adr WORLD
News magazine of
INDIA INTERNATIONAL ADR ASSOCIATION
Volume-2 Issue-3 | July-August 2017

THE EDITORIAL

Dr RAJESH SHARMA
Senior Lecturer, Justice & Legal Studies
RMIT University, Melbourne

Words From The Chief Editor

ADR World is committed to spread the value of mediation to every corner of the World. In this regard we should rely on the next generation. So from this year *ADR World* has started "ADR Ambassador" program for students from around the globe. These selected students will make contribution in the form of short write ups, collecting information about recent developments in the field of ADR around the world, conduct surveys, research, interviews and other related activities. Their final work will be published in the *ADR World* to recognise and acknowledge their efforts. Our ADR Ambassador will also generate and contribute discussions, share views on recent developments on our *ADR World Blog*.

We believe that it is time now to trickle the knowledge and skills of ADR to the student level so that we could make early start in preparation for the future leaders. *ADR World* is the right place to start this initiative in a small way. *ADR World* and *ADR Blog* will provide the right platform for the students to interact with their peers from around the world and also with the current leading experts.

Our young editor Mr. Gracious Timothy is going to pursue his LLM in Dispute Resolution at Pepperdine University. Though he will be busy with his studies he will continue to provide his support from the USA. We wish him the best for his study and his future professional path.

IN THIS ISSUE

Sabine Walsh
LLM, Mediator
President, Mediators' Institute of Ireland

Robust but Dynamic – A New Regulatory Framework for Mediation in Ireland

It appears as though Ireland may finally be on the verge of adopting a comprehensive regulatory framework for mediation with the Mediation Bill, 2017, which is working its way through parliament at present. The current regulatory regime for mediation in this jurisdiction is piecemeal and sometimes contradictory, and difficult to access for those unfamiliar with the system. Rules triggering mediation, and those governing the process itself, tend to be contained in context-specific legislation or jurisdiction-specific court rules, along with some caselaw. Regulation of the mediation profession is contained in "soft" law such as institutional rules and codes of practice.[i] The new Mediation Bill addresses many of these areas, at least to some extent.

First published as a general scheme of a draft Bill in 2012, the final Bill, published in February 2017, addresses itself to a number of areas.[ii] These include how cases may be diverted into mediation, aspects of the process itself such as confidentiality and enforceability of mediated agreements, and, somewhat controversially, potential costs implications for unreasonable refusal to consider attending mediation.

Whether mediation should be regulated at all, and by what means, is the topic of some debate.[iii] Arguments in favour of regulation include the need to build confidence in the process, to integrate it effectively with other dispute resolution structures and to protect those using it. Arguments against regulation or at least against "hard" regulation focus on the likelihood of regulation stifling of development of the profession and the need to preserve the essential flexibility of the process, on the other. A further and much more complex question related to the regulation debate is to what extent, if at all, regulation impacts on the uptake and use of mediation.

In Ireland, a common-law jurisdiction where regulation is informed by case law from inside the jurisdiction and to some extent from the UK, a clear regulatory regime in the form of legislation is particularly welcome, not least because of its potential to increase the visibility of mediation.

Most members of the mediation community, certainly in Ireland, would generally view some form of regulation as desirable, as working within an unregulated market brings many challenges. If regulation is generally a good idea, provided it is fit for purposes, this begs the question of what "good" regulation looks like. The author of this paper, in co-operation with two colleagues, Prof. Nadja Alexander and Dr. Martin Svatos, has addressed this question by means of studying comparative mediation regulation in the European Union.[iv] In studying the regulatory frameworks of 28 different Member States, the authors devised a rating criteria for these frameworks to assist in evaluating the quality and robustness of a country's regulatory framework and as information for practitioners or clients who might be faced with choosing a jurisdiction in which to hold a mediation. In this regard it is important to point out that the focus was on the regulatory regime for cross-border mediation but this, in most countries, in intertwined with, if not identical to domestic regulation.[v]

The premise behind the rating criteria is that certainty, predictability and transparency of the rules (to include "hard" law, caselaw and soft law instruments such as institutional rules) which govern mediation in a given jurisdiction are desirable. This approach is consistent with the provisions of the EU Directive which sets out core regulatory principles of mediation but leaves it to Member States to decide how and in what form to implement them. It is also hoped that by identifying what robust regulation might look like, this might serve as a guide for governments and policy makers, such as the Irish legislature, in drafting regulatory instruments and implementing regimes.

It is through this lens, therefore, that they key provisions of Ireland's new Mediation Bill are assessed.

The first sections of the Bill deal with key aspects of the mediation process, such as the contents of Agreements to Mediate, the role of the mediator, confidentiality and enforceability of agreements. Clarity of regulation in relation to these areas if essential to protect the integrity of the process and to reinforce key hallmarks of the mediation process. Robust regulation will include clear provisions on the confidentiality of the process, for example, including to whom the obligation pertains and what it covers. The provisions of section 10 of the Bill are not perfect in this regard. Non-party participants are not covered by the provision, nor are oral communications. It is hoped that an amendment might be made to the provision in this regard during the next stage of the legislative process.

Part 3 of the Bill deals with obligations on legal professionals to refer cases to mediation. This, likely the most controversial part of the Bill, reflects the intention of the legislature to divert cases out of the courts at the earliest stages – namely when disputants consult their lawyers. Pursuant to these provisions, lawyers must "advise the client to consider mediation as a means of attempting to resolve the dispute" (section 14(1)(a)) and provide the client with information on mediation and mediation services. The lawyer must then swear a Statutory Declaration to the effect that they have carried out this duty properly. While the representative body for solicitors is taking a positive stance on this obligation, there can be no doubt that in practice this is likely to bring some resistance with it… [vi]

Part 4 of the Bill gives judges increased powers to suggest mediation to parties, and contains the provisions on costs penalties for unreasonable refusal to mediate (section 21). It also contains the most problematic provision, in the author's opinion, in the Bill. Section 17 provides for a mediator's duty to report to court after the court has invited parties to consider mediation. Not only must a mediator report on whether mediation took place or not, and why, if it didn't, it obliges the mediator if no agreement has been reached, to make a statement as to "whether, in the mediator's opinion, the parties engaged fully in mediation." (Section 17(1)(iv)) No guidance is given as to how the mediator might form an opinion on such engagement.

The problems with this provision are obvious. Confidentiality will be compromised if such a report is made, as will truly voluntary engagement in the process. If such a report, for example, were combined with the potential for costs penalties for not engaging in mediation as set out in section 21, one would have to question how a party would really be engaging in the process voluntarily.

This provision, along with some lack of clarity in some others, therefore compromises the regulatory robustness of the new regime envisaged by the Mediation Bill, 2017. It is hoped, however, that submissions made to government by all the main interest groups and bodies will be taken into account and legislative amendments may address the potential problems in the Bill.

This Bill is not perfect. Some provisions, such as those concerning a national Code of Practice, the hugely important issue of regulating the mediation profession and a scheme for mediation information sessions, are left inert unless activated in the future by means of a Ministerial Order. The mediation market, training standards and independent oversight of the profession will therefore remain in a murky, market-regulated space; an unsatisfactory situation for mediators, clients and other professionals.

For a common-law jurisdiction however, the enactment of the Bill will position mediation at the centre of the modern Irish dispute resolution system and give it a legitimacy and structure no amount of case-law or market regulation can.

Of course, the effectiveness of this regime will be dependent on how it is applied by lawyers, judges or other agents in the dispute resolution system. Nonetheless, it is essential for policy makers to recognise that if mediation is to become an integrated part of our dispute resolution system it needs to be housed within a robust but dynamic regulatory framework.

---

[i] For an overview of the current regulatory framework see Law Reform Commission, *Report on Alternative Dispute Resolution* (2010) available at http://www.lawreform.ie/_fileupload/reports/r98adr.pdf

[ii] https://www.oireachtas.ie/viewdoc.asp?DocID=34522&&CatID=59

[iii] See, for example, Alexander, *Mediation and the Art of Regulation* [2008] QUTLawJJl 1; Boon, Earle & Whyte, *Regulating Mediators?* Legal Ethics 2007 10:1

[iv] Alexander, Walsh & Svatos, *The EU Mediation Law Handbook* Wolters Kluwer, London, 2017.

[v] For a more thorough explanation of the Regulatory Robustness Rating system see Alexander & Walsh, *Regulatory Robustness Rating (RRR): A Michelin Guide to Mediation Regulatory Regimes* (9 August 2016*); Michelin II or the Regulatory Robustness Rating: Part 2 (*19 August 2016*); Michelin II or the Regulatory Robustness Rating: Part 3* (25 August 2016) all available at Kluwer Mediation Blog www.kluwermediationblog.com

[vi] https://www.lawsociety.ie/Documents/Gazette/Gazette%202017/May-2017-Gazette.pdf

The Author—

Sabine Walsh is a mediator, trainer and lecturer in mediation and conflict management and runs a busy national and cross-border mediation practice alongside teaching and training. She is based in Sligo in the Northwest of Ireland. She left practice as a lawyer to pursue mediation full-time in 2009 and has been mediating a wide range of interpersonal and commercial disputes since then.

You may reach her at: www.swmediation.com; sabinew@outlook.ie

POINTS TO PONDER

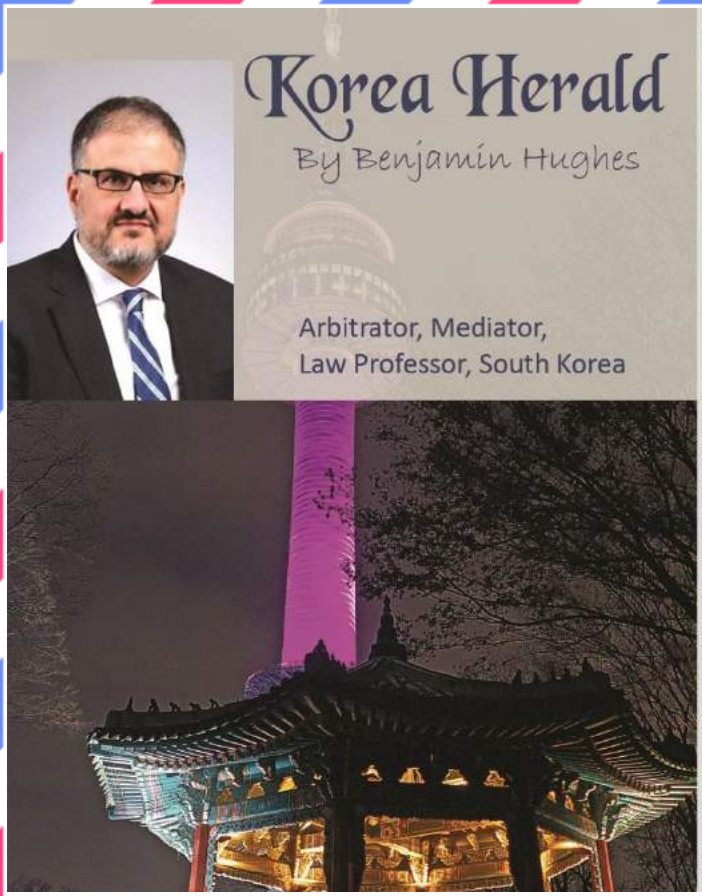
What must it take to bring Users to adopt mediation as an appropriate first step?

Mediation and its benefits are quite popular these days and have been for some time. This is especially true against the backdrop the deficiencies of the adjudicatory options of dispute resolution (arbitration and mediation). Even though mediation is truly an attractive option yet there is some kind of a hesitation amongst users in opting for mediation. The "buzz" around mediation in India has been louder than ever – more trained mediators; expanding court annexed mediation schemes; pro judicial support, etc. Yet with a booming proliferation and widespread recognition of the potential benefits, fostering a mediation culture in India hasn't seen a great change. What's missing? What else needs to be done?

Want to contribute to this discussion?
Write to us at: iiadraadrworld@gmail.com
Also, visit the IIAM Facebook and generate the discussion further at: https://www.facebook.com/arbmedindia

"Litigation is the pursuit of practical ends, not a game of chess"

Felix Frankfurter (Associate Justice of the Supreme Court of United States)



This has been a busy year on international arbitration scene in Korea. After spending the past several y ears building up the "hardware" infrastructure for international commercial arbitration in Korea by laun ching the Seoul International Dispute Resolution Center ("SIDRC"), in 2016 Korea has accomplished tw o major upgrades to its arbitration "software" infrastructure. First, the recently amended KCAB Internat ional Arbitration Rules ("2016 Rules") came into effect on 1 June 2016. Second, the Korean National As sembly has revised the Korean Arbitration Act (the "Act") to reflect the 2006 amendments to the UNCI TRAL Model Law, and the revisions will come into force on 30 November 2016. This letter highlights th e main modifications introduced by these two important upgrades.

The 2016 KCAB International Rules

The KCAB has introduced three major changes in the 2016 Rules to ensure the integrity and efficiency of arbitration proceedings. First, in order to ensure the quality, impartiality and independence of the a rbitral tribunal, Article 13 of the 2016 Rules provides that the Secretariat will now screen arbitrators no minated by the parties before confirming their appointment. If the Secretariat deems the appointment of any arbitrator to be inappropriate, it may decline to confirm such arbitrator. Further, arbitrators will now be required to sign a "statement of impartiality and independence" prior to appointment.

Second, new provisions in the 2016 Rules on joinder and consolidation enable the KCAB to more efficie ntly handle multi-party and multi-contract disputes. Article 21 provides that a tribunal may allow a thir d party to be joined to an arbitration by application of a party if all parties agree (including the third pa rty), or if the third party is a party to the same arbitration agreement and has agreed to be joined. Arti cle 22 provides that the KCAB may allow the submission of disputes arising under multiple contracts un der a single request for arbitration if it is prima facie satisfied that all of the contracts provide for arbitr ation under the 2016 Rules, the arbitration agreements are compatible, and the claims arise out of the same transaction or series of transactions. Article 23 provides that the tribunal may, at the request of a party and after allowing the parties to make submissions on the matter, consolidate claims made in a separate but pending arbitration if such arbitration is also under the 2016 Rules and between the same parties, unless any member of the tribunal in the other separate proceedings has already been appoint ed.

Finally, the 2016 Rules introduce emergency arbitrator provisions in order to provide parties with interi m relief prior to the constitution of the tribunal. Found in Appendix 3 of the 2016 Rules, the new provi sions provide a mechanism by which a party may seek the appointment of an emergency arbitrator co ncurrently with or after the filing of a request for arbitration. The emergency arbitrator will be appoint ed by the Secretariat within two working days, and the emergency arbitrator will have 15 days to rende r its order on interim measures.

These amendments and updates bring the KCAB into line with other major arbitral institutions in the re gion, and should go a long way to encourage trust in the integrity and efficiency of KCAB arbitral procee dings.

The 2016 Revisions to the Korea Arbitration Act

The Korean Arbitration Act was completely overhauled in 1999 to adopt the UNCITRAL Model Law (1985). The new revisions to the Act were intended to adopt the 2006 updates to the Model Law and to address some other latent defects and disparities between the Act and the Model Law. The revisions bring Korea into the forefront of international arbitration, with one of the most faithful incorporations on the Model Law in the Asia-Pacific region.

Among the important updates to the Act which will come into effect on 30 November 2016 are:

(i) clarification of the scope of arbitrable disputes under Korean law, following the German model of allowing the arbitration of any economic claims and any other claims which may be resolved by settlement between the parties;

(ii) relaxation of the writing requirement for arbitration agreements, following Option I of Article 7 of the Model Law;

(iii) allowing a party to seek court review of a tribunal's determination that it lacks jurisdiction, a departure from the Model Law but an improvement in my view;

(iv) adoption of most of the provisions of Article 17 of the 2006 Model Law on the availability and enforceability of interim measures, except that (a) only interim measures issued in arbitrations seated in Korea will be enforceable under the Act, and (b) the provisions on preliminary orders were not adopted;

(v) expansion of a tribunal's ability to enlist the assistance of the courts in the taking of evidence; and

(vi) simplification and streamlining of the procedures for obtaining recognition and enforcement of arbitral awards (by making recognition and enforcement decisions through a court order rather than by a court judgment).

The changes to the Act and the 2016 Rules both seek to ensure that international arbitrations seated in Korea are efficient, reliable and up to international standards in every regard. These amendments, tog ether with the hardware infrastructure already in place in Korea and the efficient and arbitration-friend ly courts, should help to make Korea a very attractive seat and venue for international arbitration in the Asia-Pacific region.

About the Author—

Benjamin Hughes is an independent arbitrator and associate professor of law at Seoul National University Law School. He is an arbitrator and door tenant of Fountain Court Chambers in London, and of The Arbitration Chambers in Singapore. Prior to launching his career as an independent arbitrator, Ben practiced international arbitration at Shearman & Sterling (in the US and Singapore), and was the founding co-chair of the international dispute resolution practice group at Shin & Kim.

You may reach him at: benjamin@hughesarbitration.com

VOICES & VIEWS

ADR, As they see it....

Arjun Natarajan

Advocate & Mediator, New Delhi

During the Global Pound Conference (GPC) Series 2016-17, Chandigarh, Arjun Natarajan, wrote a series of blogs posing some difficult questions surrounding mediation in India, including the differences between mediation and conciliation in India. In this series of just 4 pieces, he went on to explore possible answers to such questions.

By the time the conference concluded, it appeared that a much needed context has been given to understand the distinction between mediation and conciliation in India, in terms of:

1. They being processes.
2. The extent of intervention of the mediator and the conciliator.
3. The manner of enforcing the outcomes of mediation and conciliation.

Arjun views and beliefs are that addressing these questions are essential to take mediation to greater heights in India. As a lawyer and mediator, Arjun raised the following questions -

1. Would it be beneficial to categorise mediation as an ADR mechanism?
2. Does Indian law (statutory and case law) differentiate between conciliation and mediation?
3. If the second question is answered in the affirmative, then, what is the legal framework which applies to mediation in India?
4. What is the stand taken by India before United Nations Commission on International Trade Law (UNCITRAL), in relation to mediation?
5. What is the legal framework which applies to private mediation in India?
6. Are mediations arising in an arbitration squarely covered by The Arbitration & Conciliation Act, 1996?

In a series of 4 pieces, he has explored possible answers to the aforesaid questions -

PART I – What's Holding Back Mediation In India?
PART II – 'Mediation And Conciliation Can Be Used Interchangeably In India?
PART III – India's Stand Before UNCITRAL vis-à-vis Mediation?
PART IV – Are Private Mediations And Mediations Arising In An Arbitration Faced With A Legal Vacuum?

The Author—

He is a Delhi/NCR based litigator. He practises commercial law, with sectoral focus on telecommunication, broadcasting, information technology and aviation. Additionally, he practises litigation and ADR, with special focus on consensual dispute resolution (CDR) mechanisms like strategic negotiation, mediation and conciliation.

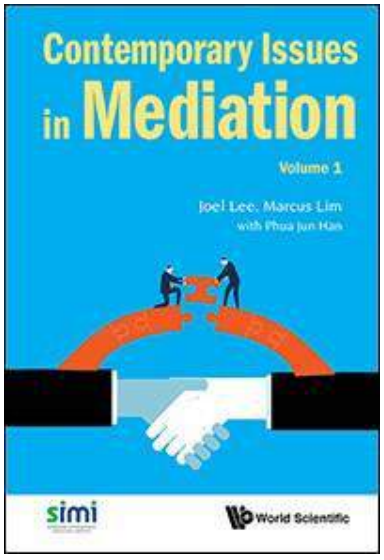
You may reach him at: adv.arjunnatarajan@gmail.com

Dorcas Anderson
LLB (National University Singapore), LLM (Harvard), Assistant Professor, SMU School of Law (Singapore)

Contemporary Issues in Mediation (Vol. 1)

— Joel Lee and Marcus Lim (Gen Eds)

This book, a publication by the Singapore International Mediation Institute ("SIMI"), features the top ten entries of SIMI's inaugural essay writing competition. It is probably the first publication in Singapore showcasing the insights of students on the practice of mediation. As William Ury, co-author of *Getting to Yes*, has pointed out in his foreword to *Contemporary Issues in Mediation*, it is crucial to plant seeds in the young field of negotiation and mediation for the benefit of future generations. This book certainly represents a significant step in this direction.



As a mediator, this reviewer found it refreshing to read these essays covering a broad range of topics in the mediation field. Three chapters in this book examine the impact of Singapore culture on the practice of mediation, four essays analyse mediation theories and techniques, and three essays focus on the interface between mediation and the law.

As the editors have observed, the essays contain very fresh insights that are "untainted" by years of practice and entrenched opinions. It is particularly heartening to see how the authors have not avoided addressing some difficult issues that have perplexed and divided mediators, but have provided their personal perspectives on resolving these tensions. All the essays also seek to contextualise the existing mediation scholarship to the Singapore society. Singapore and Asian mediators should take their cue from these authors to contribute further to the development of contextualised and autochthonous scholarship on dispute resolution.

The Book Review has been published with the permission of Singapore International Mediation Institute

simi SINGAPORE INTERNATIONAL MEDIATION INSTITUTE

Link: https://goo.gl/mqMBnG

Who's Who

the iiadra interview

Prathamesh Popat

Advocate & Mediator, Mumbai
Prachi Mediation Chambers

Q: What are your views on the current situation of alternative dispute resolution in India (particularly, mediation)? How far have we come in our mediation culture?

A: Mediation has always been a part of our culture. It lost its value, and then existence, with the advent of anglo-saxon jurisprudence and the establishment of courts of law. Mediation is now witnessing a renaissance of sorts with the courts, due to being over-burdened with a huge backlog of pending matters, giving it considerable importance in helping clear that pile-up.

We are, however, still quite afar from the ideal situation of mediation being the default mechanism to begin with. This will be achieved only through educating and empowering the end-users – the disputants – to prefer them in spite of little support from their legal advisers.

Q: Are there any cultural issues in India where people are finding it difficult to take charge of decision making rather than delegating it to a third party to impose the decision on them?

A: There are several. To mention one, being in a joint family set-up, decision-makers are culturally groomed to take into consideration the interests of all stake-holders in a given dispute when seeking to address it. As pleasing all is impossible, they shy away from seeking a resolution on their own and prefer the dispute be decided by a third party so that they are themselves not held accountable for the final outcome.

Q: Given that mediation is now known to a large extent (as compared a few years ago), there still isn't a visible growth in the use of the mediation? What are we missing?

A: It is only we trained lawyers who can say that mediation is well known. In recent deliberations certain representatives from several states brought to light that they only have a locked room with the sign-board mentioning it is a 'Mediation Cell/Room' and in fact there is hardly any ADR activity undertaken in their courts. Even where things are taken seriously, the lawyers are not precisely aware of how the process works. And the way mediation is conducted in some jurisdictions – as if it were a *judicial settlement* – it will take a long time to undo the damage being caused to the culture and fair name of *mediation*.

Q: The business community often sticks to arbitration or litigation, thinking it's the best solution in a dispute scenario. Why, according to you, there's such a tendency?

A: Contracts of yore do not have a mediation clause. They only have an ad hoc arbitration clause. That being so, arbitration is the default (binding) choice in case of disputes arising in such contracts. It will take some time for the culture to permeate amongst the transactional lawyers where they would be incorporating sophisticated multi-tier clauses to deal with disputes arising from the contracts they draft for their clients, where negotiation and mediation would be the primary default tools for dealing with disputes.

Q: What are your predictions about mediation in India in the immediate future?

A: There are several institutions/organisations gearing up to provide mediation services to the marketplace. Hence, though we do not still see much of institutional arbitration, we will find a better proliferation of institutional mediation & conciliation. Yes, things will take time. But then, as the saying goes: Rome wasn't built in a day!

The challenge will be to get the right training across. Presently, some categories of individuals, like retired judges, are not required to undergo any training to be recognised as mediators. It is like saying that if an air-hostess has put in 15 years as cabin-crew, she is qualified to be seated in the cock-pit. And it is not a laughing matter. Equally disturbing is the trend of seeing people taking a 40-hour training and calling themselves mediators, and worse still, mediation trainers!

Q: Thank you Mr. Popat for talking about the latest trends in mediation in India. It was great talking to you.

A: You are welcome. I hope, through your this endeavour, the message goes out that mediation, being as much an art as a science, requires one to undergo considerable training so as to be of useful service to the parties in the mediation room.

The Interviewee —

Prathamesh D Popat is a lawyer based in Mumbai. He took his initial training in mediation in India and then proceeded abroad to get further training under LEADR (now *Resolution Institute*), a peak dispute resolution institute based in Sydney, Australia. Later on he also received his accreditation as a mediator from LEADR and even came to be certified as such by IMI. He keeps himself abreast of development in the *mediation* field by regularly attending conferences and workshops relating to *mediation*.

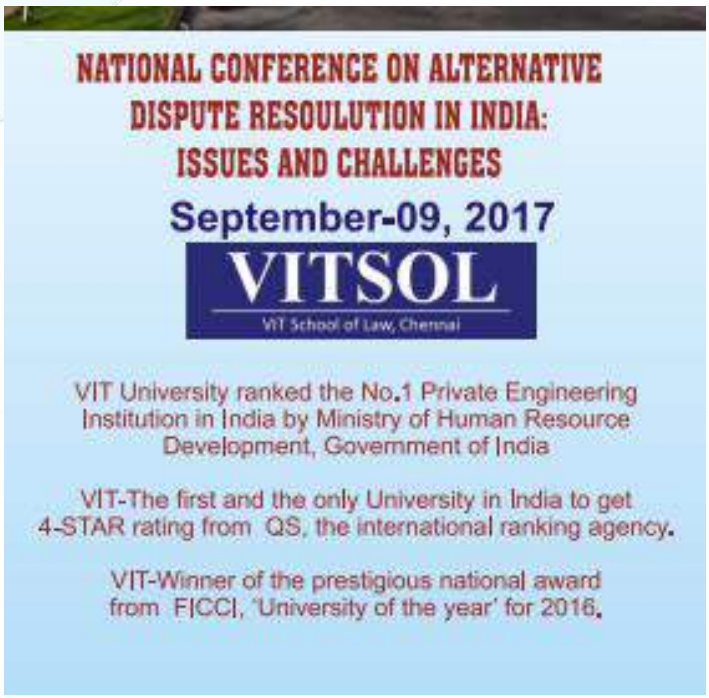
He has his proprietary firm, ***Prachi Mediation Chambers***, under which name he practices as a mediator, conciliator, advisor (counsel in mediation proceedings), ADR Consultant and Mediation Trainer.

His website is: www.prachi.me

Prathamesh regularly blogs at www.mumbaimediators.com

Get in touch with him: prachimediation@gmail.com

The Happenings



For more mediation events worldwide go to
www.MediationWorld.net

mediationworld
international mediation resources

Sandeep Bhalotia
V Year Student, LLB
Jindal Global Law School, India

"Mediation in Cases Of Domestic Violence: An Indian Perspective"

The author aims is to identify two opposite interests associated with the settlement of domestic violence cases, and look at the Indian law to see how those two interests are equitably balanced, therefore, providing a recommended way forward, not necessarily a perfect one, to handle cases related to domestic violence. Briefly, these two interests are – protecting family relationship and children from trauma and to make sure that the abuser is made to pay for his deeds – and the following paragraphs present an expose of the same.

Identifying First Interest

The use of mediation in domestic violence related cases invites conflicting opinions. A set of people believe that it is okay to use mediation in domestic violence cases just like in any other kind of dispute but another set of people believe that there is no place for mediation in domestic violence cases. Use of mediation in any dispute has its own advantages like confidentiality, informal procedures, flexibility, and its ability to save and sustain relationships. Therefore, one can say that mediation should be used to settle cases involving domestic violence. After all, it may potentially save the family relationships, protect the children from the emotional repercussions that they might suffer due to long drawn court litigation, etc. Mediation's voluntary nature preserve the right of self-determination and, therefore, parties have full autonomy to accept or reject the outcome. So, this is one way of dealing with domestic violence cases to satisfy a family interest, let us call it – the *first interest*. The *first interest* is to protect the family relationship and children from the repercussions of a family dispute

Identifying Second Interest

It would not be an incorrect assumption to say that there are a set of people who believe that cases related to domestic violence should never be dealt with mediation. It is so because domestic violence involves a criminal act and, therefore, the accused should not be let free without making him repay for his criminal act. Also, giving criminal punishment (imprisonment or a heavy fine) acts as deterrence against other citizens and, therefore, possibly reduces the rate of domestic violence cases in the community. So, the other interest associated with domestic violence cases (the interest of making it an offence) is where the abuser is made to pay for his deeds and the standards of acceptable and unacceptable behaviour are set. For the sake of our discussions, let us call this the *second interest*.

Examining First Interest

In India, ADR (Alternative Dispute Resolution) mechanisms are governed by the Arbitration and Conciliation Act of 1996 (subsequently referred to as the '**Act'**). This Act allows the arbitral tribunal to settle a dispute by use of mediation, conciliation or other procedures.[ii] In addition to this Act, Section 89 of the Civil Procedure Code (subsequently referred to as '**CPC'**) also provides for ADR mechanisms to resolve disputes between the parties. Back in 1842, the then British Prime Minister William E. Gladstone had rightly stated that *justice delayed is justice denied.* The huge number of pending cases in the Supreme Court[iii], High Courts, and lower courts[iv] in India, in addition to the less number of judges in the lower judiciary[v] has led to delay in delivering justice to the needy. The objective behind introducing Section 89 in the CPC by way of an amendment in 1999 was to clear the backlog of cases and provide a faster option to the litigants to resolve their disputes. Under Section 89 of the CPC, if it appears to the court that there is a possibility of the settlement between the parties and it can also be accepted by the parties, then the court *shall* refer parties to mediation.[vi]

The Indian courts have shown no hesitation in utilizing the tool of mediation to resolve family disputes. Recently, Karnataka High Court[vii] passed an order allowing for quashing of criminal proceedings against the accused husband. A dispute arose between the husband and wife after the birth of a girl child, and then there was filing of a divorce petition. The wife also filed a criminal case against the husband under Section 498A of IPC, 1860 and Sections 3 and 4 of the Dowry Prohibition Act, 1961. The Court referred the divorce matter to mediation under Section 89 of the CPC and both parties mutually agreed to a settlement. After this, the wife filed for the quashing of the criminal proceedings which the Court allowed stating that since the parties have settled their dispute amicably through mediation, there is no point in proceeding further with the criminal complaint. In 2014, Karnataka High Court[viii] allowed for compounding of offence on the request of the victim after considering the fact that the victim and the accused had amicably settled their divorce dispute through mediation. Both the above orders have relied on a precedent by the Supreme Court[ix] where it was held that "even if the offences are non-compoundable, if they relate to matrimonial disputes and the Court is satisfied that the parties have settled the same amicably and without any pressure, that for the purpose of securing ends of justice, Section 320 Cr.P.C. would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings in respect of such offences can be quashed in exercise of power under Section 482 Cr.P.C". The approach of the Court in above cases clearly shows its intention to let the matter settle amicably between the parties thereby satisfying the *first interest* as identified above, i.e., to protect the family relationship and children from the repercussions of a family dispute.

Examining Second Interest

Examining the *second interest,* it could be argued that in the above court cases, the judiciary has acted in such a manner that it has led to the dilution of the fear of being convicted in domestic violence related cases. The courts have overlooked the fact that it is allowing the accused to go freely without making him suffer for his criminal act. While allowing the quashing of the criminal proceeding after the matter has been settled between the parties under the Section 89 of the CPC, the Court ignored the history of Section 498A of IPC. In the 1980s, there was a drastic increase in dowry-related deaths and this generated pressure on the government from various organizations to provide for tangible protection to married women.[x] In response to public pressure the government swiftly came up with the amendment to introduce Section 498A in IPC, and till today this is the only section in the IPC which protects women from domestic violence by recognizing it as a crime. Domestic Violence under Section 498A of IPC is a cognizable, non-bailable[xi] and non-compoundable[xii] making it an offence of a serious nature. This evil practice took birth in our society because of its patriarchal nature where women are regarded as inferior to men and are subjected to abuse and this is even justified openly in the present time. Recently, Brand Finance has ranked India as "7th most valued nation brand" out of 100 countries![xiii] But, our society has not been able to keep pace with the enormous economic development. The patriarchal notion is very deep rooted in our society and the proof of the same can be ascertained from the increasing number of domestic violence cases filed throughout the country. In 2014, the State Commissionerate of Women and Child Development of Maharashtra reported that the domestic violence related cases have increased in major districts like Pune and Mumbai. In Pune, it has increased to seven folds from merely 31 in 2009 to 220 in 2013.[xiv] And in Mumbai, it has increased from 49 in 2009 to 208 in 2013. In Gujarat, the domestic violence cases increased by 1154 to 7812 in

2013 but the conviction rate is merely 2.30%![xv] Also, there has been a nationwide increase in domestic violence cases by 11.6% from 2012 to 2013 but the conviction rate has increased by only 1%.[xvi] In 2014, BBC released a report analysing the crime data which showed that there has been an increase in domestic violence cases by 134% in the last 10 years.[xvii]

Therefore, an argument could be made that on one hand there is an increase in cases related to domestic violence and the decrease in the conviction rate, but on the other hand, our courts are taking a lenient approach towards a crime that should have been eliminated long ago. Unintentionally, court's approach is leading to two problems - *firstly*, it is promoting the legal recognition of domestic violence but not taking strict actions against abusers – and sending a negative message in the society. The courts should never allow a crime to be forgiven just because the criminal cuddles the victim because doing so sends a negative message to the society that the domestic violence against women can be accepted if the parties settle their dispute amicably. Just because a victim wants to forgive the accused, it should not be the ground to quash a criminal proceeding because the crime not only affects the victim but also affects the society at large. The Supreme Court of India should take a relook at its decision because domestic violence in not a crime of private nature rather it is a violent act committed by one citizen against the other citizen and should not go unpunished. Secondly, the court has also failed to appreciate the fact that a woman can be forced and intimidated to agree for settlement under Section 89 of the CPC and, subsequently, for quashing of the criminal proceeding or FIR filed under Section 498A of IPC. The second problem is very likely to arise considering the fact that as per the Census of 2011 more than 83 crore people (out of the then total population of 121 crores) lived in rural areas. And out of these 83 crore people more than 40 crores were females with limited or no access to education and independent source of livelihood.

In the light of increasing violence against women, the United Nations (UN) adopted the Declaration on the Elimination of Violence against Women in 1993[xix] and 25th November was also declared as the International Day for the Elimination of Violence against Women.[xx]

So far, we have identified and understood two interests associated with cases related to domestic violence in India and now it is the time to look into the Indian law to understand Indian legal scenario to see how both interests may be equitably balanced. I got interested in mediation around two years ago after participating in a mediation competition which was held in V.M. Salgaocar Law College (Goa, India). I realized that the mediation is the best way to resolve almost any kind of dispute. I'm a believer of mediation. I have always kept myself mediation abreast by constantly reading scholarly works, participating in consensual dispute resolution competitions, writing and commenting about the recent developments, and having conversations and discussions about it. But one place where I have never appreciated the presence of mediation was in cases involving domestic violence. I always felt that mediation can be of no good in such cases because such cases should never even be attempted to be settled. But after reading more and trying to understand the working of mediation in such cases I seem to have changed my stand. My first observation was that the approach and process of mediation cannot be same for all kinds of disputes, it needs to be tailored after looking at the nature of the case, culture, parties involved, and interests that we are seeking to bring together.

When it comes to serious cases like family cruelty, domestic violence etc., I believe that mediation should be more regulated to ensure safety and a favorable outcome for the victim. Indian law and judges in various cases have tried to adopt Aristotle's doctrine of golden means by taking a middle approach between two extremes. The first extreme is protecting the institution of family and the future of children and, second, setting up standards of unacceptable behavior.

Measures present in Law

In general, only disputes with civil nature can be mediated. In the majority of the jurisdictions, criminal disputes, especially those which are non-compoundable, cannot be mediated but in few judgments, Indian courts have taken a view that pre-litigation mediation should be motivated for matrimonial disputes if those disputes are *fit for mediation.*[xxi] The first hurdle in mediating a case under Section 498A of IPC is that it is non-compoundable and this problem was recognized by the Supreme Court in *Ramgopal and Anr. v State of M.P. and Anr*.[xxii] The court observed that there are several offences under IPC which are non-compoundable including Section 498A of IPC and it requested Law Commission of India and Union Government to make these offences compoundable as this will reduce the burden on the courts and encourage reconciliation between the parties.

In *B.S. Joshi Case*[xxiii], the Supreme Court of India held that the High Court, while exercising it inherent power under Section 482 of Cr.P.C, can quash a criminal proceeding in a non-compoundable offence if the parties have amicably settled their differences. In that case, the Supreme Court was hearing an appeal in a matter related to domestic violence and harassment and cruelty to woman for dowry where wife registered an FIR against the husband. Later she filed an affidavit which stated that the FIR was registered at her instance due to temperamental differences and implied imputations. According to that affidavit, her disputes with the husband have been finally settled and they have agreed for mutual divorce. The High Court dismissed the petition filed by the wife stating that the offences under Sections 498A and 406 IPC are non-compoundable and the inherent powers under Section 482 of the Code cannot be invoked to bypass the mandatory provision of Section 320 of the Code. The Supreme Court while hearing the appeal felt that it is the *duty of the Court to encourage genuine settlements of matrimonial disputes*. The Court was aware of the fact that the Section 498A of the IPC was introduced to prevent the torture of woman by her husband or by relatives of her husband but the Court stated that the *hyper-technical view would be counterproductive* and would act against the interest of women and against the object for which it was added.

In *Srinivas Rao Case*[xxiv], the Supreme Court of India was hearing an appeal filed by the husband against the order of Andhra Pradesh High Court which set aside the divorce petition granted in his favour. The Supreme Court in observed that if the parties were sent to a mediation centre then the bitterness between them would not have escalated.[xxv] The Judge also stated that mediation as a method of alternative dispute resolution has got legal recognition and they have referred several matrimonial disputes to mediation centres and nearly 10 to 15 % of those disputes gets settled through various mediation centres. The Court observed that offences under Section 498A can be settled through mediation *if there exits elements of settlement* but judges need to be careful that *erring spouse should not be able to get out of clutches of law by manipulating the mediation.* In order to make sure that mediation is conducted fairly in matrimonial disputes, the Court passed few directions like taking consent of parties before referring them to mediation, setting reasonable time limit for court-referred mediation so that the resolution of dispute is not delayed, complaints under Section 498A of IPC should be referred to mediation only when there exits element of settlement etc. So, in this case court took a pro-mediation approach but provided few guidelines in order to make sure that the mediation process is not misused by the erring spouse. In *Afcons Infrastructure Case*[xxvi] the Supreme Court clarified that even when a case is referred to a neutral third party (mediator) the court retails its control and jurisdiction over the matter and the mediation settlement will have to be placed before the court for recording the settlement and disposal. Also, before referring the matter for mediation, the court is required to briefly record the reason why the case need to be referred to mediation. At para. 31 of the judgement the Supreme Court provided more detailed procedure to be adopted by a court under Section 89 of CPC thereby placing sufficient measure in place so that the process of mediation is not misused against the weaker party.

In *Manas Acharya vs State & Anr Case,*[xxvii] the Delhi High Court while hearing a petition for quashing of an FIR filed under Section 498A of IPC held that the settlement agreement executed before the Mediation Centre between the parties is a comprehensive legal, valid and binding document. Recently, the Bombay High Court in *Dr. Jaya Sagade v The State of Maharashtra*[xxviii] while hearing a petition against the circular passed by the Government of Maharashtra that there is no harm in mediating domestic violence related cases without court order. The circular provided that mediation for cases under DV Act can only be carried after the case is filed and direction are given by the court for mediation. The court placed considerable emphasis on the fact that no women should be counselled to settle or reside with a violent husband. The court noted that if there is risk of recurrence of domestic violence then a Domestic Incident Report (DIR) of the incident of physical violence under Section 10(2) of the DV Act must necessarily be filed by the Counsellor before commencing counselling. But in cases where women needs only maintenance order upon she having left her shared residence consequent upon domestic violence caused to her, a pre-litigation counselling would be an answer. The court also stated that recourse to Section 14 of the DV Act and Rule 14 under the DV Act can only be made after obtaining the consent of the violated woman and in accordance with specific, express guidelines invited from the Bench. In its order the court set aside the impugned circular but in order to provide protection to violated women it stated that the mediation should commence only upon voluntary and informed consent of the aggrieved woman and there shall be no pressure on her to settle her claim. The court also took precautionary measure by stating that no mediation shall be undertaken in case of serious physical domestic violence suffered by any woman.

All these above judgements have one thing in common i.e., all of them have taken a pro-mediation approach in domestic violence case but they have also established some measure to make the mediation process more fruitful and fair. Whether you are favour mediation or not but one thing that should be kept in mind is that, the mediation is a virtue, if it is completely ignored in matrimonial disputes then family as a social institute might lose its value, but if used without proper regulations and supervision then it would suppress the weaker party and deliver unfair results.

[ii] Section 30 of the Indian Arbitration and Conciliation Act, 1996.
[iii] As on 1/3/ 2015, 61300 matters were pending before the Supreme Court of India, available at- http://supremecourtofindia.nic.in/p_stat/pm01032015.pdf, last seen on 2/11/2015.
[iv] Over 3 crore court cases pending across country, The Economic Times, available at - http://articles.economictimes.indiatimes.com/2014-12-07/news/56802830_1_120-cases-high-courts-expeditious-disposal, last seen on 31/10/2016.
[v] Available at - http://www.newindianexpress.com/thesundaystandard/Vacancy-Nightmare-Courts-Delay-in-Justice/2015/10/04/article3061196.ece, last accessed on 31/10/2016.
[vi] Section 89(d), The Code of Civil Procedure, 1908.
[vii] *Mohammed Mushtaq Ahmad and Ors. Vs. State by Kengeri Police Station and Ors.* 2015(3) AKR 363.
[viii] *Gurudath K. Vs. Respondent: State of Karnataka* MANU/KA/2695/2014.
[Ix] (2013) 4 SCC 5
[X] Statement of Objects and Reasons, The Criminal Law (Second Amendment) Act, 1983, 26th December 1983
[xi] First Schedule, The Code of Criminal Procedure, 1973.
[xii] Section 320, The Code of Criminal Procedure, 1973.
[xiii] *Nation Brands 2015*, Brand Finance, (2015), p.no. 7, available at - http://brandfinance.com/images/upload/brand_finance_nation_brands_2015.pdf, last seen on 2/11/2016.
[xiv] Neha Madaan, *Rise in domestic violence cases*, Times of India, available at - http://timesofindia.indiatimes.com/city/pune/Rise-in-domestic-violence-cases/articleshow/30636710.cms, last seen on 2/11/2016.
[xv] *Domestic violence cases rise, conviction rate goes downhill in Gujarat,* DNA, available at - http://www.dnaindia.com/india/report-domestic-violence-cases-rise-conviction-rate-goes-downhill-in-gujarat-2000205, last seen on 3/11/2016
[xvi] Ibid.
[xvii] Geeta Pandey, *100 Women 2014: Violence at home is India's 'failing'*, BBC News India, available at - http://www.bbc.com/news/world-asia-india-29708612, last seen on 3/11/2016.
[xviii] Census of India 2011, available at - http://censusindia.gov.in/2011census/censusinfodashboard/, last seen on 3/11/2016.
[xix] Resolution on Declaration on the Elimination of Violence against Women, United Nations, available at - http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/48/104, last seen on 1/11/2016.
[xx] United Nations General Assembly, *Resolution on International Day for the Elimination of Violence against Women*, United Nations, available at - http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/54/134, last seen on 1/11/2016.
[xxi] *K. Srinivas Rao v D.A. Deepa*, Civil Appeal No. 1794 of 2013, Supreme Court of India
[xxii] *Ramgopal and Anr. v State of M.P. and Anr* (2010) 13 SCC 540
[xxiii] *B.S. Joshi & Ors. v State of Haryana & Anr.* AIR (2003) SC 1386
[xxiv] *K. Srinivas Rao v D.A. Deepa*, Civil Appeal No. 1794 of 2013, Supreme Court of India
[xxv] *Ibid.* Para 31.
[xxvi] *Afcons Infrastructure Ltd. vs. Varkey Construction Co. Pvt. Ltd.* 2010 (8) SCC 24.
[xxvii] *Manas Acharya vs State & Anr* CRL.M.C. 2090/2012 & CRL.M.A. 7236/2012, 14412/2012
[xxviii] *Dr. Jaya Sagade v The State of Maharashtra* SOM.PIL.104/2015-DB

The Author—

Sandeep Bhalotia
Penultimate Year Student (IV Year)
Jindal Global Law School, O. P. Jindal Global University (India)
You may reach him at: 13jgls-sbhalothia@jgu.edu.in

“The Inaugural ICC Australia Asia Pacific Commercial Mediation Competition”

In July, ICC Australia held its biggest educational event with 14 university teams from the Asia Pacific region competing around the mediation table at the inaugural ICC Australia Asia Pacific Commercial Mediation Competition.

Each team had put months and hundreds of hours into perfecting their problem-solving skills in cross-border commercial disputes. Through this competition, students learnt to effectively combine the use of mediation and collaborative problem-solving skills to successfully represent parties' interests and progress towards a settlement.

The 14 teams from Singapore, India, New Zealand and Australia competed over three rounds with each team improving over the course of the competition. During the competition participants applied ICC’s Amicable Dispute Resolution (ADR) Rules to settle commercial dispute scenarios that had been drafted by a group of international mediation experts.

The ICC Mediation Rules provide an easy to use framework and a comprehensive body of rules for the conduct of mediation. As our global economy expands, transnational disputes become increasingly important and having a set of rules that cannot be seen as favouring any one culture or nation is important.

Competing in the final on 9 July 2017 were the National University of Singapore and The University of Auckland.

The final problem was a dispute titled The Space Race and involved whether a space ship should be launched, should passengers be allowed on it and who would fund it. The competition was fierce with the winning team being announced by his Honour, Justice Clyde Croft as the National University of Singapore. The team has won a place in the ICC International Commercial Mediation Competition held in Paris in February 2018.

Justice Croft said "ICC—Australia has been instrumental in promoting and growing mediation and arbitration in Australia and more broadly the Asia-Pacific Region. Its work deserves the praise and support of the courts and the commercial community, domestically and internationally."

ICC Australia wishes to empower tomorrow's business leaders and legal minds, equipping them with the skills to better meet the dispute resolution needs of international businesses in an increasingly cross-cultural and global marketplace.

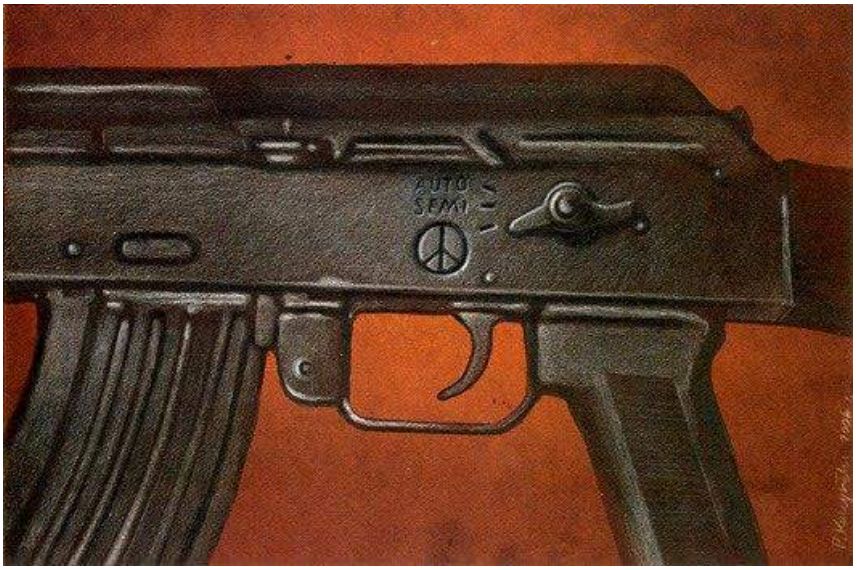
The competition was supported by the Victorian Government, The Melbourne Commercial Arbitration and Mediation Centre, Cornwall Stodart, the Resolution Institute, the Australian Government Attorney-General's Department, ADR Centre, The Victorian Bar and 35 volunteer judges, mediators and session supervisors.

The winning team from the National University of Singapore with His Honour, Justice Croft.

The report above is republished from the Australian Chamber of Commerce & Industry Blog

Source: https://www.acci.asn.au/news/national-university-singapore-wins-first-prize

the studio



"It should be the first duty of a member of the legal profession to compose family differences and settle dispute and controversies, by amicable settlement, and thereby prove how mistaken is the popular notion that lawyers foment dissensions for their own ends."

(Justice Raj Kishore Prasad, Paper Read at Rotary Club Meeting Patna, 1956 AIR Journal Section)

The Editorial Board

MEMBERSHIP iiadra

IIADRA represents the common interests of Arbitrators, Mediators, ADR Practitioners and ADR Users in promoting standard, professionalism and quality of ADR in the domestic and international arena. Membership with IIADRA will secure information, facilitate alliance with partners in the ADR world engaged in preventing and resolving conflicts and invitation to exclusive international and national conferences and discussions on the subject. We are working on shaping the future of dispute resolution. Join us!

Log on **to www.adrassociation.org/magazine** for further information

PUBLICATION OPPORTUNITY

Write for us and be recognized for your contributions within our circulations. Any original, innovative and thought provoking ideas related to ADR may be shared with us. Submissions may be made to the Editor. Publication of the post/ article will be the discretion of IIADRA and submissions made indicates that the author consents, in the event of publication, to automatically transfer this one time use to publish the copyrighted material to the publisher of the IIADRA News Magazine.

Please email your submissions as an attachment to the Editor at:
iiadraadrworld@gmail.com

We look forward to receiving your submissions!

CONTACT US

Get in touch with us for information about subscribing to the e-magazine, membership options in the India International ADR Association, or events or programs on ADR

BCG Mid Town, 7 B&C, Kerala Management Avenue, Panampilly Nagar, Cochin 682 036, Kerala State, INDIA
Tel: + 91-484-6007666 Email: info@adrassociation.org
www.adrassociation.org