
Global Mediation Development: Developing Cultures of Mediation

Committee Members: Ken Cloke, Bruce Edwards, Alberto Elisavetsky (Argentina), Obi-Farinde Morenike (Nigeria), Tara Ollapally (India), Lara Traum (Russia)

Report – Introduction and Objectives

To support the growth of mediation movements on a global level, our Committee sought to understand the growth of mediation in Argentina, India, Nigeria, and Russia with the objective of building a resource for new mediation movements. The main questions that we analyzed were:

- 1. How was mediation introduced in your country?*
- 2. What were the main challenges you faced introducing mediation into your country?*
- 3. How have you addressed these challenges?*
- 4. What are the factors that have supported the growth of mediation in your country?*
- 5. Where do you see mediation in your country in the next 5 years?*

Through an understanding of these questions for these four diverse jurisdictions, documented in this report are some considerations to bear in mind when introducing a mediation movement as well as supporting its growth to acceptance and adoption.

1. Introducing Mediation – factors to consider when introducing mediation in your jurisdiction

- a. High Caseload** - The push to start a mediation program at the national level has generally been motivated by the strain on the judicial system caused by a high pendency of cases. Although proponents of the movement believe that mediation

must be seen as the “appropriate” process for many disputes, adoption of the process on a governmental level is easiest when pitched as an alternate process to ease the burden of the courts.

- b. Overarching Legislation** - Some kind of initial legislative action is necessary to bring mediation into the spotlight as a formal dispute resolution process. While the kind of legislation adopted in these four countries varied – an umbrella mediation law mandating mediation for certain categories of cases (Argentina) or amendments to existing laws to include mediation (India) - legislative action is necessary to set the ball rolling.
- c. Court Annexed Mediation** - Setting up of court annexed mediation programs has been a popular first step to introduce mediation to the countries’ dispute resolution landscape. These programs have typically been established through a formal institution such as The Honorary Mediation Commission, made up of expert mediators under the Ministry of Justice (Argentina) or the Mediation & Conciliation Project Committee, an initiative of the Supreme Court of India.
- d. The Multi – Door Courthouse** - Nigeria introduced mediation by setting up the Multi - Door Courthouse program at the High Court of Justice in Lagos through a private – public partnership offering neutral evaluation, arbitration and mediation services.
- e. Mandatory Mediation** - Movements that are able to establish mandatory pre-trial mediation policies (Argentina) have been able to kickstart the usage of the process much faster as compared to movements with voluntary mediation policies (Russia).

II. Common Challenges in Introducing Mediation

- a. Public awareness and acceptance of the process** - Formal processes like litigation are deeply rooted. Building awareness and trust in the alternate collaborative process is challenging. Low awareness results in a misplaced perception that mediation is inferior to litigation and that engagement in the mediation process is a sign of weakness.

- b. Resistance from the Bar** - Lawyers are resistant to mediation and will hesitate to suggest mediation to their client. Clients are familiar with the structured process of courts or arbitration, making the unfamiliar option of mediation a hard sell. Moreover, lawyers are trained and experienced in the formal, rigid legal process. It takes effort and a mindset shift for lawyers to effectively engage with the voluntary, party centric and informal approach of mediation. Lawyers across the four jurisdictions perceive mediation as a ‘waste of time’ and don't see the value of a neutral in a negotiation where lawyers are present.
- c. Distrust from lack of legislation** - Jurisdictions without a law backing the mediation process and the mediated settlement agreement have had to face the challenge of distrust from both the legal as well as the disputant community. Concerns of a voluntary process wherein the parties can withdraw from the process at any time coupled with the lack of legal enforceability of a mediated settlement agreement results in unwillingness to even try the process.
- d. Hesitation to pay for the services of a mediator** - Most jurisdictions start with court annexed mediation programs where services are provided on a pro bono basis. Growing the community of quality mediators is challenging when the market is unwilling to pay for the services of a professional mediator.

III. Adoption of Mediation - Ways to Address the Challenge

- a. Mediation Law** - Legislation in the form of a comprehensive mediation law or as amendments to existing laws is critical to gain acceptance and recognition as a valid dispute resolution process. Argentina succeeded in passing a law mandating mediation before the filing of a suit in a local court, which has greatly enhanced the understanding and usage of mediation. In contrast, Russia has faced the challenge of inadequate legislation that has impacted public acceptance of the process. India amended current

legislation to include mediation¹, which serves short term needs, but does not instill the public confidence and credibility that comes with a comprehensive mediation legislation.

- b. Programs to create awareness** - Regular programs with the Bar, Courts, Industry Associations, Chambers of Commerce, Community Organizations on the mediation process are necessary to create awareness. In Nigeria, the state of Lagos introduced Lagos Settlement Week for both the Magistrates and High Courts which supported a significant improvement in the knowledge and awareness about mediation.
- c. Building a culture of mediation** - Taking mediation beyond legal disputes as a way to influence mindset and gain social legitimacy must be considered. Community mediation programs to foster good community relationships through dialogue (Nigeria), educational programs with schools and universities that emphasize the value of collaboration and dialogue (Argentina & India), facilitated dialogues for issues of public concern are some ways to build a culture of mediation.
- d. Training judges** - Judges are an integral resource for building a mediation movement. Training judges to understand mediation and identify appropriate cases to refer for mediation is an essential way to legitimize and increase usage of the process.
- e. Growth of Private mediation** - While several mediation movements begin with court annexed programs, building a private mediation movement is necessary to (1) professionalize the service, (2) attract high quality professionals, (3) allow more complex disputes to be mediated, and (4) support the growth of the movement as a whole.

IV. Other Factors to support the growth of mediation

¹ Section 12 A of Commercial Courts Act; Section 442 of the Companies Act; Section 9 of Families Court Act

- a. Online Dispute Resolution and the use of technology** - With COVID forcing the closure of courts, mediation has become more visible and appealing to many disputants. Mediation has also been able effectively move online - ODR platforms have supported the increased and easy access to dispute resolution resulting in a significant increase in the number of users of mediation. Increased awareness programs and training programs that have been held online has also significantly added to the tremendous growth of the mediation eco system.
- b. Increased government backing** - With the signing of the Singapore Convention, governments and courts are recognizing the need and value of mediation to support overwhelmed court systems. Increased jurisprudence validating the legality of a mediated settlement agreement, especially in India and Nigeria, has significantly boosted the movement. Policies mandating mediation courses in law school curricula (India) or requiring lawyers to inform their clients about ADR processes (Nigeria) or online mediation platforms set up by the government to promote easy and free access to mediation services (Argentina)² are other factors that have supported the recent growth of mediation.
- c. Overwhelmed court systems** - Alternative processes like mediation have become necessary because of over overburdened court systems. With caseloads increasing every year, access to justice has become a significant issue. There is no other option but to design and promote alternative options. Mediation is increasingly being seen as not only an alternative process but also as an appropriate process for many disputes.
- d. Entry of young legal professionals** - Young, innovative legal professionals who see the need for a change in the status quo, has propelled the growth of the mediation

² Virtual platform for remote mediation incorporated in the Province of Salta, through an agreement between the Ministry of Justice and ODR Latin America; Mediation Centre established by The National Directorate of Alternative Dispute Resolution Media of the Ministry of Justice

movement in each of the countries we examined. In Russia, the entry of young, new professionals in dispute resolution as mediators is seen as a welcome change in a society that is distrustful of the “old guard” while in India mediation is being seen as the space for innovation in the law and justice space. Legal systems established in colonial times in many of these countries are finally experiencing change through the introduction and growth of mediation movements.

V. Mediation through the next 5 years

There is a strong sense of hope that mediation is a concept whose time has come and will see significant growth in the next five years. It is recognized that collaborative dispute resolution is not only needed as an alternative to overwhelmed court systems but as a more peaceful way to respond to and manage dispute. Mediation growth for the next 5 years include:

- a. The Singapore Convention on Mediation will incentivize governments to introduce/amend laws to recognize mediation. This will also place mediation on par with traditional processes such as litigation and arbitration.
- b. Local and contextual growth of mediation that is understood by the public as a home-grown process as opposed to a western influenced process will go a long way in garnering domestic support for mediation.
- c. The culture of mediation will expand beyond legal disputes through efforts to encourage the mindset of collaboration.
- d. Increased referral from the judiciary as judges realize the value of the process and understand ways to use mediation to ease case load.
- e. A significant increase in the use of Online Dispute Resolution especially after positive user experience through COVID.

- f. The increased demand for mediation will spur the need for strong mediator training programs. In order for mediation to grow, well trained, strong mediators who can mediate effectively online as well as face-to-face are an essential focus for the next 5 years.

- g. More focused systems will need to be established at the national and international levels to monitor and maintain quality of the profession.

-----X-----