adr WORLD
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INDIA INTERNATIONAL ADR ASSOCIATION
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THE EDITORIAL

Words From The Chief Editor

I am pleased to bring to you the 2nd Issue of ADR World. This issue has been technically enhanced so that it can be circulated by e-mail easily. The technical issue caused some delay but it was worth sorting out.

After noticing the first issue of ADR World, Justice Madan B. Lokur, Judge, the Supreme Court of India and Lord Woolf of Barnes, Lord Chief Justice of England and Wales, 2000-05 have sent their letter to the editor congratulating us for starting this magazine. They both wish this magazine to play a crucial role is strengthening the ADR movement in India and elsewhere.

For the next issue we are planning to achieve three things. First, we will apply to obtain ISSN number for this magazine so that it will be listed in the global directory of online publications. With this number we will be able attract scholars and professionals of ADR to make regular contribution. Second, we will host all issues of ADR World on the website of IIADRA so that readers can easily locate the content of the magazine. This website will also serve as the archive of ADR World. Third, to make the content more rich, in terms of contribution, we will invite one or two academics or professions from our covered or other jurisdictions to contribute for the ADR World.

We express our sincere gratitude to all our contributors in giving full support to ADR World with their valuable and thought provoking ideas through their writings.

Dr. RAJESH SHARMA
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IN THIS ISSUE

FRANCIS LAW

Hong Kong well positioned in providing cross-boundary dispute resolution services

The China Council for the Promotion of International Trade - Hong Kong Mediation Centre Joint Mediation Center (CCPIT-HKMC Joint Mediation Center) was formed on 9 December 2015. It is co-founded by CCPIT/CCOIC Mediation Center and HKMC. Being the first joint Mediation Center in the region set up by two major mediation institutions in the Mainland and Hong Kong, it aims to provide an efficient and effective platform for resolving cross-border commercial disputes among China, Hong Kong, countries in Asia and in the world.

Mediation is not limited by geographical restrictions and can be conducted in different jurisdictions including common law and civil law jurisdictions, in Hong Kong and the Mainland. With these advantages, parties concerned can resolve disputes involving multiple jurisdictions through mediation, without the need to pursue litigation in individual jurisdictions.

As China is actively promoting the "Belt and Road" initiative, the National 13th Five-Year Plan and the Asian Infrastructure Investment Bank etc., it is believed that these plans would lead to further increase in cross-boundary trade and other areas of co-operation among countries in Asia and in the world. It is however foreseeable that those cross-boundary commercial disputes are expected to follow. Thus, the demand for dispute resolution services by these enterprises would definitely become greater. Furthermore, cases involving enterprises 'going global' and international enterprises making investments in the Mainland will be on the rise. There will be an increasing demand for legal and dispute resolution services by these enterprises. Since Hong Kong is equipped with the dual advantages under the principle of "one country, two systems", the CCPIT-HKMC Joint Mediation Center can provide more diversified cross-boundary dispute resolution services for these enterprises.

The Secretary for Justice of Hong Kong, Mr Rimsky Yuen, SC, said in the Inauguration Ceremony of CCPIT-HKMC Joint Mediation Center on 9 December 2015 that with its dual advantages under the principle of "one country, two systems", Hong Kong can act as a neutral venue for providing cross-boundary dispute resolution services when the Mainland and foreign enterprises are in dispute. By doing so, Hong Kong can reinforce its important status as the legal services and dispute resolution centre in the Asia-Pacific region.

Looking ahead, Hong Kong can enhance its role in dealing with cross-boundary commercial disputes. The CCPIT-HKMC Joint Mediation Center will become a new platform for co-operation in mediation in the region. We trust that it will further promote mediation services in the region by providing more diversified services.

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JONATHAN RODRIGUES

A Tale of Two Cities – Wien & Paris

The swimming pool had prepared me for the ocean….

To know where you stand, you need to compete with the best among your peers; it doesn't matter if you are a first-timer or it's the world stage. If Consensual Dispute Resolution Competition (CDRC) Vienna in July 2015 was an eye-opener for many of us, 'Mediation Novices'; the ICC Paris in February 2016 was a confirmation of the vast and diverse communities warming up to Mediation as the conflict management tool of the future. This is a comparison of the contrasting and common experiences in Europe.

The two competitions – a debutant and a leader for over a decade – had varied structures, modules and backgrounds. CDRC tested negotiators and mediators, while ICC stressed on mediation advocacy, thus evaluating only negotiators. The former selected 16 International teams competing, while the latter chose a total of 66 colleges from across the globe. CDRC let the participants take center stage and guide the process, while ICC pushed for professionals to facilitate the mediation session, thus demanding the experts to double up as assessors and mediators. There is more to dissect and distinguish, but an important element that both events consciously executed well was creating a suitable environment – free, yet responsible; casual, yet smart; friendly, yet competitive – for amateurs and professionals to experience mediation simulations.

First Impressions…

Set in the backdrop of the dusky European summer, when the sun refused to set before the 11th hour on the longest day of the year, Vienna provided for the perfect orientation environment for the freshers. The pressure of being the first team from Goa to represent India in CDRC's inaugural edition had stolen the overwhelming feeling of leaving our homeland for our first foreign trip. This all changed in Vienna. Dialogue got easier between the Germans and the Brits after we had finished singing a Beatles song during the Quarter-finals @CDRC Vienna 2015.

The fear and anxiety evaporated in the embracing warmth of the afternoon sun. CDRC made you feel that every participant was granted equally exclusive space and attention at the event venue. There was plenty of time to talk,

walk and even escape for an evening drink or a midnight snack. A stranger turned into a friend, then there were mutual friends who made it a clique and soon the entire group knew each other's names and faces.

Paris was cold. It's not the weather alone, but the recent security tensions that have made people cautious and suspicious. Though the chilly wintery wind blew strongly across the land, Paris dazzled in its beauty under a starry, sometimes overcast February sky. The city was in a state of conflict and it didn't try to hide that. In fact, it demanded a conscious initiative from its inhabitants and visitors to be sensitive and collaborative in bridging the many culture divides. The ICC headquarters resembled a buzzing bee hive, with professionals and peers from all over the world entering and exiting the building. There was no pampering, no time for small talk and ice-breaking. You introduced yourself, collected your kit and got on with the task. If you recognized a friend in the crowd, you tried to dive into some nostalgic moments before someone else stole him or her away. It took skill to make an acquaintance, thus giving value to the newly-forged friendships.

Prep, Problems & 'Partaay'!

Learning is an essential part of these events and mostly takes place during training and feedback. CDRC dedicated an entire day to workshops for participants and coaches. ICC probably thought it wasn't necessary as they attracted the best in the business, but as participants we missed out an opportunity to pick up some tricks and styles from the rich pool of experts. The engaging sessions at Vienna, conducted by CEDR, provided the perfect confidence boost and facilitated synergy among participants. We accepted that besides winning and losing, we had so much to learn from each other – a pointer ICC could consider as it grows and evolves.

Feedback time was my best part of the competitions. This potentially dreadful time was well managed by the experts at CDRC and ICC through well-structured and constructive evaluation. The experts always had a gentle tone and a warm smile, which made them feel more like mentors than assessors. Some looked at this time to read between the lines of what the experts said, weigh the compliments and criticisms, and measure their chances of winning the round. For me, it was a class in mediation. These feedback slots taught us techniques, styles, ethics, tricks, reading and respecting body language, being cautious with accents and gestures. On a competition perspective, we understood that we had to be sensitive to backgrounds of the opponents, the mediator and the assessors.

Problems are meant to be solved, but those drafting them face an equally challenging task to keep them balanced. ICC's gesture to acknowledge the best author among its problem drafting committee must be appreciated. Different problems for different sessions at the ICC brought in freshness and flexibility in the negotiators' limitations and creative scope. It allowed participants to start afresh and move on from a bad session. On the other hand, CDRC pursues the same problem till the end, which tends to get monotonous and tiring. On the flip side, this is how it is in real life situations, where one session may not resolve a conflict. Parties and counsels need to break and shift gears over a few sessions, with new twists and turns in their interests, until they lay it all out on the table and reach a consensus.

The scores are now being tabulated. And what do you after an emotionally tiring day of negotiations? Yes…Partaay! Socials play a huge role in networking, besides soothing heartbreaks. CDRC inaugural dinner was perfectly organized in the campus pub, against the setting sun. All grown up, holding a dazzling glass of champagne, we discussed mediation… Kidding! Conversation revolved around each other's cultures, festivals, weather patterns, sports, political patterns. Language and religious borders were trespassed even at the ICC socials, but in simple words – 'It was too cramped'. More open space and a proactive effort to engage the multitudes of communities represented at the event would do everyone a lot of good.

In the end, all that matters is Mediation triumphed at Vienna and Paris. We made friends, burnt out fingers and learnt a lesson or two, rubbed shoulders with the pros and pledged to be ambassadors of mediation in our own little ways.

If I didn't learn well at Vienna, I would have drowned in Paris. If I didn't dive into the ocean, I wouldn't be able to test how well I had learnt in the pool.

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ENA SHAW

The Current Development of ADR in Victoria, Australia

Alternative Dispute Resolution or Mediation had its humble beginnings in the early 80s with the opening of Community Justice Centres in NSW. Victoria followed closely with the opening of mediation services in the area of neighbourhood disputes and mediation in the Family Law area. The model used was based on Fisher and Ury's book Getting to Yes. In a poll conducted in 1993 by the Federal Attorney General's Department, less than 17% of the population surveyed knew the term mediation or had even heard of mediation.

Since that time there have been immense strides in the field of mediation. Nearly every legal jurisdiction and many Commissions throughout Australia use mediation in one form or another to assist in the resolution of disputes. Increasingly, many court based mediations are mandatory prior to any litigation. Mediation has been viewed as a better and cheaper way to resolve conflicts than court processes.

The Neighbourhood Dispute Settlement Centres were amalgamated into The Department of Justice and Regulation in Victoria in 1993. They employ mediators on an ad hoc basis where a rigid model is followed where the mediators have a prescribed role at each stage of the mediation process. They have expanded their role and now operate as the first step in the legal process of the Magistrates Court in Victoria.

Many community based organisations such as Relationships Australia, Lifeworks and Centacare have used the mediation process in Family Law for a number of years. With the passing of the The Family Law (Shared Parental Responsibility) Amendment Act 2006 represents the most substantial step ever taken by the Commonwealth Government of Australia towards interventionism in family matters. The Amendment Act attempted a significant cultural change – to encourage more shared and co-operative parenting after separation, and to shift the focus, for post-separation dispute resolution, away from court action and towards private, mediated methods.

Mediation or Family Dispute Resolution (FDR) has become mandatory prior to issuing in court for children's matters in the The Family Law Court of Australia in matters involving the children. The mediator meets with the

clients individually and if the process is deemed unsuitable, then a certificate under section 60I must be issued prior to parties issuing in the Family Court. If the parties are deemed suitable then the FDR process proceeds. FDR processes need to assess for suitability and power imbalances such as family violence. Sometimes shuttle mediation is used with parties in different rooms or even different buildings. It can be shuttled on different days as well.

Legal Aid has developed its own model of ADR, which is called Roundtable Dispute Management. This process is conducted mainly over the telephone with the Chair in one location and the parties attending with their legal representatives at another location. Generally, the legal representatives are in their own offices with the clients. This process mirrors the collaborative process that is slowly gaining popularity in Family Law disputes.

Telephone dispute resolution has also developed, particularly for parties separated by large geographical distances. It can also be used when there are issues of family violence. It is available to any parties that wish to access the service in general. Allied to this service there are a number of on-line mediation processes available as well.

In October 1995 the National Alternative Dispute Resolution Advisory Council (NADRAC) was established as an independent body that provided policy advice about alternative dispute resolution (ADR) to the Attorney-General of Australia. NADRAC was ended in late 2013. It provided expert policy advice to the Attorney-General on the development of ADR and promoted the use of alternative dispute resolution. NADRAC made significant contributions to the development and promotion of ADR in Australia, publishing reports and papers on the topic. They developed standards and a National accreditation process for mediators. Prospective mediators are required to do 40 hours of initial training and then pass an assessment process. Continuing education and current practice are also required to maintain registration.

The development of mediation has spread through many areas including ombudsman offices, which include energy, telecommunications, finance, healthcare, Human Rights Commission, small business commission, Farm debt and the Equal Opportunity Commission. Courts have embraced mediation services which better enable parties to have access to justice. For example, the Children's Court uses Family Conferencing to assist families in overcoming issues that are impacting on the care of the child/ren. Another area that is now using mediation is the Defence Forces in abuse or bullying cases and sexual harassment. Many employers wanting staff with conflict resolution skills by advertising for Nationally accredited mediators.

Allied to mediation has been the development of Collaborative Law. In this process, disputing parties with their legal representatives meet together with the assistance of a family consultant and a financial neutral. Although this may be seen as an expensive process it allows the parties to have immediate legal advice and the ability to have their own decision making process.

In Australia the National Mediation Conference has taken place every two years since 1990. On examination of the National Mediation Conference program in 1998, topics included parent-adolescent, family law, lawyers as mediators, industrial relations, community, victim-offender and training.

By the time of the National Mediation Conference in 2014, topics had expanded to include statutory ADR, Courts and Tribunals, Standards, International, Native Title, Workplace and Business, On-line Dispute Resolution, Peer mediation, Defence Force Sexual Harassment, Research and Elder mediation which includes estate planning and care of the elderly.

The use of mediation has become more acceptable to disputing parties since the advent of mandatory mediation ordered by the courts and the need for a section 601 certificate to issue on children's matters in The Family Law Court of Australia. Matters of deep concern have been the awareness of Family Violence as a major contributor to power imbalances and the need to carefully screen parties before allowing mediation to proceed.

As the population ages another growth area has been Elder mediation, where some community base organisations and private practitioners have become involved in mediation on issues arising out of the care of the elderly, particularly issues involving elderly parents and their children and estate planning.

It can clearly be seen that the development of mediation in Australia has spread into many areas. The maturation of a field of discipline can be seen through the understanding and knowledge of the general population and its acceptance for that discipline. The understanding of mediation and its use is permeating through the community. This is demonstrated by a movie in 2011 called "Face to Face" where a mediation is shown in a workplace situation. Hence mediation in Australia has a place in the dispute resolution arena.

The professionalization of mediation through a National Accreditation register with minimum standards, ethical practice and on-going education demonstrates the coming of age of Alternative Dispute Resolution as a legitimate area of discipline in Australia in general and Victoria in particular.

The Author—

Ena Shaw is a registered psychologist, a registered Family Dispute Resolution Practitioner and a Nationally Accredited Mediator based in Melbourne. She has worked with separating families, divorce and children's living arrangements, for over 30 years. She has also worked with families in crises and homeless youth, offering counselling and therapy.

United Nations
UNCITRAL

UNCITRAL VIEWS

By Joao Ribeiro

Transparency in ISDS: the way forward

The push for transparency in investor-State arbitration is gaining momentum. In 2013 UNCITRAL adopted the *Rules on Transparency in Treaty-based Investor-State Arbitration* and later in 2014 the General Assembly adopted the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)*. These developments are part of a welcomed trend towards further transparency in ISDS.

Unlike other forms of arbitration involving private parties, ISDS has an unquestionably public character – the UN General Assembly when adopting the *Mauritius Convention* '[r]ecognize(d) the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations'. Decisions challenged in investor-State arbitrations often touch on very important issues of public policy, of public interest, involving taxpayers' money and disputes on, for instance, natural resources or environmental issues. In particular, investors could challenge laws protecting human rights, the environment or public health. For example, investor-State arbitrations have been related to the drinking water supply system in Bolivia and Tanzania, the ban of an additive to gasoline in California, the rescission of fishing permits in Chile due to environmental concerns, and racially-focused affirmative action measures in South Africa.

In the context of recent and current negotiations of international and regional investment treaties, some States and regional organizations have aimed at improving the overall system of ISDS. Transparency is surely not a panacea for critiques, or for the issues that they raise. However, transparency can ameliorate the sting of some criticism. Transparency is a necessary condition for any meaningful independent analysis of the benefits of ISDS. That analysis, and the public conversation surrounding it, will strengthen ISDS and so strengthen investment treaties.

According to UNCTAD, 2014 saw the conclusion of 24 International Investment Agreements in Asia Pacific. In 2015, claimants initiated 4 known treaty-based ISDS in the region. By UNCTAD's count, the total number of ISDS cases in the Asia Pacific has reached 79 concerning regional claimants and 146 from regional respondents.

The recent increase in the number of International Investment Agreements, because of its expected impact on

the growth of trade and investment across borders, may lead to potentially increasing number of disputes involving States and investors. This will most probably result in mounting interest by the public in such matters, and thus highlighting the importance of transparency in ISDS.

An important feature of transparency is that it may enhance the quality of decision-making. All parties involved would be motivated to conduct the arbitration impeccably. If the award is to be published online, they would be motivated to ensure it is free of error. And publicity will translate into accountability.

In the longer term, the publication of arbitral decisions will create a *de facto* body of case law. Transparency could possibly promote more consistency in decisions by tribunals. This has already happened to some extent, with the regular publication of decisions and other important documents by ICSID. By promoting consistency, transparency will promote relative equality in the treatment of parties to ISDS. Thus transparency can serve the principle of equality at the foundation of the rule of law: that we ought to treat like cases alike and different cases differently.

With all this in mind, the *UNCITRAL Rules on Transparency* mark a departure from the position that treaty-based investor-State arbitrations are generally private and/or confidential. These new innovative Rules mean that the public is able to obtain information about such cases. The public will gain access to basic information regarding investor-State arbitrations conducted under the *Rules* by the publication of key documents.

The Rules may also apply to those arbitrations initiated under the *UNCITRAL Arbitration Rules* pursuant to a particular treaty concluded before 1 April 2014, if the State parties or the parties to the dispute agree "to their application". UNCITRAL has recognised that the need to opt-in was an issue. In response to the issue, UNCITRAL developed the *Mauritius Convention on Transparency*, which provides for the application of the *Rules on Transparency* to arbitrations arising out of investment treaties concluded before April 2014.

The *Mauritius Convention on Transparency* was open for signature on 17 March 2015 and sixteen countries have already signed it and Mauritius was the first ratifying State.

In conclusion, the *UNCITRAL's standards on transparency present* an opportunity for States to improve ISDS. If that opportunity is realised, it will advantage all parties by reinforcing the benefits enjoyed under investment treaties. More broadly, investment treaties are a means for controlling risks associated with foreign investment. Their uptake can translate to increased foreign investment and a subsequent path towards economic development.

Transparency in treaty-based ISDS can enhance international trade and development in the Asia-Pacific region and beyond. The choice before us might not be between having or not having transparency in investor-State arbitration. The choice before us might be having or not having a sound and reliable investor-State arbitration system.

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VOICES & VIEWS

ADR, As they see it....

SUBASH MENON

Chairman & MD

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Litigation in courts is a long drawn and winding process. This led to the evolution of ADR to provide a faster path to dispute resolution, with Arbitration emerging as a chosen route. However, the ground realities of the process of Arbitration in India have made it anything but, leading to the entire purpose getting defeated. From my personal experience with Arbitration over the past several years, I wish to cite two instances to expose the state of affairs.

In the first instance, an Arbitration Panel is yet to be appointed even after three years of continuous efforts at the Madras High Court. The other side has dragged their feet and they have been aided by the difficulty to get the matter listed and heard. In the second instance, Arbitration proceedings are yet to be completed even after two years of efforts. The biggest issue there is the lack of time for the members of the panel. Over the past two years, the Panel has met for exactly 12 days over 4 sessions with an average time gap of 6 months between two sessions. In fact, the time gap between the 3rd and the 4th sessions was 13 months. Why isn't the process time bound? Why should the members of the Panel be allowed to take on far too many cases than they can handle? Why should there not be a limitation for the number of panels that each member can be part of?

After several years of effort, when an award is made, the appeal process starts in the courts – inching its way from the lowest court to the highest court in the country. I will not be surprised if the two instances mentioned above take in excess of 10 years including both Arbitration and the appeal process. Was this what was envisaged in ADR? Can we not have special courts or benches for Arbitration related matters like appointment of judges, single stage appeal process etc.? In the absence of corrective measures, I will certainly think many times before accepting ADR in any contract in the future. I had rather face the tortures of a court process than face the dual tortures of both ADR and courts. If the judicial system does not correct the problems that are being experienced in Alternative Dispute Resolution process in India today, it will soon be termed as Avoidable Dispute Resolution process.

LETTERS TO THE EDITOR

Letter from Justice Madan Lokur

Having been associated for several years with alternative dispute resolution mechanisms in India and particularly with the mediation and lok adalats, I am extremely glad to learn of the launch of ADR World.

India has great potential in making mediation successful. In fact, over the last couple of years judges and lawyers have taken much greater interest in mediation and have been encouraging litigants to resort to this alternative dispute resolution mechanism.

In my view, mediation is perhaps the best way, if not the only way, of reducing a large number of cases in the courts across the country. Since our courts permit easy access to justice to litigants and also provide free legal aid to indigent litigants and disadvantaged sections of society, it is difficult to contain the inflow of cases. Mediation, if encouraged by society, will surely provide beneficial to indigent and disadvantaged litigants, and lessen the burden of the courts thereby enabling the justice delivery system to deliver responsive and quality justice.

ADR World will, I hope, assist in the venture of encouraging amicable resolution of disputes through mediation and, in the long run, enable the justice delivery system in India to be more efficient and efficacious

Madan B. Lokur
Judge - Supreme Court of India

Letter from Lord Woolf

As an enthusiast for a great many years of ADR and in particular mediation and being a great admirer of Indian lawyers and jurists, I was extremely pleased to learn about the developments in ADR taking place in India. If this is to reach its full potential it will need the strong support of Indian practitioners and they in turn will need to be made familiar with the many developments taking place in India and elsewhere.

I am therefore absolutely delighted to learn of the launch of ADR World. From what I have learnt about the magazine it should be the ideally placed to fill this need so I wish it the highly successful future it deserves. As an increasing numbers of lawyers become involved in ADR it should have an assured increase in its circulation.

Lord Woolf of Barnes
Lord Chief Justice of England and Wales
(2000 – 2005)

The Happenings

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Michael McIlwroth, Global Chief Litigation Counsel, General Electric (GE) Oil & Gas

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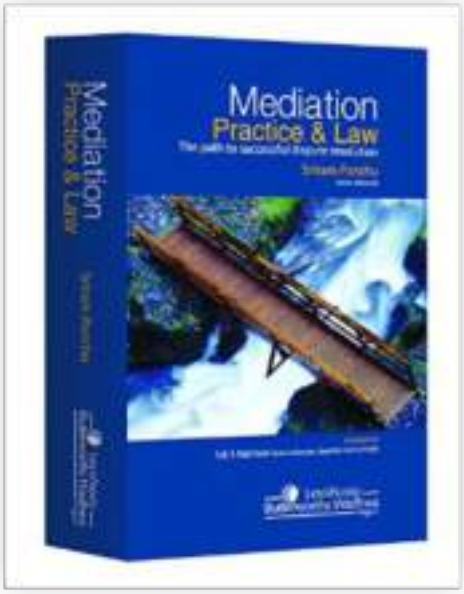


SRIRAM PANCHU
Senior Advocate

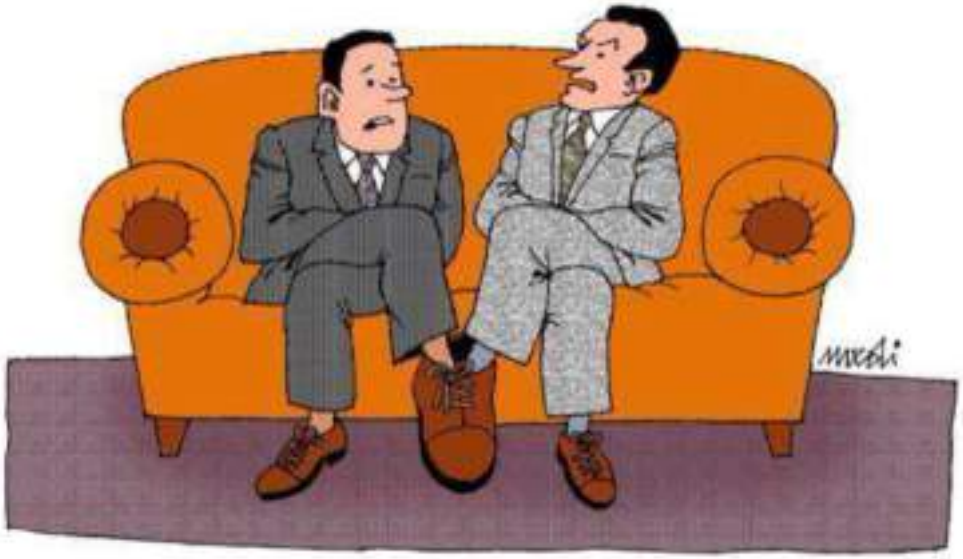
Mediation Practice & Law - The Path to Successful Dispute Resolution

Litigation's losses are high in terms of time, expense and damage to relationships. There is a need for alternative methods which are quicker, cost less, yield practical and enforceable solutions, while preserving relationships. With its focus on non-coercive and consensual processes, mediation is the fastest growing dispute resolution remedy worldwide

With the law being amended and the courts setting up in-house mediation centres, a wide range of cases, including civil, commercial and matrimonial disputes, are being resolved by this process. Private mediation and professional practice are also taking off. The author brings out the art, techniques and skills required for mediation. He walks the reader through a full-length mediation with notes to illustrate different stages. The book shows how mediators deal with seemingly dead-end situations, and details norms of confidentiality and ethics. Advice for mediators, lawyers and parties follows. The law on the subject and the precedents laid down by courts in India and abroad are exhaustively dealt with. The book, based on the author's experience of over two decades, is widely used as a reference and guide by mediators, judges and lawyers. It will also benefit companies and individuals facing or contemplating litigation, and is a must-have for law and social science libraries. In its second edition, the book adds substantial content, and updates developments and decisions of courts in India and abroad."

- by **Gracious Timothy** (Advocate, Mediator)

THE STUDIO



Negotiations are always a subtle matter, not simple. The main thing here is to Conduct the affairs to a mutually acceptable balance of interests.

- Gorbachev

One child, one teacher, one book and one pen, can change the world.

- Malala Yousafzai

The Editorial Board

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We look forward to receiving your submissions!

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