

**Mediate.com Task Force on Online Mediation Training
Global Growth Forum - 4/23/21 DRAFT**

COMMENTS ON MEDIATION IN INDIA

I. How was mediation introduced in your country?

India has been facing a pendency issue in our court system which has been growing progressively acute. At present, we have over 40 million cases pending before our courts – 4 million more compared to Feb 2020¹. As part of the reforms to the justice system to better manage the backlog there has been a concerted push to ADR processes. The first real push for ADR was the insertion of Section 89 to the Code of Civil Procedure 1908 (“CPC”) through an amendment in 1999. This provision empowers the court to refer a case for resolution through one of the ADR modes wherever it appears that there ‘exists elements of a settlement acceptable to the parties’.

While the statute books gave the necessary impetus as early as 1999, adoption of ADR was minimal. In 2005², The Supreme Court through a landmark judgement took a strong pro-mediation stance which led to the framing of model rules and establishment of court annexed mediation centres, bringing mediation into a formal framework for the first time. The Mediation and Conciliation Project Committee (MCPC) was set up by the Supreme Court to oversee the growth of court annexed mediation programs through the country. Today there are over 39,000 mediation centers around the country.³

The past five years has also witnessed the growth of private mediation in the country. This has allowed for disputes to be mediated pre-litigation, the expansion of mediation services to a range of commercial disputes from low value/high volume cases to complex commercial disputes and the professionalization of the services of a mediator. The entry of private players has also supported the growth of tech platforms providing online dispute services, laying the foundation for a completely new way disputes in India are managed and resolved.

II. What were the main challenges you faced introducing mediation into your country?

a. Mindset to mediation

Although the culture to mediate is not new to India’s history, nearly 300 years of the Anglo-Saxon court system has resulted in a strong adversarial mindset in the Indian disputant. Mediation is often seen as a sign of weakness resulting in disputing parties refusing to try mediation.

¹ Read more at: <https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts>

² Salem Advocate Bar Association v Union of India AIR 2005 (SC) 3353

³ <https://nalsa.gov.in/lsams/nologin/lsamsMediationInformationReportGenerateView.action>

b. Bar Resistant to mediation

Lawyers are trained in the adversarial system and are hesitant to propose mediation to their clients. Fear that their clients will see them as incapable/ fear of diminished revenue (court case in India is ~15 years and lawyers typically charge their clients on a per appearance basis) / lack of familiarity with the mediation process are some of the barriers to the adoption of mediation by the legal community.

c. Judges not actively promoting mediation

Although the Supreme Court has shown great leadership to promote mediation, judges in India have not been able to effectively use mediation to address the docket crisis. Some of the reasons for the lack of full utilization of mediation by the judges include (1) too many cases on the case list on a given day resulting in the inability on the part of the judge to apply his/her mind to refer a case to mediation (2) Inadequate training to judges to identify cases suitable for mediation (3) incentives are structured around disposal of cases through traditional court hearings – no incentive for using ADR (4) lack of proper structures within the court system to support a strong ADR referral framework.

d. Lack of Awareness to Mediation

Although mediation was formally introduced into our legal vocabulary in 1996, there is still very little awareness about the process. When our institution, CAMP was set up in 2015, nearly 10 years after the establishment of court annexed mediation programs in the country, the knowledge of mediation was virtually non-existent. Awareness amongst all the necessary stake holder groups – parties/lawyers/judges/government was extremely low to support the growth of a new dispute resolution movement.

e. Unstructured growth of the mediation movement

Mediation was introduced to India through structured court annexed mediation programs. The growth of the mediation movement however has been largely ad-hoc. Mediation services have been mushrooming throughout the country through different institutions and individuals. India has not been able to create a dedicated umbrella body, constituting experts representing gender, regional, generational and communal diversity, to lead the growth of the movement from the adoption as well as standards perspective.

f. Mediation seen as a pro bono service for matrimonial disputes

When mediation was first introduced through the court annexed mediation programs, mediators (all lawyers) provided their services on a pro bono basis. Additionally cases that were referred to mediation were largely matrimonial disputes. This trend has challenged the transition of mediation as a profession as well as the extension of mediation to civil and commercial disputes.

g. No umbrella mediation legislation

ADR processes in India are governed by the Arbitration and Conciliation Act. Unfortunately Mediation is not covered under this Act. The lack of a stand alone legislation on mediation that protects the fundamental concepts of confidentiality, voluntariness and self-determination as well as gives enforceability to a mediated settlement agreement, has stood in the way of mediation gaining the necessary confidence. The growth of private mediation has also been impacted by the lack of strong legislation giving legal validity and enforceability to a mediated settlement agreement.

III. How have you addressed these challenges?

a. Push to mediation legislation – umbrella and other legislations

Despite the absence of an umbrella mediation legislation, the parliament has recognized the value and need for this process and introduced clear-cut provisions for mediation in four legislations which govern different categories of disputes. These legislations have without a doubt, created some degree of credibility and brought the process into the meaningful consideration of the legal community. These legislations are:

- Section 12A to the Commercial Courts Act, 2015, which states that a suit, which does not contemplate any urgent interim relief, cannot be instituted unless the plaintiff exhausts the remedy of pre-institution mediation. [1]
- Amendments to Consumer Protection Act, 2019 which directs the setting up of consumer mediation cells at every court and urges that if it appears to judge that there exist elements of a settlement, parties may be directed to settle the dispute by mediation. [2]
- Companies Act was amended in 2013 to include Section 442 which gives an option to the parties to proceedings before any of the Company Law Tribunals to opt for mediation. It also empowers these Tribunals to refer parties to mediation suo moto. [3]
- Section 9 of Family Courts Act, 1984, which evokes the active referral of the court to mediation as part of the responsibility on the court to make efforts to resolve the dispute by settlement.

Despite these efforts, there is a need for an all encompassing mediation legislation. Seeing this need, the Supreme Court acknowledged in 2019 that there is a ‘dire need to enact Indian Mediation Act’.⁴ Following this, the Court set up a committee to prepare a draft legislation for mediation.⁵ The draft legislation has been submitted to the Government for consideration.

⁴ MR Krishna Murthi v New India Assurance Co. Ltd. 2019 SCC OnLine SC 315

⁵ Ajmer Singh, ‘Supreme Court Forms Committee to Draft Mediation Law, will send to Government’ (The Economic Times, 19 January 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will->

b. Creating Awareness and Influencing the Mindset

Creating awareness of the process at the Bar, industry associations, law schools and at the government has been crucial to building a culture of mediation. Specific awareness efforts that are noteworthy include:

- i. Advocacy in Mediation programs focused on lawyers understanding the skills of effective representation in mediation as well addressing concerns of revenue because of a mediation practice;
- ii. Work with companies, Chambers of Commerce and other industry bodies to understand the value of a mediation clause in contracts and the value of a neutral in a negotiation;
- iii. Encouraging businesses especially in the field of e-commerce/ banking/ digital payments space to adopt ODR for low value/ high volume cases;
- iv. Work with policy think tanks respected by the government who have made strong recommendations to pass a mediation law, including specifically, the Mandatory Opt-Out Model similar to the Italian Model.
- v. The Bar Council of India requiring that Mediation be taught as a compulsory subject for all law students.

c. Growth of private mediation service providers

The growth of private mediation service providers over the past 5 years in India has challenged the notion that mediation is a pro bono service for matrimonial disputes. Mediation is being used for a range of commercial disputes such as IP, joint venture, partnership, landlord-tenant, commercial contracts, banking & finance etc. Mediation is also slowly growing as a profession with more clients willing to pay for the services of a mediator with specialized skills to mediate complex disputes.

d. Innovation in the law and justice space

Collaborative Dispute Resolution has created the space for innovation in the law and justice space. With the coming together of lawyers, technologists/entrepreneurs, policy think tanks, organizations dedicated to support innovation in the law and justice space, funding organizations, NGO's and academics, dispute resolution is slowly moving outside the confines of a court hall.

These ODR service providers have been able to rapidly scale up and show the value and effectiveness of the process for a range of disputes from payment of wages to migrant workers to multi million dollar cross border disputes. This has supported a tremendous shift in the mindset towards ODR/ADR.

e. Active engagement to build the 'social muscle' to collaboration

In order to grow the sector there is an understanding that behavioral response to dispute needs change. Efforts to influence that thought process on the societal level is underway with the growth of organizations focused on educating the community on the value of collaboration

send-to-government/articleshow/73394043.cms> accessed 1 June 2020

and dialogue. There is an understanding of the need to build a ‘social muscle’ that supports a collaborative response to conflict.

IV. What are the factors that have supported the growth of mediation in your country?

a. An overburdened court system

A litigant in a commercial case in India, spends over 1,445 days, or almost 4 years in-and-out of courtrooms⁶ and ends up spending 31 per cent of the claim value in out-of-pocket expenses such as legal fees and court fees⁷. For certain dispute categories, the statistics are worse – the average pendency of a land acquisition case, from its creation to its resolution by the Supreme Court, is 20 years⁸. These figures are pre pandemic. Some estimates speculate that the pandemic has set our courts behind by over a decade. This desperate reality of the Indian judiciary has caused members at every level of the judiciary (especially the Supreme Court), the government, business and community to call for a new way to manage dispute resolution. Out of no choice, alternate processes like mediation (online and in-person) are increasingly being seen as extremely effective and efficient ways to address the pendency issue in India.

b. COVID - Closing of Court Halls – ADR/ODR

COVID has been a game changer for the ADR/ODR movement in India. The closing of court halls forced the digitization of the court system. Litigants and lawyers for the first time experienced ‘dispute resolution not as a court where justice is administered, but as a service which is availed of’⁹.

Even though the Courts went online, the pendency issue has reached an all-time high with backlogs swelling at every level of the judiciary. There is research to suggest that the COVID pandemic threatens to set the Indian dispute resolution system back by a decade.¹⁰ ADR/ODR is being seen as the paradigm shift solution that could bring the much needed relief to our judiciary at this time.

c. The entry of innovative changemakers who have plugged into the resources of the world to build the movement

There has been a surge in the number of ODR start ups entering the law and justice space creating an incredible energy and buzz to change the status quo. These innovative thought leaders have brought in all the stake holders – businesses, government, mediators, lawyers, think tanks etc to accelerate the creation of the eco system for mediation.

d. Positive Impact experiences

⁶ Doing Business 2020. World Bank Report <https://www.doingbusiness.org/content/dam/doingBusiness/country/i/india/IND.pdf>

⁷ Same as above

⁸ <https://theprint.in/opinion/indian-courts-clogged-with-land-disputes-because-laws-keep-conflicting-each-other/254033/>

⁹ Justice Chandrachud speech at Key Stakeholders Meet for Advancing Online Dispute Resolution(ODR) in India hosted by NITI Aayog, in association with Agami and Omidyar Network India, June 2020

¹⁰ ODR Handbook

With the growth of ODR a wide spectrum of cases are accessing mediation. Business enterprises are adopting ODR and seeing the effect of these processes not only in resolving disputes quicker and cheaper but also in improved customer satisfaction.

Complex commercial disputes are also increasingly accessing mediation. Parties are finally having the chance to experience the efficiency and effectiveness of alternate processes. As the critical mass of positive users increases, the process is gaining credibility and acceptance in the minds of the larger public.

- e. A strong network of court annexed mediation programs throughout the country

Under the leadership of the Mediation & Conciliation Project Committee (MCPC) every state and union territory in India has multiple court annexed mediation programs at the district and state level. This has laid a strong foundation to build the mediation movement. Many lawyers are introduced to mediation through these court annexed program and hundreds of thousands of citizens have found resolution at no cost.

V. Where do you see mediation in your country in the next 5 years?

- Mediation is here to stay in India. The tremendous cost of a justice system that is built purely on the court system has hugely impacted India. The dispute resolution cost to the Indian citizen and business is 56 Billion dollars – 1.8% of our GDP. ADR/ODR is being seen as a sustainable solution to India's justice woes by all the essential stakeholders of the system. A well implemented ODR program can expand the Indian economy by 26 billion dollars each year.
- COVID has pushed the mindset of the litigant and the legal community that one does not need to 'go to court' to avail of dispute resolution services. The most respected and senior judges of our highest courts have also echoed and affirmed the value of resolving disputes through ADR/ODR. The perfect storm is brewing for ADR/ODR to become an acceptable and real part of our justice delivery system.
- Innovation in the law and justice space is booming with new ADR and ODR service providers. Over 350 % increase in the number of ODR start-ups between 2018 -2021.
- Government is actively supporting ADR/ODR – India signed on to the Singapore Convention. Working on ratification. Mediation for Cross border disputes will hugely increase.
- Large public enterprises such as the Reserve Bank of India and National Payments Corporation of India are building processes into their dispute resolution framework to refer disputes related to digital payments. This is only the beginning to the innumerable ways this can be expanded and grown.
- Judges are increasingly innovatively referring complex commercial disputes for mediation to both court annexed mediation programs as well as private mediation centers – increase in bankruptcy cases being mediated; mediation before Section 11 filing (appointing an arbitral tribunal).