficient, especially when searching for, annotating, and/or exchanging materials between the client, counsel, experts, and fact witnesses. The ability to hyperlink to exhibits from pleadings and witness statements, for example, is a very useful and time-saving function.

More efficient preparation of hearing materials

The cost of creating printed bundles for hearings can be significant, especially in document-heavy, multi-party and multi-adjudicator procedures, whether before a court or arbitral tribunal. Arranging for the printing of hardcopy bundles, each of which must be physically updated each time a change is made, is time consuming. An online review bundle(ORB)reduces the work involved in preparing and updating bundles.

In the event that the ORB is set up at the outset and filings are uploaded as and when they are served, the bundle will evolve with the dispute. Amendments can be made online, avoiding the need to physically refresh various printed sets. This can save huge time and cost (especially in multi-party and multi-adjudicator procedures) and reduces the danger of errors between duplicates. An ORB likewise saves money on courier costs as there is no need to transport the bundle and access can be restricted to those with a password, protecting confidentiality.

More efficient hearings

An electronic hearing can be 25% to 30% faster than a conventional hearing. This is to a great extent driven by the smoother and more proficient administration of the hearing bundles. Gone is the tedious and thumb-desensitizing process of everybody in the hearing room finding the right document or searching for extra duplicates in the event of a photocopying blunder.

There are likewise critical presentational benefits. During cross-examination, for instance, each document mentioned can be immediately brought up on screen, empowering the cross-examiner to continue with their questioning, liberated from the interruption of searching for the relevant file and page.

Another advantage is that everybody in the meeting room will see documents at the same time. Client cannot flip through bundles. This focuses the attention of the whole hearing room on the document being examined. Swifter resolution of disputes can benefit parties as well as the court system.

A more proficient hearing is not just quicker, and often less expensive as a result. As time is not wasted, technology helps parties to better communicate their viewpoints in the restricted time span available. ORBs can encourage simple, novel methods of introducing and presenting evidence. It is far easier to explore an enormous, complex accounting spreadsheetelectronically. Complex information can likewise be examined and introduced electronically in clearer, more intelligent, ways.

Mobility and global reach

As India continues to develop as a global commercial center, disputes increasingly cross borders. Parties, counsel, witnesses, specialists and the court or tribunal maybe situated in different countries. Online hearings are particularly alluring in those circumstances, and can reduce the expense and burden of travel.

ORBs can be shared globally. Witnesses can give their evidence from anywhere utilizing a video interface related to an ORB – everything necessary is for the observer to approach a safe area where a substance screen can be set up and some type of video-connect innovation (presently broadly and economically accessible). Frequent business travellers are spared the stress of conveying large quantities of confidential files or the danger of losing their papers in transit. With an ORB,

counsel and adjudicators need only convey their PC or iPad to the hearing destination.[21]

Issues and challenges to ODR

The greatest test that India faces is making the move from tried and tested traditional dispute resolution techniques to ODR. For ODR to gain a greater foothold in India, it is important to provide support to organizations choosing ODR, give more consideration and guarantee to expand the job of the private area in debate settlement and construct long haul and feasible innovation stages to encourage this. ODR can be utilized in lion's share of questions emerging out of online exchanges, all the more especially, at the pre – prosecution stage. For ODR to gain more extensive reach in India, platforms must enable parties to communicate in their own dialects.

The Way Forward

India's overburdened court system has discouraged foreign investment as foreign investors are reluctant to risk having to resolve a dispute before the Indian courts. India's slow but steady change to an innovation-driven, paperless dispute resolution jurisdiction is viewed as a much needed refresher and welcome development by home grown industry and international financial backers alike.

The change in outlook is sure, however, the speed at which it will happen will rely a ton upon how we acknowledge innovation as a critical piece of the legal

framework. The field of question goal is further liable to be changed by man-made reasoning and hereafter, it is essential that incredible consideration is given in planning ODR instruments and techniques due thought is given for the joining of these innovations.

India's conventional since quite a while ago drawn and costly debate goal frameworks have been a huge trouble spot for abroad financial backers. India's continuous change to an innovation driven, paperless and consistent question goal design is an invite help to all – homegrown industry and likely financial backers.

This change is sure, nonetheless, the speed at which it will happen relies upon how well we acknowledge innovation as a fundamental piece of the legal foundation. The field of debate goal is probably going to be additionally changed by man-made brainpower and consequently, it is significant that in planning ODR devices and methodology due thought is given to joining of these advancements.

Most likely, the high-esteem debates and genuinely complex issue will keep on requiring a blend of the on the web and disconnected frameworks. The guarantee of ODR, in any case, for a nation like India, where the normal removal pace of cases is very low, is a silver coating on the contest goal skyline. At the same time, pre-suit/appeasement will likewise arise as a vital instrument for settling debates later on. With the digitization of courts and ODR, hindrances towards a quicker contest settlement likely could be decreased.

The fate of India's debate goal looks encouraging with virtual legal executive, online intervention and online assertion as favored methods of question settlement.

During this underlying period of improvement, a thoroughly examined framework will be significant. Execution of a strong ODR framework vows to catalyse a much needed development and shape the fate of India's question goal from the conventional strategies to ODR in the coming decade. A huge scope utilization of ODR innovation likewise holds the possibility to be joined with man-made reasoning devices. It is just a short time that innovation can step in to check the huge convergence of cases in India and change the manner in which we settle questions. Likewise, the eventual fate of India's contest goal looks encouraging, speedier, time and financially savvy.

The utilization of ODR in India is at an incipient stage and is beginning to acquire unmistakable quality step by step. A joint perusing and understanding of the Arbitration and Conciliation Act, 1996, Information Technology Act, 2000, and Indian Evidence Act, 1872 make ODR legitimately and in fact suitable, yet additionally defeats jurisdictional issues, dispose of topographical obstructions, robotize authoritative undertakings, improve profitability of experts, advance eco-accommodating cycles, lastly, convey a snappy, affordable and compelling answer for questions.

That being said, the three parts of administration have been gaining ground in advancing our lawful and equity conveyance framework and are making it helpful for officially draft ODR in standard debate goal.

In May 2019, an undeniable level advisory group established by the Reserve Bank of India presented a report on 'Extending of Digital Payments' in India and was of the view that instalment frameworks should move

towards utilizing a machine driven, online contest goal framework to deal with grumblings quickly.

President of India **Ram Nath Kovind** and Chief Justice of India **SA Bobde** stressed on the adoption of mediation as a tool for dispute resolution and integrating artificial intelligence in judicial processes.[22]

[1]E. Katsh, and J. Rifkin, J. Online Dispute Resolution: Resolving Conflicts in Cyberspace (San Francisco, Jossey-Bass, 2001).
[2]https://resolve.atthecadre.com/support/solutions/articles/44001795306-what-is-cadre-and-why-cadre-
[3]https://resolve.atthecadre.com/support/solutions/articles/44001795420-what-is-odr-and-why-odr-
[4]https://resolve.atthecadre.com/support/solutions/articles/44001796488-how-much-time-does-it-take-to-give-an-award-
[5]https://www.sama.live
[6]https://www.sama.live/rules_and_procedures.php
[7]https://www.sama.live/rules_and_procedures.php
[8]https://www.sama.live/how_sama_works.php'Reach an Agreement'
[9]https://www.sama.live/how_sama_works.php 'Get a Decision'
[10]https://resolveoncord.com/dispute-resolution/
[11]https://resolveoncord.com/hearingroom.php
[12]https://resolveoncord.com/about-us/
[13]https://agami.in/odr/
[14]https://agami.in/online-dispute-resolution/five-key-insights-from-the-catalyzing-odr-meeting-at-niti-aayog-on-june-6/
[15]https://agami.in/odr/ Activities - 'Unlocking ODR to enhance EoDB'
[16]https://disputeresolution.online/
[17]https://youtube.com/playlist?list=PL6B3DUQURF89_kcLPTA63wVhAGok75pZm
[18]https://www.presolv360.com

[20]https://economictimes.indiatimes.com/small-biz/startups/features/online-dispute-resolution-is-beginning-to-find-takers-in-india/articleshow/73206371.cms
[21]https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20170925---international-arbitration-report---issue-9.pdf?la=en-in&revision=
[22]https://www.barandbench.com/columns/online-dispute-resolution-a-possible-cure-to-the-virus-plaguing-the-justice-delivery-system

ABOUT THE BOOK

Covid-19 and its aftermath have had a dramatic impact on society as a whole. The consequences and impact of this challenging period will be felt for a significant period of time. This book explores the evolution of ADR, reflecting on ADR as it was before the pandemic, as it is now and what it will become. Furthermore, this book focuses on how such evolution presents a pathway towards the future of ADR and international cooperation within the ADR community. This book features contributions from ADR enthusiasts from around the world.