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ONLINE MEDIATION- THE WAY FORWARD

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ABSTRACT

In the position of long drawn court process mediation is becoming one of the strong method of alternative dispute resolution. Almost every statute suggest the disputed parties to first attend mediation procedure before coming to court procedure. Unlike court process which is western method of settling disputes, mediation has close association with the people of our country in resolving disputes in traditional days. The article tries to cull out the historical growth of mediation process and also the various legislation which gives importance to mediation process at first instance. Particularly article attempts to picture the need for online dispute resolution and its advantages in settling the disputes in the time of pandemic. It concludes by portraying the measures and policies adopted by government in bringing online mediation across various streams.

1.1 INTRODUCTION

For years India's justice delivery system depends on court room. The significance and importance of mediation are restricted only to family disputes. Mediation is one of the methods of Alternative dispute resolution available to the conflicting parties. A neutral mediator helps the parties to reach amicable solution and satisfactory settlements in their disputes. Many IP litigation ends in settlement where it is considered as efficient, cost effective, preserves the relationship of the parties¹. Mediation is also known as conciliation procedure which gives parties full control over the process and disputes and also to its outcome. Mediation is not binding procedure and it results in win-win situation where both the parties agreed to submit to mediation and mediator is also not a decision maker. The process of arbitration and mediation differ as the former is a formal procedure whereas the latter is informal one and interest based procedure. The process of mediation is not suitable in all cases where mensrea is involved against state or of public in nature; it only suits for contractual relationship. Mediation is the party centered process where interest and rights of the parties are focused, and special negotiation and communication techniques are used to settle the dispute outside the judicial process. The mechanism of mediation needs to be promoted as a best method of ADR by developing confidence in the process of mediation. As we are in the era of Internet and every walks of our life are digitalized its right time to opt for online mediation

¹ <https://www.wipo.int/amc/en/mediation/what-meditation.html>

in the adjudication process. This article tries to study the feasibility of online mediation and effective implementation in the adjudication process in the forthcoming days.

1.2 EVOLUTION OF THE CONCEPT

The concept of mediation is not a new process or phenomenon it existed even in pre independent India in the form of Panchayats. With the advent of British colonialism in India the Anglo saxon dispute resolution slowly entered and faded the mediation process. In the global history the concept is traced back to the ancient Greek where the villagers settle the disputes between the villagers. Justinian digest in roman civilization also recognized the process of mediation. Industrial dispute act 1947 legally recognized Mediation as a method of alternative dispute resolution .Section 89 of the Civil Procedure Code 1908 allowed the courts to settle the matters by way of alternate dispute resolution between the parties. It came by the way of amendment in 1999. The mandatory condition is the consent of the parties and the court has the power to refer the cases to any one of the alternative dispute resolution method. Rule 5(f) (iii) of the Civil Procedure Rules, 2003 provides provision for mandatory mediation when the parties are not ready for mediation but there should be the element of settlement. By this commercial mediation is given life in India. The Arbitration and conciliation Act 1996 governs the private mediation in India. Court annexed mediation is governed by Civil Procedure Code. Private Mediation is discussed under Part III of the Arbitration and Conciliation Act and Part II of the Civil Procedure Alternate Dispute Resolution and Mediation Rules (the Mediation Rules) also provides for various rules relating to mediation.

DEFINITION

- The word mediation is defined in the civil procedure code and alternative dispute resolution rules 2003. Settlement by ‘Mediation’ means the process by which a mediator appointed by the parties or by Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing

misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions².

- Mediation has been defined in the Cambridge Dictionary as "*the process of talking to two separate people or groups involved in a disagreement to try to help them to agree or find a solution to their problems.*"
- Black's Law Dictionary has defined Mediation as "*A method of non- binding dispute resolution involving a neutral third party who tries to help the disputing parties to reach a mutually agreeable solution.*"
- The Supreme Court stated that the words 'mediation' and 'conciliation' are used synonymously. In this commentary, the words 'mediation' and 'mediator' are used; they should be taken also to mean 'conciliation' and 'conciliator' was expressed by the Supreme Court³.
- Hon. Arthur M. Monty Ahalt (ret.) defined Online Dispute Resolution (**ODR**) as, "*ODR is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It involves negotiation, mediation or arbitration, or combination of all three. Alternative Dispute Resolution in the online medium*"⁴.

TYPES OF MEDIATION

Mediation is of many kinds-

1. Statutory/Mandatory

² <https://www.lexology.com/library/detail.aspx?g=d45eed57-db32-40b6-a5e6-edad2363de76>

³ Afcons Infrastructure Ltd v M/s Cherian Varkey Construction [2010] (7) SCALE 293,

⁴ **Soumya Jha**, India: Online Dispute Resolution- A Compelling Option Or A Far -Fetched Reality During Pandemic Times07 August 2020. <https://www.mondaq.com/india/arbitration-dispute-resolution/972422/online-dispute-resolution-a-compelling-option-or-a-far-fetched-reality-during-pandemic-times>

Disputes such as labour and family law are subjected to mandatory mediation procedure by the Civil Procedure- Mediation Rules, 2003.

2. Court Ordered

This type of mediation is further divided into two court referred and court annexed.

Court Annexed: It is provided by the court as a part of the judicial systems. Settlement is achieved by all the participants like the litigants, lawyers and judges in the justice delivery system.

Court-Referred: The court refers the matter to a mediator.

3. Private

In the private mediation, mediation services are offered on a private, monetary basis by qualified mediators to the Court, general public, and the commercial and governmental sectors for dispute resolution through mediation. Recourse may also be taken to private mediation in pending cases or pre-litigation disputes. The mediation can be the outcome of contractual agreement between the parties or by voluntary interest of the parties in the mediation.

1.3 ONLINE MEDIATION AND TRADITIONAL MEDIATION

The main challenges faced by the Indian Judicial system are:

1. Lack of technology in court process
2. Excessive cost in litigation process
3. Complexity of procedure
4. Massive backlog of cases

So to address the above mentioned challenges it's the right time to introduce ODR in the main stream of Justice delivery system⁵. Traditional Mediation procedure is an informal, but structured settlement procedure. The key aspects are voluntary, non-binding, confidential, interest based approach. The principle of confidentiality and parties' option to terminate mediation at any time of the meeting stage and element of financial, business and personal interest is also considered during the negotiation process. In a facilitative mediation, the mediator merely assists the parties in their communication and negotiations. In an evaluative mediation, the mediator also provides a non-binding assessment of the dispute⁶. Dispute resolution mechanisms in India are not updated to the current scenario of time and technology. Increase in number of cases filing and already pending enormous backlog of cases courts are overburdened in justice delivery system. After the amendment of Commercial courts Act 2015 mediation has gained momentum in dispute resolution mechanism. To increase its efficiency now its correct time to opt for online mediation where many firms in civil law and common law countries provide for it. Most service providers follow a standard model of mediation practice for individuals who wish to resolve their disputes remotely. Online mediation makes the whole procedure simple where the interested parties should register to the website of service provider and individual details and facts of the dispute, sum involved should be mentioned. Technicalities of the mediation session are discussed. Modalities of online mediation are explained. Both online and traditional mediation are both party driven and it is three way video conferences between the parties, online mediator appointed by the service provider. It is ensured by the service provider that the mediator so appointed, is a qualified neutral third party with no prior association with the individuals involved in the dispute. Technology makes online mediation more accessible. Nowadays court process itself moving into digital room, so online mediation will be more viable for low cost cases. In practice, the proceedings under alternative dispute resolution are made through a fixed place that suits both parties and the mostly conducted by the professional in the locality. With the advent of online dispute resolution in India, the entire proceedings are made available online at the comfort of home and best of the professional from across the country is engaged to provide the best of alternative dispute resolution in India.

⁵ Bhaven Shah, CASE FOR ONLINE DISPUTE RESOLUTION IN INDIA **Bhaven Shah (Co-founder of Presolv360)**, <https://www.lexadr.com/post/case-for-online-dispute-resolution-in-india>

⁶ <https://www.dispute-resolution-hamburg.com/mediation/what-is-mediation/>

1.4 LEGAL SANCTITY OF MEDIATION

Other legislation that covers mediation is:

- Commercial Courts Act 2015, whereby it is mandatory for parties to exhaust the remedy of pre-institution mediation under the Act before instituting a suit. The Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018 (the PIMS Rules) have been framed by the government under the Act.
- The *Micro, Small and Medium Enterprises (MSME) Development Act, 2006* mandates conciliation when disputes arise on payments to MSMEs.
- More particularly, family and personal laws including the *Hindu Marriage Act, 1955* and the *Special Marriages Act, 1954* require the court in the first instance to attempt mediation between parties. Section 14 (2) of the Hindu Marriage Act, 1955 and Section 29(2) of Special Marriage Act, 1954
- Section 32(g) of the *Real Estate (Regulation and Development) Act, 2016* provides for amicable conciliation of disputes between the promoters and allottees through dispute settlement forum, set up by consumer or promoter associations⁷.
- Legal Services Authority Act, 1987 read with Section 89 of CPC. When the dispute is referred by the court to Lok Adalat Section 20(1) of the Legal Services Authority Act, 1987. Further, it has been provided under Section 21 of the Legal Services Authority Act, 1987 that a settlement before a Lok Adalat is enforceable as a court decree.
- Section 442 of the Companies Act, 2013 read with the Companies (Mediation and Conciliation) Rules, 2016. When any matter is pending before the company law tribunal then the matter can be referred to the mediation by the central government.

⁷ Manisha T Karia, Effective implementation of Mediation in India: The way forward
<https://www.barandbench.com/columns/effective-implementation-of-mediation-in-india-the-way-forward>

- 129th Law Commission of India Report: The aforesaid Law Commission Report recommends courts to refer disputes for mediation compulsorily.
- Sections 37-38 and Chapter V of the Consumer Protection Act, 2019 mandates that disputes arising under the act should be first referred to mediation.
- Mediation and Conciliation Rules, 2004. In exercise of its powers under Part X and Section 89 (2) (d) of CPC, the Hon'ble High Court of Delhi has framed these rules.
- The Supreme Court of Indian established Mediation and Conciliation Project Committee in April 2005 for the effective implementation of mediation and effective mode of dispute resolution.

1.5 INTERNATIONAL POSITION

India is witnessing wide range of shift from traditional court procedure to alternative dispute resolution mechanism. It is no doubt that mediation is gaining importance nowadays where many institutions train and sensitize individuals upon the importance of mediation. Traditional mediation in online medium will be more vibrant and powerful. Further, with India having become a signatory to The United Nations Convention on International Settlement Agreements Resulting from Mediation (“Singapore Mediation Convention”) on August 1, 2019, it is expected that India will soon roll out new legislations recognizing both cross border and local mediation settlements alike to ensure effective implementation of the convention⁸. WIPO Mediation rules also provide the parties to opt for mediation. Dispute relating to intellectual property and Commercial transaction are dealt by them. They are patent, knowhow and trademark licenses, franchises, computer contracts, multimedia contracts, distribution contracts, joint ventures, R & D contracts, technology-sensitive employment contracts, mergers and acquisitions where intellectual property assets assume importance, and publishing, music and film contracts⁹.

⁸ Sandhya Swaminathan, Kartikeya Singh

May 2020 Mediating Amidst a Crisis: Is Online Mediation a Solution for India?

<https://www.mediate.com/articles/swaminathan-online-india.cfm>

⁹ <https://www.wipo.int/amc/en/mediation/guide/index.html>

1.6 ELEMENTS OF ONLINE MEDIATION

The stages in ordinary mediation process are:

1. Introduction and Opening Statement
2. Joint Session
3. Caucus or Separate Session and
4. Closing

The objective of these stages is to establish neutrality, create an awareness and understanding of the process, develop rapport with the parties, gain confidence and trust of the parties, establish an environment that is conducive to constructive negotiations, motivate the parties for an amicable settlement of the dispute and establish control over the process. In general mediation begins with a joint session to set an agenda, define the issues and ascertain the position and/or concerns of the parties. This allows the parties to attack the resolution process either on an issue-by-issue or group-by-group basis. The joint session is then followed by a separate caucus between the mediator and each individual party or their counsel. It also gives the mediator an opportunity to ask questions which may well serve to create doubt in an advocate's mind over the validity of a particular position¹⁰. There is no penalty when settlement is failed at mediation¹¹.

Key elements of online mediation

1. stable Internet connection,
2. a device (preferably a computer) with a camera and a microphone,
3. subscription to videoconference applications like zoom or Skype in order to avail the service.

¹⁰ Mediation Defined: what is Mediation? JAMS Mediation Services, <https://www.jamsadr.com/mediation-defined/>

¹¹ What Is Mediation And How Does It Work? <https://corporate.findlaw.com/litigation-disputes/what-is-mediation-and-how-does-it-work.html>

1.7 ADVANTAGES OF ONLINE MEDIATION

Dispute Resolution Centre of Thurston County has listed the advantages of opting for mediation has alternative dispute resolution method for disputing parties¹².

1. Mediation is affordable.
2. Mediation is fair and impartial.
3. Mediation saves time and money.
4. Mediation is confidential.
5. Mediation avoids litigation.
6. Mediation fosters cooperation.
7. Mediation improves communication.
8. Mediation identifies underlying issues.
9. Mediation allows personalized solutions.
10. Mediation works¹³.

Online Mediation

1. Cases which are of low value when conducted in online benefit the court and claimant.
2. Flexibility in meeting Location which removes geographical restraint.
3. Statements and testimonies of the parties can be easily collected and recorded and can be reviewed over the entire process.
4. Stress, Emotional mistrust and tensions due to physical appearance of the parties will be reduced
5. Intervening delays could be reduced to possible extent like missing documents, absent statements
6. Date and Time of the meeting could be managed efficiently.
7. Cost effective¹⁴

¹² Geetanjali Sethi, India: Mediation : Current Jurisprudence And The Path Ahead,24 June 2020, <https://www.mondaq.com/india/arbitration-dispute-resolution/957898/mediation-current-jurisprudence-and-the-path-ahead>

¹³ <https://corporate.findlaw.com/litigation-disputes/what-is-mediation-and-how-does-it-work.html>

¹⁴Hasan Sadik, Online mediation is on the rise but what is making it so popular? <https://www.resolutionpeople.co.uk/online-mediation-rise-in-popularity/>

8. Automatic administrative procedure
9. Eco- friendly process as there will be minimal use of paper
10. Conducive environment which gives full liberty¹⁵.

In general there are many advantages in mediation. Parties will have full control over the scope of mediation in reaching mutually agreeable solution to the problem. If the part feels the mediation is unhelpful at any stage they are free to get out of the procedure. It allows direct participation of the parties in negotiation. It takes less time to resolve the disputes and economical in nature. The Bangalore Mediation Centre, released the data stating that the mediation process can take a maximum of 60 days, the average time taken to settle a case is a mere two hours. If a settlement is reached, the parties also save money on their hourly costs and no further litigation. Court fees are also refunded. Confidentiality in the process of mediation is the main element which helps in better communication of the parties. Mediation promotes finality in dispute resolution as there is no scope for an appeal, a revision or further litigation on the successful conclusion of mediation. Court-referred mediation also allows for a refund of court fees in cases of settlement.

1.8 PRACTICAL CHALLENGES IN IMPLEMENTING ONLINE MEDIATION

1. Data Protection

In India still we have weak data protection measures, so in this situation privacy in online mediation is very hard to assure. Technological assurance in ICT system and contractual agreement of secrecy between the parties should be formulated to have effective safe mediation

2. Enforcement

Enforcement of online arbitral award is another challenging issue. The person responsible for enforcing and what will be the penalty if the parties fail to enforce are yet to be defined.

¹⁵ Ibid

3. Insufficient laws on ODR

There is no proper layout of laws establishing online dispute resolution. In absence of legal recognition and insufficient laws and rules it's very hard to effectively implement ODR

4. Lack of awareness

People are also not aware of the online dispute resolution mechanism viable solution for dispensing timely, cost effective and efficient justice.

5. Poor technology system

Lack of high speed internet connection, poor service providers, and people inability to access technology are all back drop for ODR.

Apart from that other disadvantages of Mediation are:

- **Informality:** In the informal setting of mediation, there are no formal rules or procedures that have to be followed. Mediators don't have access to a lot of tools to get people to testify or produce evidence to get to the truth of a matter.
- **Unfairness:** The lack of formal rules means that there is no way to ensure a fair procedure for the parties involved.
- **Success not guaranteed:** Mediation may also be unsuccessful and not lead to a settlement between the parties involved. The parties will then have to resort to the money and time intensive court system after already wasting a significant amount of them in the mediation.
- **Non-binding:** The agreement reached in mediation is non-binding. Parties to a settlement may also attempt to dispute the settlement agreement in case the agreement is not made binding on them. The legitimacy of the settlement can be questioned in the

court. The only solution to this is to agree to make the settlement agreement binding on both parties before signing it¹⁶.

1.9 ROLE OF JUDICIARY

1. Salem Bar Association v. Union of India¹⁷

In this matter, Writ Petitions were filed challenging the Amendments made to the Code of Civil Procedure by way of Amendment 46 of 1999 and Amendment 22 of 2002. Amongst other amendments, the attention of the Hon'ble Supreme Court was drawn to Section 89 of the Code of Civil Procedure. The Hon'ble Supreme Court observed that the provision of Section 89 of the Code of Civil Procedure has been inserted to ensure that all the cases which are filed in the courts need not necessarily be decided by the courts. The Hon'ble Supreme Court opined the need to promote Alternate Dispute Resolution. It therefore, considered Section 89 to be a welcome step. It was therefore suggested by the Hon'ble Supreme Court, that a Committee be constituted so as to ensure that the amendments made to the Code of Civil Procedure become effective and result in quicker dispensation of justice.

2. Afcons Infrastructure v. Cherian Varkey Construction Co. Ltd¹⁸.

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

¹⁶ [Akanksha Mathur](https://blog.ipleaders.in/mediation-in-india-process/#:~:text=Mediation%20first%20came%20to%20be,was%20passed%20by%20the%20Parliament.), How Does The Mediation Process Work – Steps and Procedure, <https://blog.ipleaders.in/mediation-in-india-process/#:~:text=Mediation%20first%20came%20to%20be,was%20passed%20by%20the%20Parliament.>

¹⁷ (2003) 1 SCC 49

¹⁸ (2010) 8 SCC 24

Procedure, when it may be invoked, the categories of cases which are not suitable for Alternate Dispute Resolution and the scope and ambit of conciliation.

3. MR Krishna Murthi v. New India Assurance Co. Ltd¹⁹.

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

4. M. Siddiq (D) v. Mahant Suresh Das²⁰

Mediation proceedings should be conducted with utmost confidentiality so as to ensure its success which can only be safeguarded by directing that the proceedings of mediation and the views expressed by the parties and mediators are kept confidential. The mediation proceedings should not be reported in any print or electronic media²¹.

5. Meters and Instruments Private Limited &Anr. vs. Kanchan Mehta

The court observed in this case that technology should be used to reduce paper usage and overcrowding of courts. The cases should be categorized to conduct the proceedings whether partly in online or in entirely in online²².

¹⁹ 2019 SCC Online SC 315

²⁰ Civil Appeal No. 10866-10867 of 2010)

²¹IBID, <https://www.mondaq.com/india/arbitration-dispute-resolution/957898/mediation-current-jurisprudence-and-the-path-ahead>

²² . 2017 TaxPub (CL) 0840 (SC)

1.10 MEDIATION IN THE MIDST OF PANDEMIC

The pandemic has reversed the life of human beings and we are forced to adapt and survive. Day to day affairs of common man is badly affected by the outbreak of COVID-19. With advent of technology work from home culture has been followed during the lock down days. Justice delivery system also completely affected. This shows that the dispute resolution system has not been kept up with time and technology. Already the court room is burdened with massive backlog of cases which will be further increased by the new cases filed. Many countries have adapted to online dispute resolution mechanism in their judicial process and they can withstand the natural crisis like this pandemic. Unlike the traditional mediation online mediation bridges the gap between the justice and people who are unable to access justice. In the present situation of social distancing norms to protect the people from COVID, online mediation will be a better option and hope.

1.11. CURRENT SCENARIO OF ONLINE MEDIATION

The recent initiative taken by the government for effective implementation of online *dispute* resolution is:

1. In 2018, Pre- Institution Mediation and Settlement Rules along with Commercial Courts Act make mandatory mediation process for commercial disputes above 3 lakhs.
2. Legacy dispute resolution scheme 2019 was introduced to settle the disputes of Service tax and Central excise.
3. In 2019, Reserve Bank of India constituted committee which submitted report named Deepening of digital Payments stating that Online dispute resolution system should be established to address the complaints.
4. Consumer Protection mediation Regulation 2019 formulated under the Consumer Protection Act by the National Consumer Dispute Redressal Commission provides panel of mediators and mediation procedure and cost to address consumer grievances.
5. Vivad Se Vishwas scheme was introduced by the finance ministry in 2020 budget to settle the dispute of tax payers pending at various forums.

1.12. CONCLUSION

In India the scope of Online dispute resolution is still in primitive stage. In this era of digitalization use of technology can ensure access to justice and equity. Promotion of technology driven dispute settlement mechanism is the need of the hour to ease the court process and improve the efficiency of Indian legal system. 11 billion sheets are used in the Indian courts which will have serious impact on our climate change which could be addressed only by the digital platform and making our judicial system an eco friendly one. In spite of reference of mediation in numerous legislation, still it has not gained momentum in the mainstream of justice delivery system. Lack of proper conflict management and overburdened court system are hampering the development of nation economic power at international level. ODR is the key to address this issue and it is the future of justice combined with Information and Communication Technology to facilitate dispute resolution. Constitution of India guarantees the citizen access to justice but still many people in the rural and illiterate could not access to it. Thus it's the right time to effectively implement ODR mechanism in the main stream of justice delivery system for all type of cases and give legal sanctity to the system.

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