Volume I Issue I

INTERNATIONAL JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION

New Age ADR:Mediation as the way forward

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Abstract

This article provides an overview on the status of mediation law in India along witha comparative international perspective thereof. It dwells into the practical hurdles in mediating disputes, arising due to various reasons, largely owing to the lack of a comprehensive legislation on the topic. The saving grace for this form of alternate dispute resolution in India has been the positive judicial approach it has received from courts all across the country over the years. Upon analysing the various legislations and regulations on mediation law world over and looking at the progress rate of mediation as an effective method of dispute resolution, there is a pressing need to incorporate similar provisions pan-Indian and draft anall-inclusive legislative as the way forward for alternate dispute resolution, keeping in mind the challenges faced at the local level and the changing needs of litigation in a postCovid-19 world.

Keywords

Mediation, ADR, pre-institution mediation, court-annexed mediation, settlement, CPC

Introduction

Mediation, a relatively unexplored method of alternate dispute resolution ('**ADR**'), is a form of settlement wherein a third party facilitates an amicable resolution of issues between disputing parties, and such settlement is the result of negotiations and consensus between the parties. In the Indian context, it is defined as a voluntary non-adjudicative form of dispute resolution where a neutral third party assists parties to a dispute to reach an amicable solution through negotiation and facilitation.[1]

Mediation can broadly be divided into two types, voluntary mediation or court-mandated mediation. Court-mandated mediation can be further divided into two kinds, based on the stage it is resorted to: Court-referred mediation and Pre-institution mediation. Court-referredorcourt-annexed mediation, as the term reads, is mediation directed by courts post reference of a dispute before it, whereas mediation before reference to court is termed as pre-institution.

Mediation is strongly encouraged by Indian courts for speedy disposal of disputes. Several courts have tried to promote it by setting up mediation centres housed within their premises, and providing infrastructural, institutional and administrative support at the expense of the host court.

While court-annexed mediation is fairly successful in India, private commercial mediation remains relatively unexplored. This is primarily attributable to the lack of a robust legislation on mediation in India. The two principle legislations applicable are the Civil Procedure Code, 1908 ('**CPC**') and the Arbitration and Conciliation Act, 1996 ('**ACA 1996**'), which only govern the duties of mediators pertaining to disclosure, improper conduct, confidentiality, imposition of settlements, etc, as better enunciated below. While there exist stray state-specific rules on mediation, we lack a pan-India legislation.

Through this article, the author will elucidate upon the limited legislative provisions governing mediation, the judicial interpretations thereof, instances from across the globe and a comparative analysis with international mediation models, comprehensive study of the issues faced while mediating in India and ways of boostingthe Indian mediation market moving forward,

[1] Mediation Training Manual, 2016 by the Mediation and Conciliation Project Committee, Supreme Court of India

highlighting the pragmatic viability of adopting mediation as a serious go-to dispute resolution mechanism.

I. Legislative background

Despite several early Law Commission Reports,[2] the first instance of formal recognition of mediation in India was in 1999, when the CPC was amended[3](‘**CPC Amendment**’) to introduce new provisions in Section 89, which empowered courts to direct disputing parties to settle by various means of ADR, including mediation. Even today, this remains the sole provision which governs mediation in civil proceedings. Further, the Arbitration and Conciliation Act, 1940 was amended to introduce the ACA 1996, which can loosely be interpreted to regulate mediation in India. Interestingly, the provisions under Part III of ACA 1996 refer to ‘*settlement agreements*’ and ‘*conciliation proceedings*’ but nowhere expressly provide theoretically or procedurally for mediation. A crucial addition to this Act was Section 30, which providesthat parties can resort to settlement of disputes by the means of mediation, conciliation or any other procedure, pending arbitral proceedings, on consent of the tribunal, and if such a settlement goes through, the arbitration proceedings can be terminated. The settlement agreement arrived at would thenbe recorded in the form of an arbitral agreement.[4]

An additional incentive for parties to resort to mediation is seen under Section 16 of the Court Fees Act, 1870, which was revised by the CPC Amendment. As per this provision, if a Court refers parties to a suit to any mode of ADR as referred to in Section 89 of the CPC, upon settlement therein, the plaintiff would be entitled to a refund of the full amount of court fees paid. The intention behind this was to promote mediation as an economical and cost-effective means of dispute resolution, apart from also being a speedy mechanism.

These provisions are supplemented by rules framed by various Courts, applicable to matters covered within their jurisdiction. Such rules are a result of the Supreme Court judgment in *Salem Advocates Bar Association v. Union of India*,[5]wherein the Court had requested the Law

[2]Law Commission of India, *129th Report on Urban Litigation, Mediation as alternative to adjudication*, 1998, which strongly emphasised on the need for resorting to mediation in India.
[3] Code of Civil Procedure (Amendment) Act, 1999, w.e.f. July 1, 2002
[4] Section 30 (2) & (4) of ACA
[5] (2003) 1 SCC 49

Commission of India to prepare draft model rules for ADR and also frame draft rules for mediation under Section 89(2)(d) of the CPC. Following this, the Law Commission drafted a Consultation Paper on Draft ADR Rules, consisting of Draft Mediation Rules in Part II thereof. Resultantly, several High Courts enacted rules for ADR and mediation, based on this Draft Report. This consultation paper was verbatim notified by High Courts such as the Rajasthan High Court as the Alternate Dispute Resolution Rules, 2004,[6]the Delhi High Court as the Mediation and Conciliation Rules, 2004[7] and the Bombay High Court as the Civil Procedure - Alternate Dispute Resolution Rules, 2006[8] ('**Bombay HC ADR Rules'**). Additionally, mediation centres were set up by several Courts, one of them being the Delhi High Court, in exercise of its rule making power under Section 89(2)(d) of the CPC. In 2005, the Mediation and Conciliation Project Committee was also established by the Supreme Court, to oversee the effective implementation of mediation as an effective mode of dispute resolution.

Besides this, pre-institution mediation is now gaining momentum in India. It is recognised and mandated by several enactments such as the Companies Act, 2013, Insolvency and Bankruptcy Code, 2016, Family Courts Act, 1984, Consumer Protection (Amendment) Act, 2019, Industrial Disputes Act, 1947, Commercial Courts Act, 2015 ('**CCA 2015**'), among others.

The CCA 2015 provides for mediation to be mandatorily carried out by parties before the institution of a suit. Section 12A of thisAct expressly states that parties are not entitled to any relief, if they do not resort to the remedy of pre-institution mediation, with a sole exception in cases of urgent interim relief, which must be established. The section goes on to draw a 3-month timeline for such mediation, extendable by 2 months on consent of the parties, which period is excluded when computing limitation. In this regard, the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 have been framed under the Act. Similarly, under the Companies Act, a regulation known as the Companies (Mediation and Conciliation) Rules, 2016 has been enacted along the lines of the ADR and Mediation Rules enacted by various High Courts. Thus, pre-institution mediation is gaining traction as a remedy that must compulsorily be exhausted before initiating proceedings before courts.

[6]http://rlsa.gov.in/RSLSA_actrule/40.pdf
[7]http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_QEP90BUB.pdf
[8]https://legalservices.maharashtra.gov.in/Site/Upload/Pdf/civil-procedure.pdf

II. Judicial Approach

Mediation is oft recommended by Indian courts to effectively resolve instituted disputes and reach a settlement that is acceptable to both parties, despite some hurdles faced in its practical implementation. The Tamil Nadu High Court has gone to the extent of stating that making an attempt for alternative redressal of disputes is not only a statutory obligation of the court under Section 89 of CPC, but also forms part of a duty that the court owes to the public.[9] Thus, the judicial approach has been welcoming and courts have resorted to mediation in a wide array of disputes, as enunciated below.

A landmark judgment providing clarity on the ambit of Section 89 of CPC is the landmark case of *Afcons Infrastructure Ltd. &Ors. v. Cherian Varkey Construction Co. (P) Ltd. &Ors.*,[10] ('**Afcons case**'), where the Supreme Court observed that courts shall not refer any unwilling party to arbitration or conciliation but may, if thought fit, refer parties to mediation, judicial settlement or Lok Adalat even without consent of parties.It was also held that cases relating to trade disputes, consumer disputes, commercial and contractual issues and even limited tortious liability could be settled through mediation, thus providing impetus to such settlements.

The Supreme Court has gone above and beyond to ensure that mediation proceedings are strictly confidential and has emphasised that in case of court referred settlements, the mediator must simply place the agreement before the court without conveying to the court what transpired during the proceedings.[11] This principle has also been upheld by the Central Information Commission, which went to the extent of clarifying that mediation proceedings are protected under the exceptions available under the Right to Information Act, 2005 and are not subject to being disclosed, as public interest does not mandate it.[12]

Insisting on the importance of mediation and while recommending it as a course of action in numerous disputes, the Supreme Court hasurged courts to set up mediation centres and refer disputes thereto. This was held especially important in matrimonial disputes, which frequently

[9] *T. Vineed v. Manju S. Nair*, 2008 (1) KLJ 525
[10] (2010) 8 SCC 24
[11] *Moti Ram v. Ashok Kumar*, (2011) 1 SCC 466
[12] *Rama Aggarwal v. PIO, Delhi State Legal Service Authority*, CIC/SA/A//2015/900305

arise out of issues that may be amicably settled, pertinently in cases involving child custody, maintenance, etc., which were held to be pre-eminently fit for mediation.[13]

The Delhi High Court answered an interesting question in the case of *Dayawati v. Yogesh Kumar Gosain*[14]: *Is it legal to refer a criminal compoundable case, such as one of dishonour of cheque u/s. 138 of the Negotiable Instruments Act, 1881* ('**NI Act**'), *to mediation?* Upon an analysis of various provisions of the Criminal Procedure Code, 1973 ('**CrPC**') and the NI Act, this question was answered in the affirmative. While it has been consistently held that mediation can be resorted to in civil disputes, its applicability in criminal disputes was uncertain. The Court held that, despite the lack of an express statutory provision permitting mediation under the CrPC, the same could be resorted to in those matters which fell under the ambit of Section 320, *i.e.*, compoundable offences. Further, it was observed that the Delhi High Court had framed its mediation rules in exercise of the rule making power under Section 89(2)(d) of the CPC, but such rules would govern all proceedings pending before this High Court or any other subordinate court. It was clarified that the nature of Section 138 proceedings is quasi-civil, and in such matters, the statutory prescription must be expanded to do complete justice, bearing in mind public interest. Thus, this paves the way for mediation in certain criminal matters, which would be a speedy way of disposing of otherwise lengthy proceedings. However, it is pertinent to note that these mediation rules are state-specific, and in the absence of such rules, other Courts may not hold a similar view to that of the Delhi High Court.

Another significantcase is that of *M. R. Krishna Murthi v. The New India Assurance Co. Ltd. &Ors.*,[15] where the Supreme Court recommended the Legislature to investigate the feasibility of setting up a Motor Accident Mediation Authority at the district level, which would ensure speedy disposal of disputes arising under the Motor Vehicles Act, 1988. This matter came in an appeal from an impugned order passed by the Motor Accidents Claims Tribunal computing future earnings while assessing the loss suffered by the victim in a motor accident. It was held that:

> *"Insofar as disputes regarding claims are concerned, there is a need to resolve the same at the earliest inasmuch as compensation money may be badly needed*

[13] *K. Srinivas Rao v. D. A. Deepa*, (2013) 5 SCC 226
[14] (2017) 243 DLT 117 (DB)
[15] AIR 2019 SC 5625

> *by the claimants for so many reasons and delay may bring insurmountable sufferings of various kind. Having regard to the fact that large number of accidents are giving rise to phenomenal quantum jump in such cases, methods need to be adopted for quick resolution. Here, mediation as a concept of dispute resolution, even before dispute becomes part of adversarial adjudicatory process, would be of great significance. Advantages of mediation are manifold. This stands recognised by the Legislature as well as policy makers and need no elaboration. Mediation is here to stay.."*

Further, upon considering the statutory recognition mediation is gaining under IBC, Companies Act and so on, the Court commented:

> *"In fact, the way mediation movement is catching up in this country, there is a dire need to enact Indian Mediation Act as well."*

In a recent dispute regarding intellectual property rights,[16] the Delhi High Court directed parties to pre-institution mediation as per the rules of CCA 2015, before being tied in litigation proceedings. The case was successfully settled between the parties before the Mediation and Conciliation Centre of the Delhi High Court and a decree was passed recording the terms of settlement, which *inter alia*included reliefs such aspayment of damages to the injured party andrefraining from future acts of infringement.

Another particularly fascinating case is the historic *Ayodhya*dispute,[17]where a five judge constitutional bench of the Supreme Court, by an order dated 8 March 2019, directed court-monitored mediation in the dispute which arose out of the building of a mosque under Mughal emperor Babur's regime, on a site which Hindus believed marked the spot of birth of Lord Ram. This led to communal violence in the area for a period of nearly 70 years, and has since then, been a highly litigious issue. The Court relied on provisions of CPC and directed mediation between the parties despite commenting on the slim chances of consensus, requesting the mediators to maintain utmost confidentiality of the proceedings. The 3 mediators appointed in this regard were (Retired) Justice Fakkir Mohamed Ibrahim Kalifulla, spiritual guru Sri Sri

[16]*Inspirelabs Solutions P. Ltd v.GrabOnRent Internet P. Ltd. &Anr.*, CS (COMM) 149/2019, Order dated 2nd August 2018

[17]*M. Siddiq (D) v. Mahant Suresh Das*, Civil Appeal No. 10866-10867 of 2010

Ravishankar and Senior Advocate, famously known for his contributions to mediation law in India, Mr. Sriram Panchu,[18] who were directed to explore the possibility of bringing about a permanent solution to the issues raised by the parties in numerous proceedings. Unfortunately, the mediation proceedings were not successful, and this was noted by the Court in its final order, while remarking that this was due to the lack of agreement between the parties.

The reference of an issue as volatile as the *Ayodhya* dispute to mediation has opened the doors for mediation in various cases, showing it as a possible mode of resolving highly sensitive religious and political disputes. Mediation in a matter of this magnitude, having such wide coverage, has an added benefit of public reach. Lack of public awareness about ADR methods is a major drawback having an adverse effect on its growth in India. However, through such a case, mediation can reach the common man and can be seen as a possible method of settling disputes amicably, bringing about a key change in the mindset of litigators. The failure of these proceedings could be prevented by enacting provisions that deal with a deadlock situation and how mediators must approach it, before the proceedings are abandoned in its entirety, undoing all the progress made.

Shortly after this, mediators were appointed by the Apex Court in the case against Shaheen Bagh protestors. The protests arose against the controversial Citizenship Amendment Act, 2019, where hundreds of people took to the streets at Shaheen Bagh in Delhi, refusing to vacate till their demands were heard. The Supreme Court, recognising the sensitivity of the issue and the heavy political clout, appointed Advocates Sanjay Hegde and Sadhana Ramachandran and former bureaucrat Wajahat Habibullah,[19] to intervene and promote dialogue between the various parties involved. The mediators were directed to visit the site and speak to the protestors, understand their concerns and try reaching a settlement on the issue in the form of a report. This is bound to have a far-reaching impact in promoting mediation in various kinds of disputes, while raising awareness amongst the masses.

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[18] The Hindu, *Ayodhya title dispute: Who are the mediators appointed by the Supreme Court?,* March 8, 2019, available at https://www.thehindu.com/news/national/ayodhya-title-dispute-who-are-the-mediators-appointed-by-the-supreme-court/article26469362.ece

[19] Times of India, *Who are Shaheen Bagh mediators?*, February 19, 2020, available at https://timesofindia.indiatimes.com/india/who-are-shaheen-bagh-interlocutors/articleshow/74175587.cms

Thus, while India faces a lack of a dedicated statute on mediation, courts have not shied-away from promoting it, no matter the nature or scale of the dispute.

III. International perspective

The ACA 1996 is adopted from the UNCITRAL Model Law and Conciliation Rules and has proven to be a pristine enactment that has successfully given impetus to international and domestic arbitration, being the leading form of ADR in India today. On a similar footing is the UNCITRAL Model Law on International Commercial Conciliation, 2002 ('**UNCITRAL Model Law 2002**'), which equates conciliation and mediation,serving as a reference point for countries to frame mediation and conciliation legislations. It is important to note that the rules on mediation notified by various Indian Courts[20] are not in consonance with the principles laid down in the UNCITRAL Model Law 2002, which includes detailed provisions regarding mediation proceedings, *inter alia*, admissibility of evidence, procedure for termination and requirements for a settlement agreement to be binding and relied upon. This Model Law was amended in 2018 and now reads as the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.[21] The amended Model Law covers all the requisites for governing mediation, both at a domestic or international level and aims at achieving the goal of internationally promoting amicable settlement of disputes.

Subsequently, in 2012, the Secretary General of the General Assembly, United Nations also published a Report titled '*Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution*',[22]which focused on the need for and methods of amicably settling disputes, at both international and domestic levels. In furtherance of this, the United Nations also published a guide titled '*Guidance for Effective Mediation*'.[23] Thus, the

[20]*Supra*, see notes 6-8
[21]https://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_II.pdf
[22]https://peacemaker.un.org/sites/peacemaker.un.org/files/SGReport_StrenghteningtheRoleofMediation_A66811.pdf
[23]https://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf

United Nations and other international bodies have gone beyond their call of duty to promote mediation across the globe.

A recent development in international mediation law is the United Nations Convention on International Settlement Agreements resulting from Mediation, also known as the Singapore Convention on Mediation ('**2018 Convention**'), adopted in December 2018. The 2018 Convention was opened to countries internationally in August 2019, and India was one of the first few signatories thereto. The 2018 Convention is a culmination of all previous reports and suggestions, and aims at giving legitimacy and enforceability to international settlement agreements resulting from mediation, alike international arbitral awards enforceable under various conventions such as the New York Convention, which paved the way for commercial arbitration gaining traction as a mode of ADR on the global scale. The 2018 Convention, over the course of the next few years, could create significant momentum in the recognition of mediation in international disputes, taking international commercial mediation and enforceability of settlements therein to its pinnacle.

The ideal example for a successful mediation model internationally is that of Singapore, which is one of the leading countries in ADR today, having comprehensive laws on arbitration and mediation. The Singapore International Arbitration Centre ('**SIAC**') has established the SIAC Rules, which govern arbitration, and are widely chosen as the substantive law in international commercial arbitrations. Similarly, the Singapore Mediation Centre ('**SIMC**') has established a set of regulations pertaining to mediation law, known as SIMC Rules. Both these regulations are commonly relied on due to their practicality and efficiency. An interesting amalgamation of these rules, known as SIAC-SIMC-Arb-Med-Arb Protocol, is also becoming increasingly popular. It sets out a process where mediation is attempted in the course of arbitral proceedings. If the dispute is settled through mediation, the settlement agreement may be recorded as a consent award under the provisions of the New York Convention, and wouldhold the same value as an arbitral award,being enforceable in the countries which are signatories to this Convention, subject to any contrary local legislation. Parties can achieve finality through either the mediation or arbitration processes. While many countries have allowed mediation midst arbitration proceedings, Singapore is the first country to clearly set out a procedural model governing such proceedings.

The Arb-Med-Arb is an effective and flexible method of ADR, which combines the advantages of confidentiality and neutrality with enforceability and finality. Under this model, the arbitrator(s) and mediator(s) are to be separately and independently appointed by SIAC and SIMC respectively, unless the parties have agreed to vest the powers for both in the same person. Thus, in all such cases, there is a clear differentiation in the procedures to be followed and persons to adjudicate or preside over such proceedings, resulting in utmost transparency.

There is not a Mediation Act that regulates mediation in the United Kingdom ('**UK**') for domestic disputes, but there is an increasing number of sectorial regulations and case law that require litigants to consider mediation before going to court.[24]Such proceedings are loosely governed by the Civil Procedure Rules ('**CPR**'),[25] the primary civil law in the country. The CPR requires parties to explore settlement options before resorting to courts for dispute resolution, and governs both, domestic rules for mediation as well as rules regarding cross-border mediations in the European Union ('**EU**'), read with the relevant EU Directives.[26] Mediation is commonly resorted to in civil, consumer, family, employment and commercial disputes in the UK. Further, currently, less than 5 percent of cases raised in courts across the United States of America result in a full trial taking place. A substantial factor in that statistic is the successful use of mediation, which is estimated to result in a positive resolution of roughly 80 percent of cases.[27]

Another important instance is of Egypt, where mediation is a mandatory procedure in cases brought by private parties against the government, and this is presided over by retired judges and other leading personnel. In Africa, mediation agreements are recognised by the law and are binding, being extremely common in labour and industrial disputes.

Internationally, the practice of incorporating mediation clauses in contracts is gaining popularity in the field of both, private and commercial mediation. Such clauses go to the extent of

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[24]P. Cortes, *ThePromotionOf Civil And Commercial Mediation In the UK,* University of Leicester School of Law, Research Paper No. 15-23, July 21, 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633215

[25] Under the Civil Procedure Amendment Rules, 2011

[26] EU Mediation Directive 2008/52/EC and the Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133)

[27]Skuld, *US vs UK - a comparison of mediation processes*, May 2017, available at https://www.skuld.com/topics/legal/pi-and-defence/us-vs-uk---a-comparison-of-mediation-processes/

specifying the name of the mediator(s) or institution whose assistance may be sought in appointing a mediator to settle disputes between the parties which have arisen or may arise in the future.

Thus, world-over, mediation has been recognised due to its wholistic, solution-based nature. With the unprecedented rise in international trade and commerce, we see a rise in the demand and need for resorting to mediation and negotiation as a method of resolving disputes, rather than resorting to time-consuming and uneconomical methods such as litigation and arbitration.

IV. Comprehensive analysis

From the precedents above, it is evident that mediation is a flexible mode of ADR. There are multi-fold reasons for resorting to mediation to successfully settle disputes. These are briefly enlisted as follows:

Firstly, to resort to mediation in India, one does not need a pre-existing contract or any specific clause therein.

Secondly, while litigation usually has rigid procedure that needs to be followed religiously, the same is the not the case in mediation. As mediation proceedings are not strictly binding and promote one-on-one interaction of parties with the mediator, parties are more receptive to undergoing the process, even if it is just for the purpose of knowing what the other side is willing to offer.

Thirdly, mediation can be used to settle a varied range disputes of different natures, whether commercial or private, such as family disputes, labour and industrial issues, political and religious disputes, compoundable criminal wrongs, contractual disputes, intellectual property disputes, and so on, as already evidenced from the cases mentioned hereinabove.

Fourthly, by its very nature, mediation is an economical mode of settlement, as opposed to arbitration and litigation. In most mediation proceedings, one does not need to engage a lawyer, thus largely saving on legal fees. The environment during mediation meetings is also relatively relaxed and conducive to discourse, thereby making it a mode of resolution accessible to and convenient for all sections of society.

Lastly, the most cogent reason for enacting a legislation on mediation is thatit is a process by which parties voluntarily settle a dispute amongst themselves and such settlement is only reached when the parties are at consensus *ad idem*, i.e., consenting to the same thing in the same sense. The settlement reached at is one acceptable to all parties on the basis of the constructive role played by them in the proceedings.

This is clear from the provisions in Rule 16 of the Bombay HC ADR Rules, which state that the role of a mediator is, *inter alia*, to facilitate voluntary resolution of disputes, to communicate the view of each party to the other, assist them in identifying issues and exploring areas of compromise, emphasizing that it is the responsibility of the parties, and in no way imposing terms of settlement. Therefore, it is entirely voluntary and based on the inputs and efforts of the parties, whereas the mediator only plays a passive role. The natural corollary to this is that the possibility of any further litigation would be extremely low, unlike in arbitration, where the award is determined by a third-party adjudicator and not a facilitator. An arbitrator, being a third party, may pass and impose an award that might not be entirely acceptable to the parties, who then resort to appeals before court. So, while the purpose of ADR is to settle disputes out of court and reduce the burden of courts, this may not be effectively achieved. However, the same is possible in mediation to a larger extent.

Exposing one side to the perspective of the other helps elucidate the rationales and justifications behind a proffered proposal as well as understand the constraints under which the other side is operating.[28]The attitude of the parties gradually shifts from thinking about their rights and liabilities towards accepting their actual needs; they are keener on solutions and mutual interests.[29]Thus, if parties are encouraged to resort amicably settle their disputes, it will ensure speedy and assured delivery of justice, while also reducing the burden on the courts that already face a tremendous backlog.

Having said the aforementioned and while it is true that mediation is the way forward for amicable settlements and ADR, the Indian market and legal fraternity has not accepted it wholeheartedly. There may be various concerns raised by critics of mediation. Some of these are analysed below.

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[28] Gary S. Mendoza, *Mediation as an Instrument for Crisis Management,* Yale L.J. (1981)

[29] Sriram Panchu, *Mediation Practice and Law: The Path to Successful Dispute Resolution*, 2d ed., 2011

Concerns raised regarding mediation in India

In the *Afcon's* case,[30] the Supreme Court observed that Section 89 of CPC was vaguely drafted and needed to be amended keeping in mind the overall scheme and purpose of the CPC, while being read with Rule 1A, Order X therein. It was stated that one of the possibleanomaly's in this provision is the mixing up of definitions of '*mediation*' and '*judicial settlement*' under Sub-section (2), Clauses (c) and (d) respectively. Further, it was held that if their meanings were interchanged, the said clauses would make better sense. Thus, while Section 89 is the primary legislative background for mediation in India, it suffers from various lacunae.

As for the mediation rules enacted by various High Courts, it may be observed that they serve as insufficient to govern mediation proceedings, owing to multifarious reasons. Firstly, these rules are an incomplete guide to mediation, covering only certain procedural aspects of it. They lack detailed provisions on the structure and conduct of mediation. Secondly, substantive law and procedural rules must necessarily go hand in hand for successful applicability of any law. However, the lack of substantive law on this topic renders the rules innocuous. Consequently, these rules do not comprehensively govern the start to end of a mediation proceeding. Lastly, these rules are applicable only within the territorial jurisdiction of the notifying Court and lack pan-India applicability. Thus, while these rules are an initial step towards improving the scope of mediation in India, they are grossly inadequate.

Similarly, rules regarding pre-institution mediation incorporated under legislations like CCA do not come without their shortfalls.While this is a positive step towards inculcating the culture of mediation in commercial disputes, it may not succeed in its entirety,as the voluntary nature of mediation is lost in such mandatory proceedings. Often, this could end up being a wild goose chase, wasting the time of the parties, mediator and courts. Thus, while pre-institution mediation is essential, it needs to be supplemented with a conclusive framework which governs settlements, while ensuring that it remains a lucrative remedy for all parties involved.

[30] *Supra*, note 10

In several cases of court recommended mediation, the parties may agree to undergo mediation in a perfunctory manner, with no real intention of settling. This could be used as a dilatory technique to postpone the final adjudication of the dispute, which becomes possible due to the lack of a robust legislative framework guiding the process. Parallelly, the ACA 1996 provides for timelines for commencing and settling disputes, serving as a more reliable option. The same must be implemented in the sphere of mediation while adopting a legislation, by implementing penal provisions that will prevent such actions.

Further, even where parties may be willing to settle, they often reach a deadlock where neither of them may be willing to agree to way forward, thereby hampering the entire process. In such situations, mediators are rendered helpless and must end the proceeding.

Tackling such concerns and criticism

All the aforementioned issues emanate from the lack of a comprehensive regulation governing mediation law in India. All other modes of ADR in India find statutory recognition. Conciliation and arbitration are governed by the ACA 1996, Lok Adalats find backing in the Legal Services Act, 1987, neither of which are expressly applicable to mediation proceedings. Owing to this, mediation remains at the bottom of the barrel amongst these other modes of ADR, which are seen to be far more successful in India.

The concerns arising hereinabove need to be tackled legislatively, by strengthening the mandate under Section 89 of CPC, along with enacting the necessary legislation. Once this is done, mediation proceedings will attain more structure.

The essence of such legislature needs to be to provide a framework for mediation, while still retaining its informal nature, in order to encourage parties to pursue it. Currently, settlement agreements arising out of private mediation which do not follow the statutory requirements under ACA 1996[31] are not enforceable under this Act, and must be enforced as consent decrees under the CPC[32] or executed as a contract between the parties.[33] Thus, the legislation enacted on

[31] Sections 73 and 74

[32]Under Order XXIII Rule 3

mediation must focus on enforcement of settlement agreements and ensuring that such settlements are final and cannot be challenged in appeal before a court, so as to ensure minimum judicial interference and also prevent an increase in the backlog of cases in our courts.

Besides this, the legislation must also focus on setting up centres and institutions that specialise in promoting and managing mediation in India. This includes institutions which would specifically train professionals in this field to be advocates engaged in mediation, as well as mediators. Such centres and institutions should have good infrastructure and resources to ensure maximum efficacy.

Additionally, mediation clauses must be incorporated in agreements in order to creative an environment of discourse and deeper understanding of the issue at hand. This is particularly important in employment agreements and labour contracts. Parties entering such agreements would first negotiate a dispute and only upon failure of it, resort to court. This would reduce the pressure on both, the employer and employee, who otherwise face the impending doom of lengthy and expensive litigation.

V. The way forward for mediation in India

Even though the success of mediation cannot be certainly predicted or guaranteed, what can be agreed upon is that even in the present paradigm and without a substantive governing law, this mode of ADR has proven successful time and again, and can be seen as a reliable means to settle any and every dispute in foreseeable future.

In a recent development, a Committee has been set up on the recommendation of the Supreme Court in January 2020, to look into the practicality of drafting a legislation on mediation and formulating a code on the subject, covering various topics such as conduct of mediators, their qualifications, modes of promoting commercial mediation and so on.[34] While this is a key step in

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[33] *Shri Ravi Aggarwal v. Shri Anil Jagota*,2009 SCC Online Del 1475

[34] Economic Times, *Supreme Court forms committee to draft mediation law*, will send to government, January 19, 2020, available at https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms?from=mdr

the way forward, the same must be done in a timely fashion, ensuring a thorough research of international models and precedents, along with the local needs of Indian courts.

In a post-Covid 19 world, invariably a plethora of new cases will be unleashed upon the judicial system, which have seen limited functioning during the lockdown.[35] Courts are likely to face an overflow of litigation arising from breach of contractual obligations, non-payment of dues, employee and family disputes, and so on, leading to an overburdened judiciary overnight.

In such a situation, turning to mediation might be an effective way to handling such disputes. Parties are more likely to be receptive to negotiations due to the unprecedented circumstances of the global pandemic and might gain from resorting to discourse. The importance of this paradigm shift is emphasised because courts are likely to have a slow start on reopening, with stringent regulations and controls to avoid gatherings and crowding in court, with limited matters heard each day.

With the anticipated increase in disputes and need for urgent reliefs midst the lockdown, there has been an advent of technology in the Indian litigation market, with regular hearings being conducted virtually.Mediation hearings may very well be carried on virtually or even over telephonic calls. Such virtual proceedings would also help parties save on time and costs.Even in case of physical meetings, the lack of documents and filing makes it for a safer mode of dispute resolution, in light of the contagious disease.

Thus, parties are likely to find an efficacious remedy in virtual and physical mediation as a quick fix to the stagnation caused during this hiatus. There is a pressing need to comprehensively review the current regime on mediation law and enact the needful legislation, now more than ever.

[35]Office Order of the High Court of Delhi, New Delhi, No.R- 43/Rg/Dhc/2020