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EDITOR'S NOTE

With a view to popularize the concept of ADR and to encourage the new generation to absorb the idea of resolving conflicts in a more cooperative manner, IIAM had promoted a scheme in 2011 for students to develop the qualities of research and presentation by providing opportunity to publish articles on arbitration, mediation, conciliation, dispute resolution and similar topics. We have been receiving original, innovative and thought provoking articles and the quality has been improving tremendously. Selection of the “Best Young Author” has become a tough job for the Board. Congratulations to all the authors for their excellent work. Well done!

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ROLE OF ARBITRATION IN INFRASTRUCTURE CONTRACTS

ADITYAPRATAP SINGH & SAURABH SHARMA



Infrastructure facilities include any form of facility that is provided with an objective to be used by public or the society. There are different kinds of disputes arising in Infrastructure Contracts. Since the state is the major bid holder in these contracts, the state does not favor Alternative Dispute Resolution Mechanism. But with the recent developments, Arbitration is being accepted as the ADR in the infrastructure contracts. The authors analyse how Arbitration is effective in dispute resolution in infrastructure contracts. In the second part the authors also discuss arbitration in detail with respect to Awards, Equity clauses, etc.

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Introduction

Infrastructure facilities include any form of facility, whether in the nature of a physical structure or a resource, commodity or a service, that is provided with an objective to be used by public or the society.¹ Infrastructure is most critical term for development and more so for industries. Despite heavy expenditure on it for past so many years, Infrastructure is still inadequate for the development of the country. That is why public sector had this huge responsibility of bridging the gap between the demand and supply. Unfortunately, over the years the public sector started becoming active in areas other than infrastructure. Two main reasons provided for the last of infrastructure development in the country has been identified as inadequate user charges and regulatory uncertainty.² States are turning to PPP's and Toll finance for the development.

The constitutional framework in India does not permit for a single law governing the rights for development of projects in the Infrastructure contracts. While infrastructure remains mainly public sector monopoly, the rationalization of user charges in this sector is vital. A regulatory scheme which is to be fair to the consumers is the need of the hour. In infrastructure there was a need to form joint ventures between the private and public sector. Where the partnership act was need to be applied. Except for the state of Andhra Pradesh and Gujarat, No other state has formed legal framework

(Footnotes)

¹ Piyush Joshi, *Law Relating to Infrastructure Contracts*, (New Delhi: Butterworth, 2003) at p.2.

² Anupam Rastogi, "infrastructure sector in the PM's report of the advisory council.

regulating the PPP contracts. A conciliation board with precise proceedings of arbitration, settlement and judicial proceedings are spelt out in the Andhra Pradesh Government's AIPDE Act. After this Gujarat too came up with something similar this was one of its first kinds, the GIDA Act.

There are regulatory issues of particular importance in all infrastructure contracts. These include:

- (i) whether the public is willing to pay for services that were previously subsidized;
- (ii) whether regulations will restrict the freedom of the operator to set and review appropriate fare/toll levels;
- (iii) whether and when the concession will revert back to the government;
- (iv) what will be the policy on competing infrastructure providers; and
- (v) whether the legal framework for awarding concessions, permits, and land acquisition, if necessary, is well defined.

Normally, the law of the country in which the project is developed applies to concession agreements. Yet, governments are not always forthcoming in accepting alternative dispute resolution mechanisms (such as mediation and arbitration) to resolve controversies arising from a concession. These mechanisms are internationally recognized and provide a viable means to resolve problems expeditiously and transparently. Their inclusion in the concession will provide comfort and reliability to the parties involved in the agreement and, therefore, should always be considered. Further ADR (Alternative Dispute Resolution) clauses are not adverse to government contracts. As for arbitration, judicial review is still a possible approach for resolution of disputes.



A woman went to doctors the office. She was seen by one of the new doctors, but after about 4 minutes in the examination room, she burst out, screaming as she ran down the hall.

An older doctor stopped and asked her what the problem was, and she explained. He had her sit down and relax in another room.

The older doctor marched back to the first and demanded, "What's the matter with you? Mrs. Terry is 63 years old, she has four grown children and seven grandchildren, and you told her she was pregnant?"

The new doctor smiled smugly as he continued to write on his clipboard.

"Cured her hiccups though, didn't it?"

Doing my best at this present moment
puts me in the best place for the next moment.
~Oprah Winfrey~

Dispute resolution has never been, and it is expected will never be, an exclusive function of the state³. Arbitration⁴ is one form of alternative dispute resolution (ADR)⁵. ADR is often lauded for its potential to produce “better” quality outcomes, including fairness leading to the same justice outcome, than courts. International Arbitration has become the principal method of resolving disputes between states, individuals, and corporations in almost every aspect of international trade, commerce, and investment.⁶ States have modernized their laws so as to be seen to be ‘arbitration friendly’. Simple international arbitration may require reference to at least four different national systems or rules of law, which intern may derive from international treaty or convention-or indeed, from the UNCITRAL Model Law on international arbitration, which is referred to later in this chapter. Concurrently, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the “New York Convention,” and herein also simply as the “Convention”) has been ratified by over a hundred countries to date, including the United States and many Latin American countries, enhancing the enforcement of arbitration agreements and awards nearly worldwide.

Infrastructure projects typically involve several different types of contracts, and arbitration may not always be the preferred means of dispute resolution for each of those types of contract. Moreover, the various different participants in infrastructure projects each have their own interests at heart, which often dictate different preferences with respect to dispute resolution procedures. As a result, the various different project contracts frequently contain different choice of law and forum provisions that can give rise to labyrinthine and piecemeal resolution of project disputes.⁷ The general advantages and disadvantages of arbitration relative to national court litigation of international commercial disputes are oft debated.⁸

Dispute settlement procedures in relation to infrastructure projects in India would depend on the parties involved and the regulatory framework governing the concerned sector. In relation to certain infrastructure sectors, the governing statute provides for the manner of settlement of disputes arising between the government agency and the concerned project developer.⁹ In India Arbitration is regulated by ‘Arbitration and Conciliation Act, 1996’. The Arbitration Act, 1940 dealt exclusively with the domestic arbitration, this act deals not only with domestic but also with International Commercial Arbitration. Only a clause that party should refer the matter to arbitration, a suit would still lie.¹⁰ The act is based on the model law adopted by the General Assembly of the United Nations and the UNCITRAL Conciliation rules 1980. The Act is divided into four parts, where part I is applicable only to where the place of arbitration is in India. Part II provides for the enforcement of foreign awards. Part III provides for regulations concerning conciliation proceedings and Part IV provides for certain supplementary provisions.

Arbitration in Infrastructure Contracts

Disputes in the construction industry may be resolved by a wide variety of means. Arbitration, which is used in construction contracts as the major means of final dispute resolution. Disputes in Infrastructure contracts can also be resolved by Court practice in terms of procedure, and with the rules of evidence which apply to civil litigation. Between these two formal systems lies a variety of consensual procedures generally referred to as Alternative Dispute Resolution (ADR).¹¹ These procedures are generally free from formal rules but can still generate difficult legal issues. In addition, since 1998, Infrastructure contracts falling within the statutory definition are subject to

(Footnotes)

³ Sarah Rudolph Cole, Arbitration and State Action, 2005 *Brigham Young University law review* 1 at 47.

⁴ *Berkovitz v. Arbib&Houlberg, Inc.*, 130 N.E 288,290(1921) (Cardozo, J.) (“Arbitration is a form of procedure whereby differences may be settled.)

⁵ Other forms of ADR include mediation, mini-trial, and summary jury trial.

⁶ Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, (New York: Oxford University Press).

⁷ Otto Sandrock, *Is International Arbitration Inept to Solve Disputes Arising Out of International Loan Agreements?*, 11 J. Int'l Arb.33(1994); KimmoMettala, *Governing-Law Clauses of Loan Agreements in International Project Financing*, 20 Int'l Law. 219, 236-40 (1986).

⁸ Alan Redfern& Martin Hunter, *Law and Practice of International Commercial Arbitration* 22-26 (2d ed. 1991); Sir Michael Kerr, *International Arbitration versus Litigation*, 1980 J. Bus. L. 164 (1980).

⁹ For example: The Telegraph Act 1885; Oilfields (Development and Regulation) Act 1948; Petroleum Act 1934; The Airport Authority of India Act, 1994.

¹⁰ Pollock and Mulla, *Indian Contract and Specific Relief Act*, (Vol-I, 13thEdn, 883.

¹¹ John Uff, *Construction Law*, Seventh Edition, 23.

mandatory provisions for rapid and temporarily binding “adjudication”. This procedure takes precedence over any other form of dispute resolution.

In construction contracts, the agreement to arbitrate is often included as one of the clauses of a standard form of contract, such as article 5 and clause 41 of the JCT form and clause 66 of the ICE form. In such clauses the parties agree to submit specified future disputes to arbitration. There may also be an agreement to arbitrate made after the dispute has arisen, usually referred to as an ad hoc agreement.

In either case there must be a submission (sometimes called a reference) of a specified disputes o arbitration, by one party serving notice to refer on the other. No particular form is required for a submission but it is an important step, as it usually constitutes the commencement of the arbitration for the purpose of limitation, and thus equivalent to the issuing of a claim form in a court. Subject to agreement of the parties, arbitral proceedings are commenced when one party gives notice initiating whatever step is required in accordance with the arbitration agreement, for example requesting the President of the ICE to appoint an arbitrator.¹² No particular form is required for an arbitration agreement, whether made in advance or after a dispute has arisen. If the agreement is in writing, this is invariably so in the case of a construction contract, the arbitration will be governed by the arbitration Act 1996.

Multiple tribunals have never been favored in building and engineering disputes. The JCT and the ICE forms of contract refer specifically to one arbitrator. The international (FIDIC) conditions contemplate that there may be more than one arbitrator, and the tribunals consisting of three arbitrators are common place under ICC procedure. The function of an umpire is however virtually unique to English arbitration law and other laws deriving from it. The selection and appointment of an arbitrator follows the reference to arbitration. The arbitrator may be named in the arbitration agreement, but it is more usual to find a requirement that the arbitrator be agreed between the parties and in default appointed by a specified or identified person. The JCT and ICE forms provide for appointment, in default or agreement, by presidents of RIBA or ICE respectively. Where the parties cannot agree and there is no mechanism for the appointment, the court has power to appoint an arbitrator.¹³

(Footnotes)

¹²s.14 Arbitration Act 1996,

¹³s.7, Arbitration Act 1996.



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Effect of Arbitration in Infrastructure Contracts

Building and infrastructure contracts usually contain wide arbitration clauses, but the clauses in the JCT and ICE forms are expressed to be subject to certain time limits. Before 1984 cases before the courts proceeded on the basis that where there was an arbitration agreement in the contract, the court would exercise the same powers as the arbitrator, for example by reviewing certificates and extensions of time as necessary. In the case of *Northern RHA v. Derek Crouch*,¹⁴ the court held that the court did not have the same powers and interpreted the words “open up review and revise any certificate” in the JCT arbitration clause as creating a power exclusively to be exercised by an arbitrator. The result was that the court was held to have no jurisdiction over such matters. The case was followed in series of decisions of the official referees (now TCC judges) and in other decisions of the court of Appeal. The decision in *Crouch* was finally and decisively overturned by the House of Lords in *Beaufort Developments v. Gilbert-Ash NI*,¹⁵ an appeal from the court of appeal of Northern Ireland. It was there held that clear and unequivocal words would be needed to deprive a party of recourse to the court and that this was not the effect of the JCT arbitration clause. Lord Hope put the matter this way:

“If the contract provides that the sole means of establishing the facts is the expression of opinion of an architect’s certificate, that provision must be given effect to by the court. But in all other respects, where a party comes to the court in the search of an ordinary remedy under the contract is entitled to examine the facts and to form its own opinion upon them in the light of the evidence. The fact that the architect has formed an opinion on the matter will be part of the evidence. But, as it will not be conclusive evidence, the court can disregard his opinion if it does not agree with it.”

Thus, with the exception of a final or other certificate which is expressed to be conclusive evidence in subsequent proceedings, the courts or an arbitrator have parallel jurisdiction to entertain disputes arising from the contract.

Multi Party Infrastructure Contracts

Ordinarily arbitration must be limited to the two parties to the contract, but infrastructure contracts usually involve more than two parties. Multi party arbitration can take two forms. Consolidation involves treating two or more arbitrators as a single case, to be heard in one set of proceedings and determined by one single award. Alternatively, there may be concurrent hearings of two separate arbitrations which remain separate and lead to two separate arbitrations which remain separate and lead to two separate awards, save only that the awards may be expected to be consistent. The problem for arbitrator in such circumstances to adopt a form of procedure which avoids inconsistent findings but which also respects the individual privacy (autonomy) of the parties.

This position is confirmed by a new provision in the Arbitration Act 1996 as follows:

- “35 – (1) *The Parties are free to agree –*
- (a) *That the arbitral proceedings shall be consolidated with other arbitral proceeding, or*
- (b) *That concurrent hearings shall be held,*
- (2) *Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.”*

This provision does not assist the arbitrator who is appointed in two related disputes involving different parties, where there is no such agreement. In the case *Abu Dhabi v. Eastern Bechtel*,¹⁶ the court was asked to appoint an

(Footnotes)

¹⁴[1984] Q.B 644.

¹⁵[1999] 1 A.C 266, 8 B.L.R. 1.

¹⁶(1992) 21 B.L.R. 117.

arbitrator in a main contract and a sub-contract arbitration which were closely related and where the parties had agreed that the arbitrator be appointed by the English court. The court had to weigh up the competing arguments for and against appointing the same arbitrator. The court of Appeal concluded that they could appoint the same arbitrator on the parties agreement that there could be an application to replace the arbitrator if one party thought that it was being prejudiced. Lord Denning M.R expressed the problem as follows:

“The sub-contractors, for instance, might say that the arbitrator’s decision in the first arbitration might affect his decision the second arbitration. If he had already formed his view in the first arbitration, they would be prejudiced. It would be most unfair to them: because he would be inclined to hold the same view in the second arbitration. On the other hand, as we have often pointed out, there is often a danger in having two separate arbitrations in a case like this. You might get inconsistent findings if there were two separate arbitrators.”

The solution to such problems lie clearly in agreement such as that found in some of the standard forms of contract, such as the JCT 80 forms. These oblige the employer, contractor and sub-contractor to consent to the joining of disputes which are substantially the same or connected. The problem might be solved by making certain rules for the whole industry.



THE IDIOT?

Once upon a time in a village there was an idiot, named Hugh. The town’s folk would often set him up with silly choices in order to laugh mercilessly at him when he made the wrong choice.

“Hugh,” they’d say, “would you rather have this shiny new quarter or this dirty old torn dollar bill?” “I’d like the shiny quarter,” Hugh would reply. His tormentor would give him the quarter and walk away laughing, declaring Hugh a true village idiot. Hugh would just shrug and go about his business.

Even though it was a poor village with little opportunity, this was repeated several times a day by many people. As the years went by, the ridicule became a ritual that dozens of townies took part in. The town’s folk had little to their names, but at least they could feel better about themselves in comparison to the village idiot this way. Not everyone would make fun of Hugh though. A few felt sorry for him and gave him hand-me-down clothes, leftover food, and even an old shack to live in at the edge of town.

One day, Hugh showed up at the village, wearing a brand new suit. Everyone was amazed, for few people in the town could afford new clothing, let alone a nice suit. One of town’sfolk asked Hugh where he got his new suit, thinking he must have stolen it. He bought it, he told them. And furthermore he added that, the fine new house being built on the mountainside that everyone was wondering about was his. When questioned where he got the money, he told them it was the money they gave him. With people giving him food, clothing, and shelter, he simply saved and invested everything they gave him. “I may be your village idiot,” he smiled and said, “but I’m no fool.” But why then, they asked, did he always take the lesser amount of money they offered him if he was so cunning? Hugh replied that if he had taken the greater amount of money, they would have stopped offering it to him. He earned his money by letting them laugh at him, but he knew the first time he took the greater amount they’d stop offering him money and find something else to laugh at him about.

So, who is the idiot? It just goes to show you, take care not to become the village idiot by your vain perceptions.

LAW RELATING TO THEORY AND PRACTICE OF ODR IN INDIA – A STUDY (PART II)

DR. N. VENKATESHWARLU



Online Dispute Resolution (ODR) is a branch of dispute resolution which uses technology to facilitate the resolution of disputes. ODR system is the same as the traditional dispute resolution model. The key difference in the two concepts lies not in the substance of their concept but in the mode or medium of practice.

Alternative resolution techniques, viz. negotiation, mediation and arbitration are complemented with the Internet Communication and Technology in ODR to carry out most of the dispute resolution procedure online. Author analyses the different processes under ODR.

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Advanced Conflict Management in Electronic Negotiation:

The initial conflict exhibits the characteristics of a business negotiation scenario. Two parties already figured out that an electronic negotiation would fit their needs and could lead to a possible solution. They know the issue and in turn their agenda items. The dynamic conflict occurs during the written message exchange. The level of conflict is influenced by five different aspects. they are:

- 1) The parties and their relationship and business.
- 2) The characteristics of each party
- 3) Their attitude concerning the initial conflict and the dynamic conflict.
- 4) The conflict issues
- 5) The escalation process itself

All these aspects are necessary for diagnosing and analysis of the conflict. A holistic concept starts with the recognition of initial conflict and its consequence on the escalation process. The level of escalation can be divided into different stages, namely, (1) hardening, (2) debate (3) action instead of words (4) images and coalition (5) loss of face (6) threats (7) partial destruction, (8) fragmentation (9) elimination. There is a polarisation and debate between the negotiators in the first stages. During the next stages, the conflict

gets more intensive and actors start to make threats. During these phases, conflicts can be constructive. Even in successful negotiations, there are different positions and opinions. The parties have to exchange information to achieve a mutual understanding. With rising escalation the conflicts are getting destruction and again stage 5 to 6, they cannot be resolved without the third party any more.

A diagnosis can be of different levels of details. A very detailed analysis cannot be guaranteed due to lack of time or missing, distorted or masked information. On the other hand, it is also not relevant to include all aspects. In the context of e-negotiation, the access to inter personal factors is particularly difficult. The negotiators act in offset locations and communicate over Time. For a possible third party, it is far harder to make a complete conflict diagnosis or to influence relevant aspects.

Concerning the introduced escalation model, there are different conflict resolution methods, which can help de-escalation. Some of them are moderation, consultation and mediation and these are briefly explained below:

- 1) **Moderation:** Moderation can be used on stage 1-3 of the escalation scale. The objective is to help participants to solve instant problem of interaction and questions concerning the content and the process. This type of intervention is useful on lower escalation levels. Moderation can offer support to explain unclear terms and definition. The creation of awareness for the joint objective can be forced by moderation. In turn, behaviour oriented interventions or advises concerning tasks, rules and functions takes centre stage. Passiveness and restrictions has an advisor are essential elements of modulations. Modulations does not have force to push parties to accept an advice.
- 2) **Consultations:** On levels 3 to 5 of the escalation scale, consultation can be an option to resolve conflicts. Consultations are active as the constructive and the negotiators understand the dynamic of the conflict and its influence. Negotiators ask for an advice and this advice should be perceived as motivating, helpful and not judging. Interventions of a consultant also focus on socio-psychological aspects. Parties have to control their emotions, thoughts and intentions and break out of the spiral of escalation. Consultation should prevent negotiation deadlocks and increase the flexibility. The parties should create self perception and reflect their situation. A consultant will not start a bilateral interaction between negotiations at the same time.
- 3) **Mediation:** On conflicts level 5 to 7, negotiators cannot resolve the dispute without the help of third party. One or both negotiators are willing to reject the negotiation. Mediation can be defined as assisted negotiation through third party. It is used to assist the parties in their negotiation, not to negotiate with the parties. It is a communicative process between all parties with the objective for the parties to generate a solution themselves.



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Online Mediation:

Mediation is a person to person process. Experienced mediators will claim that it is not possible to mediate in the truest sense except when in the physical presence of the parties. Strong emotions are invariably expressed in face to face interactions. In these environments, the third party can rely on a range of visual and non verbal cues which can enhance their ability to constructively manage the expression of strong feelings. In online settings, third parties have different challenges partially because emotions are expressed differently and it is often harder to interpret the emotional meaning and impact of written cues. The parties may even likely to issue threats when communicating. Given these patterns of communication in online exchanges, the online mediator not only aware of these tendencies but also needs to set and follow clear behavioural ground rules. As online mediator, one needs to actively and quickly intervene if and when one or both parties hurl insults. It is also important to remember that the written communication can be ambiguous and hard to interpret. The online mediator has to skilfully handle the situation, perhaps he may have to clarify or reframe and test with the parties the meaning of a statement before reacting to it or forwarding to other party.

Inspite of certain difficulties in interpreting the messages as stated above, the online mediation is preferable and appropriate for the following types of cases.

- 1) Disputants are geographically distance from each other and travel for a traditional mediation is not possible or is cost prohibitive.
- 2) Jurisdictional issues make it unclear as to which jurisdiction should prevail and/or would make enforcement of a court decision difficult.
- 3) None of the parties are seeking to act judicial precedent or to clarify existing laws.
- 4) The dispute itself arose from an internet based purchase. In those cases the disputants tend to be geographically separated, have no ongoing relationship, and have regular access to internet.
- 5) Scheduling difficulties make it impossible for the parties to attend traditional mediation session.
- 6) Concerns about violence or intimidation between the parties make a traditional mediation setting inappropriate, but the parties wish to move forward with mediation.
- 7) For other reasons, a traditional mediation is not feasible yet the parties want the assistance of a third party neutral to help resolve their dispute.

The procedure for mediation is the same as offline, except that the facilitative and evaluative techniques are combined with information technology. In the online environment, just like in the offline environment, it aims at finding a win-win solution to a conflict with third neutral party called mediator. In addition, technology supports these parties and form an essential and integral part of dispute resolution process, which is referred as fourth party¹. The provider of the technology used in e-mediation is known as fifth party.

Normally, the e-mediator (third party) owns the e-mediation tools (fourth party), and sometimes the e-mediation website (fifth party) provides chat, e-mail and then communication tools (e-mediation tools). Now a days it is common use that when parties went to an e-mediation website, the provider of the site offers e-mediation as a total concept. The e-mediation tools and the e-mediator are included in the e-mediation service. However, variations combinations of e-mediation service providers are possible. Some of such combinations are as under:

- 1) The e-mediation-mediator: This is the e-mediator who does not have his own e-mediation website, but just has a website (not an e-mediation website) on which he promotes his own service/skills as an e-mediator. This party is the third party in e-mediation.

(Footnotes)

¹ E.Katsh and J.Rafkin, online Dispute Resolution resolving conflicts in cyber space, Jossey-Bass, San Franscisco, 2001

- 2) e-mediation technique provider: The services of this provider are the offering of e-mediation tools (chat, e-mails etc.). This provider is not an e-mediator, but actually delivers services that are used during the mediation process on the site of this provider. This party is the fifth party in e-mediation.
- 3) e-mediation-over all providers: This party is the party who facilitates the e-mediation process from the beginning until the end. This party has an e-mediation website and either is also an e-mediator or offer the services of one or more mediators. This provider is a combination of the third and the fifth party in e-mediation. This fifth party can indicate one of the following situations:
 - a. e-mediation mediator who owns an e-mediation website on which he provides e-mediation tools. Or
 - b. An e-mediation technique provider who does not only offer e-mediation tools on this e-mediation website, but also offers the service of e-mediators. These e-mediators are either under contract with the technique provider or by they can be working on a freelance basis.

The parties have more options to select any combinations i.e. select the e-mediation-over all provider or select separately the e-mediator and e-mediation technique provider.

Mediation Process:

People in different parts of the world can use online mediation to resolve dispute by using secure encrypted e-mail or secure chat rooms or in some tele or video conferences. By using pass words, it is possible for the mediator to have contact with just one of the parties in a separate 'room', when other party waits in another room. Mediators can decide to use their own ground rule or they can ask the parties to help develop them collaboratively.

The mediator can explain the difference between positions (i.e demands) and interests (i.e. underlying needs) and then ask the parties to share their interests with each other and with the mediators. The mediator can work with the parties to brain storm a list of options while explaining the importance of separating this step from the step of evaluating options. In fact this separation is easier to accomplish online as parties are not able to interrupt each other to voice disapproval of individual options, the way they could do in a traditional mediation. The mediator can assist the parties as they weigh and evaluate the option in an effort to reach an agreement. The parties are more likely to accept options and agreement that they may come up on their own rather those coming from the mediator. Additionally the mediator may wish to discuss implementation issues with the parties so as to avoid problems later. All these steps of the mediation process can be accomplished online.

P R O M O T I N G
S T U D E N T
A U T H O R S

With a view to promote and support students in developing the qualities of legal research and presentation, IIAM is providing opportunity to law students to publish original, innovative and thought provoking articles on arbitration, mediation, conciliation, dispute resolution and similar topics and critiques on judgments relating to the same topics. Selected articles will be published in the "Indian Arbitrator". From amongst the submitted articles, every year one student author will receive the "Best Young Author" certificate from IIAM.

The online mediation has many advantages. The process will allow for greater flexibility more creative solutions, cost savings and convenience. It is the best option for those who are unable to afford travelling long distance and for those disputes involving a low amount.

The University of Massachusetts is currently finalising the “third Party”, software applications that will enhance the ability of parties and mediators to interact online. Parties that wish to avail themselves of online mediation need a computer with internet access. The mediation system and the files are located on a server that can only be accessed by authorised parties.

Key issues for Online Mediation:

An essential aspect of mediation whether online or offline is trust. It is essential for a good mediator to establish trust between himself and the disputing parties. In face to face mediation this trust is established during the mediation sessions. When online mediation is concerned it seems far more difficult though no less important, to establish and maintain trust. Offline mediation often takes place between parties that have an ongoing relationship and history together and will damage the relationship as little as possible so that future relations will not be endangered. This is important to both of them and the mediator can use information about their history.

In the online mediation process, parties often do not know each other and do not have an ongoing virtual or real time relationship of any kind. The parties are involved in an electronic commerce transaction in consumer merchant relationship (C2B) or consumer/consumer relationship (C2C). In most cases, the parties have had or not had dealing with one another before the dispute arises. The mediator cannot draw on the relationship or ask about the background of the dispute in relation to earlier interactions between parties. The fact that there is no face to face contact, but communication takes place via e-mail or real time online, makes it difficult for the mediator to manage or tamper the tone of the interactions or use his skills in reading body language. It is therefore far more difficult to establish and maintain trust.

The first step is for the mediator to introduce himself as fully as possible to all the parties and allow them to do likewise. The introduction of the mediator shall cover primarily the professional career, the nature of his practice within his profession, the nature of his practice within his profession and his particular experience in mediation, especially cases similar in nature to the one in question. An introduction in real terms to the mediator as a person is usually not fully carried to until the beginning of the mediation meeting when the previously provided written information is expanded on at a personal level. Without the benefit of personal meetings, the advice in online is to expand the written introduction to add a little more of the person like home location, family circumstances, interest, hobbies etc. Uploading a photograph or perhaps a small video will help the parties get to know the mediator better. The information need not be too much but just enough to enable the parties to begin to identify a real person in whom they can, and then begins to trust.

It is equally important for the moderator to take additional steps to begin to get to know the parties. The mediation room.com offers mediators use of personality profiling module that will help identify the traits of the parties e.g., whether they are submissive or assertive by nature etc. The profiling is entirely voluntary and the parties receive a copy of the report. The parties are then asked the extent to which they believe the report is accurate.

A straight forward small consumer dispute over a product will not require as much personality enquiry.

It is also important to try to find out as much about their experience in using the Internet and technology and how complete and comfortable the parties are with the technology and communicating online.

Ensuring the parties fully understand mediation and its objection and purpose so as to appreciate it in a positive spirit is another key element in any successful mediation.

Another key issue with mediating online through text is the greater risk of misunderstandings. Words can have different meanings to different people. For example the board outside the home 'solicitors keep out' in USA refer to door to door salesman, where in UK solicitors refers to lawyers. In negotiation 'my ultimate offer' may or may not mean 'my final offer' or may or may not mean 'my best offer'.

If when asking one party what he feels about a proposal from other party and he replies with the word 'that is wicked', you might be forgiven for thinking that he did not find the offer attractive. However if he is the follower of hip hop music, the phrase would mean the offer has very much acceptable. The advice is to check carefully the words that can have a double meaning and then learn the precise meaning intended by rephrasing and seeking confirmation.

Another issue to address is the difficulty in any asynchronous online discussion of identifying any hesitance by a party in answering a question. If the party has the hesitation online, the mediator does not notice when he reads the typed word "no" in the response which may lead to problems further ahead. The advice for the mediator is that whenever a closed question of importance is raised to ask the party to scale his answer e.g. 1-10 A less than 9 or 10 cases, then open up discussion as to why that is the case.

The identity of the person, the mediator dealing with is not clear. The digital signature can play an important part. The legal validity of digital signature has been accepted by National Laws of many countries. The US Act "Electronic Signatures in Global and National Commerce Act 2000", and The Information Technology Act 2000 in India has given a signature or record sent through cyber space have the same legal validity as to a pen and paper document. The fact that a digital signature and digital records have the same legal validity as written documents makes it far easier to check some one's digital identify.

It might well prove more difficult to testify digital signature than written document. The digital signature plays an important part in ensuring authenticity, integrity and non repudiation of data communication, thus enhancing trust.

To be sure that data sent and received have not been tampered with and no unauthorised persons have access to the information, encryption plays an important part in ensuring confidentiality and data security.

INTERESTED TO CONTRIBUTE ARTICLES ?

We would like to have your contributions. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, G-254, Panampilly Nagar, Cochin - 682 036 or editor@arbitrationindia.com.

Publication of the Article will be the discretion of IIAM 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 IIAM Journal.

Another important issue that has to be addressed when setting up an online mediation procedure is privacy. Where privacy is concerned, parties should be made aware of the ways in which the privacy is protected and in what ways personal information is stored or used by the mediator or mediation company. It is imperative that the mediator or mediation firm should have a privacy policy, which addresses a number of issues. Any dispute that they receive via a website must be treated in accordance with the rules of confidentiality. The disputes must be known only to the parties involved in the dispute, including the mediator. All personal records must be recorded and used with care. By making strategic use of security possibilities, it is possible to guarantee that the right of respect for personal privacy of all parties involved in an online mediation procedure is respected. Here again encryption plays a key role.

A very important issue arises as to how the compliance of the agreement reached through online mediation, is ensured. With online mediator initiative, that is not restricted to ecommerce transaction, parties can either accept the outcome as it is or assume compliance by making the outcome legally binding in a contract.

Online Arbitration:

Technological development of recent years is significantly changing traditional arbitral practices and procedures. Electronic submissions by e-mail or video conferencing are early harbingers of the technology dense future of arbitration. Arbitration tends to involve more and more diverse online techniques. Arbitration agreements are concluded and proceedings conducted by electronic means in online settings. International arbitrators want to deliberate without leaving their home towns and would gladly issue an arbitral award in an electronic form. The online arbitration is fully admissible and effective under the current legal framework provided that certain requirements are met.

Arbitration is a process where a neutral third party (Arbitrator) delivers a decision which is final and binding on both parties. It can be defined as a quasi-judicial procedure because the award replaces a judicial decision. However, it is less formal than litigation, less expensive and faster.

For a process to be recognised as arbitration, it should comprise the following elements as explained as under:

- 1) **Mutual consent:** The mutual consent is considered as one of the fundamental principles of traditional arbitration and is crucial to the legitimatisation of the arbitration process. In arbitration agreement the consideration, valid offer and acceptance and intention to create legal obligation should exist. It is well established ruling that the parties should not be forced to arbitrate unless they have freely agreed to that particular mode of dispute settlement. To enable the enforcement of award it is necessary to have the mutual consent to submit to arbitration is essential for online arbitration also.
- 2) **Choice of Arbitrators:** Arbitrators are not government representatives or judges and they are funded by the parties to the dispute. The arbitrators are chosen by the parties or on behalf of them. The arbitrators should be independent and impartial. The term independent is defined as one which measures the relationship between the arbitrator and the parties, personal, social and financial relation. The closer the relation in any of these spheres, the less independent the arbitrator is from the party. The independence of the arbitrator can be determined prior to holding arbitration and it is an objective test to establish whether or not the arbitrator can arbitrate between the parties independently and impartially. Impartiality is a subjective notion referring to the absence of bias in the person of the arbitrator resulting from a privileged relationship with the matter to be decided. Independence and impartiality are pivotal element of any arbitration.

In online arbitration like in traditional arbitration, independence and impartiality should be considered as two of the main characteristics and such elements should not be compromised by the parties while choosing the arbitrator. The power to choose the arbitrator by the parties is one of the main differences between the arbitration and litigation. In litigation, the judges are imposed on the parties whilst in arbitration the parties choose the arbitrators.

- 1) Due process: Due process is necessarily a vital component of any arbitration since a procedure which lacks due process may not be recognised as arbitration. One process in arbitration relates to the right to be heard, the right to adversary proceedings and the right to be treated equally. In online arbitration, full compliance with all requirements of due process may have impact upon the cost effectiveness and speed of the online arbitral process. Speed and cost effectiveness are two of the advantages, which make online arbitration a more desirable means of dispute resolution than litigation or traditional arbitration.

While due process is an essential element in online arbitration, keeping the process affordable and speedy are also important factors. Thus while due process is considered a vital element of online arbitration, the degree of compliance might be variable. Some short cuts might be taken to keep the process from stalling and cost from rising. Some academics argue that due process may vary dependent upon the case or category of cases and that the arbitration tribunal or institution may adjust the degree of compliance commensurate with the nature of the dispute.

- 2) Binding Decisions: Binding arbitration in traditional arbitration is one of the most important elements determining whether the proceedings constitute arbitration. By agreeing on arbitration, the parties give arbitrators judicial role to adjudicate between them and to issue an award that is as effective as a court's decision. The binding decision distinguishes arbitration from other dispute resolutions procedures as it is the purpose of such process. Decision in online arbitration may not always be binding, in such process the arbitration award may be nonbinding for either of the parties or it may be unilaterally binding. The non-binding arbitration cannot be recognised as true arbitration.

Online arbitration proceedings in either conducted totally online means of communication or partly online by a combination of online and offline means. In totally, on line arbitration, the entire process is conducted by the use of e-mail, video conference and web based communication. The data security confidentiality, privacy and authenticity of identity can be ensured by encryption, digital signature and having privacy policy as explained in the online mediation process.

Conclusion:

The process of solving disputes by collective intelligence is in its infancy. Online Arbitration should be a preferred way of dispute resolution since it is fast, economic and efficient. Online Arbitration is still disposed by traditional arbitration rules even though it is a new method to conduct dispute resolution. The parties and the arbitrators in an online arbitration should always consider the legality of the applicable arbitration agreements and procedures. Choice of law and seat of arbitration and form of the awards. These precautions will assist online arbitration to work within the framework of existing national and international treaties. However, online arbitration should develop its own rules over the course of time. It is clear that Online Arbitration is not different from what the conventional arbitration is. The only difference is the omission of physical platform and introduction of a virtual platform.

On the basis of our analysis above, we may conclude that, providing fast, democratic, and cheap dispute resolution, ODR has a potential that needs to be explored. ODR may set forth a new era in the dispute resolution.

NEWS & EVENTS



ICC LAUNCHES NEW MEDIATION RULES

The International Chamber of Commerce (ICC) has launched the new ICC Mediation Rules at a global launch event in Paris. The new rules, which entered into force on 1 January 2014, replace the ICC ADR Rules. Drafted by an international taskforce of mediation and dispute resolution specialists from 29 countries, the new mediation rules do not mark a significant departure from the previous ICC ADR Rules with only minor amendments to many of the substantive provisions of the Rules.

The new Mediation Rules reflect the increasing tendency of parties to conduct mediation in parallel to arbitration proceedings. In particular they provide for parties to commence or continue judicial or arbitral proceedings notwithstanding that mediation is being used. The new Rules will be launched in Asia at a series of events around the region in March 2014.

NEW REGULATION IN CHINA FOR MEDICAL ARBITRATION

A new regulation has been made in China, which requires public medical institutions to inform patients that they have the option to settle their medical disputes through arbitration if the case involves a claim of more than 30,000 yuan (\$4,938). The regulation is one of several new rules that aim to steer more aggrieved patients to the city's medical arbitration system, rather than letting their complaints pile up at local hospitals.

IIAM MEDIATION TRAINING PROGRAM POSTPONED

The IIAM Mediator Training Program (Code – ITP05) scheduled from April 7 - 11, 2014 has been postponed due to announcement of upcoming elections to Indian Lok Sabha, which has been scheduled from April 7, 2014 to May 13, 2014. The participants who have registered for the program may take this as an official intimation about the postponement. The training program is rescheduled to June 2014 and the exact dates will be intimated to the registered participants.

Do not expect the world to look bright,
if you habitually wear gray-brown glasses.
~Charles Eliot~

BEST YOUNG AUTHOR 2013 ANNOUNCED

Pankti Vora, student of the West Bengal National University of Juridical Sciences, Kolkata, India has been selected as the Best Young Author 2013. This is given by the Indian Institute of Arbitration & Mediation with a view to support students in developing the qualities of legal research and presentation by providing opportunity to publish original, innovative and thought provoking articles on arbitration, mediation, conciliation, dispute resolution and similar topics in the "Indian Arbitrator".

Upcoming Training Programs from

INDIAN INSTITUTE OF ARBITRATION & MEDIATION
institution for dispute resolution & management

MEDIATION TRAINING PROGRAM

IIAM will be conducting a commercial Mediation Training Program in June 2014. The program is designed for 5 days – 40 hours. The training program combines the theory of ADR through highly interactive, skill-based courses in negotiation and mediation. The program will enhance the understanding and ability to negotiate and resolve conflicts, as well as provide a solid foundation in ADR processes and to serve as ADR practitioners and neutrals. Through discussion, simulations, exercises and role-plays, the program will focus on the structure and goals of the mediation process and the skills and techniques mediators use to aid parties in overcoming barriers to dispute resolution. The training also gives emphasis on the code and ethical standards of mediation. As per IIAM Mediator Accreditation System, based on the International Mediation Institute, The Hague (IMI) standards, a candidate having successfully completed Mediation Training Program will be categorized as Grade B Mediator and eligible for empanelment with IIAM.

CERTIFICATE IN DISPUTE MANAGEMENT (CDM)

CDM is an ongoing distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment. You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded. For more details mail to training@arbitrationindia.com

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Success is not the key to happiness.
Happiness is the key to success.
If you love what you are doing, you will be successful.
~Albert Schweitzer~