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EDITOR'S NOTE

We are quite surprised by the number of subscriptions we are receiving for our magazine. Surely, the internet has revolutionized global connectivity. Thanks to it, "The Indian Arbitrator" has become globally present. We would like to use this opportunity to integrate and professionalise the ADR system in India. We request ADR professionals around the world to contribute your articles, views and opinions, so that we can have a truly unified ADR procedure globally. To take the first step, we have amended our Mediation Rules adopting the guidelines of IMI.

IIAM would like to emphasis its support to IMI towards strengthening the cause for a unified system of mediation globally. I would like to remind the mediators that the Experience Qualification Path is due to end by June 30. Mediators who would register on the IMI portal by June 30 will have a further three months to complete their Profiles. So make use of the opportunity and register yourself.

We continue to look forward for your valuable opinions and suggestions to improve the quality and usefulness of the magazine, so as to serve you better.

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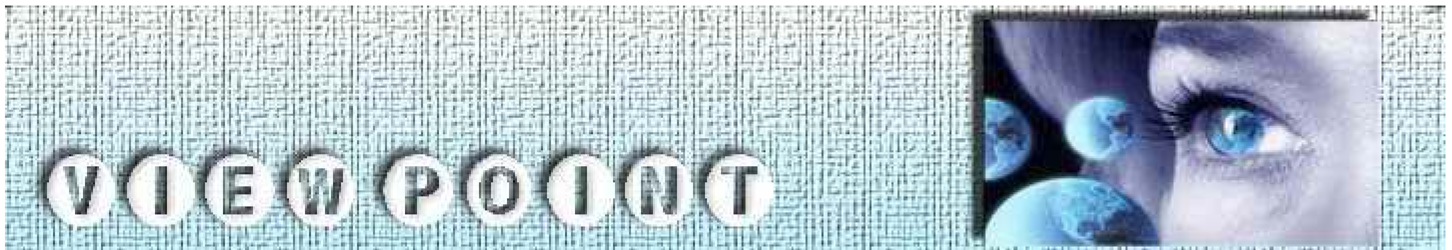

A Satisfactory Regime for Multi-Party Arbitration?

: DR. CHANDANA JAYALATH

It is important to consider the circumstances as to why multi party arbitration is so significant in international construction. The composition itself warrants. The term construction contract involves not only contractors and employers but also consultants from different disciplines, sub contractors, investors, insurers, bankers, and so on. The international nature lies in both the facts that the parties come from different countries and so is the source of supply of works, goods and services. The forms of contract also differ upon for whom the work is being carried out.

On account of the higher number of participants, there will be correspondingly a higher number of contract agreements in effect. As an example, there will be 35 nominated sub contract packages under 10 main contracts concurrently operating in a site. Such contracts would bind parties for instance, the Employer and the project's funding agencies, the Employer and the Main Contractor, the Employer and the Consulting Engineer, the main Contractor and his sub-contractors or suppliers, the Main Contractor and nominated sub contractors, as well as the Employer and the Principle Architect and his specialist sub-consultants. The greater number of participants results in fragmentation of responsibilities in the supply chain. As it invariably involves parties having different requirements, perceptions, goals and strategies, the tendency is always to occur differences, claims and then disputes.

Although arbitration is frequently preferred to litigation, it becomes no longer applicable when the matter is connected with many parties who are not parties to the arbitration.

Although the principles governing the construction contracts are basically identical in terms of how rights and obligations have been defined, we come across that the international arena is bit of comprehensive. There may be two or more different national systems of law capable of qualifying as the substantive law of the contract. It could be the law of the country where the contract is made or where the project is constructed. It could also be the law of the state where a significant part of the contract works is manufactured, or where the contract is financed or simply the law which the parties regard as well suited to govern the particular contractual relationship.

It is therefore common in the construction industry for individuals, corporations or governmental agencies to join together in a joint venture or consortium. It is also common in non-contractual matters such as product liability, to have multiple potential parties involved in the manufacture, sale and installations of the product, i.e., windows, doors, roofing, siding etc with each of these parties being a potential defendant.

When there is an issue on a construction project, it is not unusual for the employer to take that issue with the work of both the consultant and the employer. An employer may consider that the defects in the project are attributable to two or more factors including poor design, bad workmanship and lack of supervision. The employer can not begin a single arbitration procedure with both the consultants and the contractor without an agreement on all parties, as the arbitration clause of the contracts do not provide for tripartite approach. If there is no general agreement the employer will have no recourse other than to sue both the consultant and the contractor. It would be unwise to commence separate arbitrations against the consultant and the contractor as these arbitrations would perhaps involve the same issue of defect. Separate arbitration hearings by different tribunals would open up the

possibility of two inconsistent findings on the same issue also.

Although arbitration is frequently preferred to litigation (as it is seen as a more private means of resolving disputes and allows the parties to choose arbitrators with the relevant expertise to preside over their dispute), it becomes no longer applicable when the matter is connected with many parties who are not parties to the arbitration. For instance, FIDIC Red book has no mechanism for a third disputant to occupy in the dispute process although it stipulates a gauntlet for the parties to strictly comply with.

In Taunton-Collins v Cromie (1964) 2 All ER 332[1], the employer joined the contractor as a co-defendant. The contractor applied for a stay of proceedings in favor of arbitration, as there was an arbitration clause in the contract between the employer and the contractor. The English court of appeal held that it would be undesirable to have two proceedings before two different tribunals which might reach inconsistent findings. It therefore dismissed the contractor's application.

In Yee Hon Pte Ltd v Tan Chye Hee Andrew (2005) 4 SLR 398, involving a third party Ho Bee Development Pte Ltd, the contractor sued the developer for money owed for the work done[2]. The claim was stayed in favor of arbitration due to an arbitration clause in the contract between the developer and the contractor. However no steps were taken to go to arbitration. The contractor then sued the architect for recompense arising from a breach of his duties as the architect. As is the case in most construction projects, the contractor had no contractual relationship with the architect and relied on grounds such as negligence and the architect's collusion with the developer. The architect in turn sued the developer on the basis that, if the architect were found to be liable to compensate the contractor, the architect would in turn claim an indemnity from the developer.

The developer applied for an order that the architect's claim against the developer be stayed in favor of arbitration, as the contract between the developer and the architect contained a provision for arbitration. The developer also applied for the contractor's claim against the architect to be stayed in favor of arbitration on the grounds that both claims in the same construction project and that the contractor's claim against the architect involved matters that would affect and determine issues which the developer and the contractor had agreed to arbitrate.

The court rejected the contractor's contention that it did not have jurisdiction to order the contractor to enter into a multi party arbitration with the architect and the contractor in the absence of an agreement between the contractor and the architect to refer their disputes to arbitration. The court also took the view that, as both disputes are related to the same project; it would be unsatisfactory for the dispute to be arbitrated while the other was litigated because of the possibility of inconsistent findings and decisions.

It won't be a real 'alternative' to litigation if there is no ability to bring in other parties who were related to the dispute or to allow other parties to intervene.

Another example is where the contractor submits a claim for loss and expense based on its having been issued with late instructions by the architect. The architect may maintain the position that whilst the instructions could have been issued a little earlier, the contractor's claim is grossly exaggerated and submitted malafide with a view to recover some of its costs that were incurred on its own inefficiencies. If the employer accepts the claim, it will need to obtain recourse from the architect. If the employer fights the claim, it will need the architect's assistance to do so but will also need to obtain recompense from the architect if its challenge were to prove unsuccessful.

As mentioned, examples in international construction are basically group-complaints that the work had not been done properly and contains one or more defects. An employer may find himself in a position of having to choose between the parties responsible: a contractor or a consultant. What it does not wish is to find, having launched an arbitration, that it fails (e.g. the defect is one of design and the contractor is not liable) and it has to start a further arbitration against the consultant designer. Similarly, a prospective defendant may wish to bring in another party so as that the finding is made

(Footnotes)
[1] Tripartite Arbitration in Construction Disputes; Dec 2005, Rodyk & Davidson LLP.
[2] Sending Parties to Multi-Party Arbitration, March 2006, Rodyk & Davidson LLP

which correctly apportions responsibility for the damage the subject of the arbitration, e.g. one consultant liable along with another consultant. All this can be done in courts but can it be done in arbitration?

A sub-contractor loses money for having to comply with an instruction which derives from the Employer. It claims against the contractor. The Contractor does not, ideally, want to be risk being liable to the sub-contractor and have to start off all over again pursuing a claim against the Employer. This is particularly the case if the employer's defence is that completion was delayed because of matters for which the Contractor would say was the responsibility of the sub-contractor. So too with questions of the interpretation of the provisions common to more than one contract or sub-contract.

Questions might therefore arise such as how to extend arbitration for third parties, may an arbitration tribunal hearing a dispute arising from a specific contract decide issues arising from connected agreements entered into by the same parties, how separate arbitration proceedings can be commenced, may these different proceedings be consolidated and under what conditions; if they cannot be consolidated, how and to what extent can one overcome the inconveniences that arise from having several parallel proceedings; may a party to the complex contractual structure intervene voluntarily in the proceedings; when there are several defendants that have divergent interests and do not therefore want to appoint the same arbitrator, how does one go about constituting an arbitration panel, and so on.

This is why the author believes that Multi-party arbitration should have a satisfactory regime in international construction disputes. It will tie all the parties together in a dispute thus avoid them operate in the shadow of contract privity. It won't be a real 'alternative' to litigation if there is no ability to bring in other parties who were related to the dispute or to allow other parties to intervene.

(Author: Dr. Chandana Jayalath is a senior contracts specialist of Consulting Engineering Group, Doha, Qatar)

Interested to contribute Articles?

We would like to have your contributions, provided they are not published else where. 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, PDR Bhavan, Second Floor, Foreshore Road, Cochin - 682 016 or editor@arbitrationindia.com.

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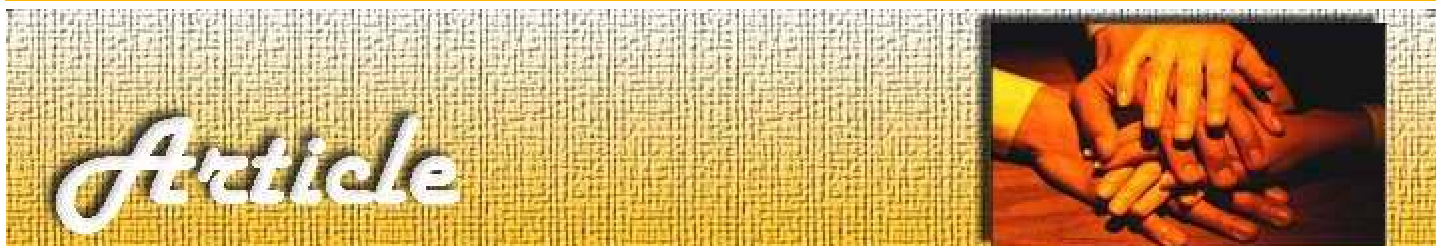
Think ...

Your "I can" is more important than your "IQ."
~from the book, "The Monk Who Sold His Ferrari"~



An Introduction to Deal Mediation

: L. MICHAEL HAGER

The first thing to know about deal mediation is that it is an extraordinarily valuable tool for lawyers and their clients. It can save negotiations that are doomed to failure for reasons of cultural difference, high emotion or a lack of orderly process. As a brand new lawyering skill, it can be an added source of income for the individual lawyer or law firm.

The second thing to know is that the biggest obstacle to the expanded use of deal mediation is the lawyer who sees it as a threat, rather than an opportunity. It took many years for lawyers to see Alternative Dispute Resolution (ADR) as a boon for their clients and a revenue earner for their firms. By shedding light on the little known opportunity of deal mediation, the ABA can speed the learning process and help make DM a new professional specialty.

The third thing to know about deal mediation is that it is not rocket science. Since it requires a "mediator personality" as defined below, the role of neutral is admittedly not for everybody. For those already engaged in the ADR field and experienced in commercial contract negotiation, expanding to deal mediation is a no-brainer. However, it is important to note that a deal mediator does not in any way supplant individual counsel for the parties. Hence all lawyers who negotiate business deals need to understand how they can select and use a lawyer neutral to improve their chances of success in complex, high value negotiations—or even in more ordinary ones where the parties have widely different expectations.

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What Is Deal Mediation?

To understand DM one has only to understand mediation in the context of dispute resolution. Parties to a contract dispute may first try to negotiate a resolution by themselves. Alas, they often fail, especially when human emotions and hidden agendas come in the way of a negotiated settlement.

A third party neutral, acceptable to both parties, can employ a number of effective mediation tools to help the parties resolve even the most intractable disputes or international conflicts. Unlike the arbitrator, the mediator does not decide, but can only lead the parties to understand how their mutual interests can be better met by an amicable settlement than by litigation or force of arms.

The mediator has a large tool box. He or she can: propose an orderly process for negotiating the dispute; help frame key issues; and hold separate "caucuses" with individual parties to vent emotions or vet ideas. The ADR mediator can facilitate plenary sessions with all the parties. By shifting from one meeting format to another, the mediator can orchestrate an ongoing brainstorming that will prompt creative problem-solving by the parties themselves. Thus in essence ADR is simply "assisted negotiation."

The Evolution of ADR to DM

Professor Roger Fisher of the Harvard Law School illuminated my path to ADR and eventually to deal mediation. Although my days as his student antedated by two decades his publication (with William Ury) in 1981of Getting to Yes, .and although the book itself focused on negotiation, not mediation; his revolutionary theory of "win-win" provides a sound underpinning for both ADR and DM.

Among the first to view negotiation as other than a zero-sum game, Roger set forth four basic principles of interest-based negotiation:

- Separate people from the problem
- Focus on interests, not positions
- Invent options for mutual gain
- Use objective criteria.

I had an opportunity to appreciate the relevance of these principles to mediation when I began a practical study of ADR— first at Professor Frank Sanders' Mediation Workshop at Harvard and later at the Summer Program of the London-based Center for Dispute Resolution (CEDR). Of course these workshops like many others in the field of ADR confined themselves to dispute and conflict resolution.

From that point, it was simply a matter of linking Fisher's negotiating methods as applied to both disputes and deals with the value-add of a neutral. I asked myself: if one can negotiate both to resolve disputes and reach agreements on fresh transactions and if mediation is merely "assisted negotiation," why not bring in a lawyer neutral to help parties reach agreement on complicated or difficult contract negotiations?

As co-founder and Director (later Director General) of the International Development Law Organization (IDLO) in Rome, I visited Australia in 1998. While there I happened to meet with Robert Pritchard, a Sydney lawyer to whom I had been introduced on an earlier trip. When our conversation turned to ADR, I told him of my wish to write a law review piece on deal mediation, but that I hesitated to do so because I had never come across any lawyer who had done it. When Robert calmly but firmly interjected "I've done it," I knew that I had found my writing partner. The result was "Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets," published as the lead article in the ICSID Review Foreign Investment Law Journal in the Spring, 1999 edition.

In the piece we focused on large, cross-border transactions which have a high percentage of negotiation failures. Robert's two case studies are the centerpiece of the article. However, the case for deal mediation is equally relevant to any negotiation large and complicated enough to warrant the extra expense of engaging a lawyer neutral.

It is beyond the scope of this introduction to summarize the article. Suffice it to say here, the deal mediator should be a commercial lawyer with years of experience in representing parties in international transactions. Beyond active listening skills, dispassionate judgment and a deep reservoir of patience, he or she will be able to gauge whether the parties have realistic expectations of each other and to guide them to jointly assess and cope with their mutual business risks. "A successful deal mediator," we contended, "can thereby help the parties achieve an enduring collaborative relationship."

(Author: L. Michael Hager is the President, Resolve-Consult International, LLC and Former Director, International Development Law Institute, Rome, Italy).

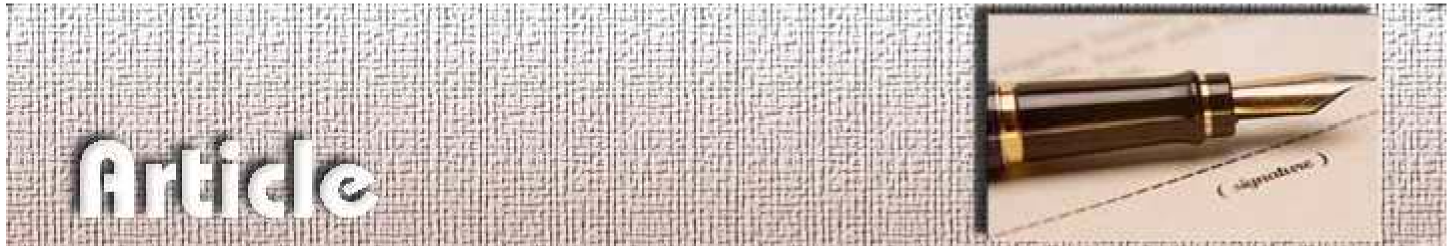
Think ...

How often do we jump to conclusions and blame others before really examining the situation?

The irate customer called the newspaper office loudly demanding to know where her Sunday edition was.

"Ma'am,' said the newspaper employee, 'today is Saturday ... The Sunday paper is not delivered until tomorrow, on Sunday."

There was quite a long pause on the other end of the phone, followed by a ray of recognition... As she was heard to mutter "Well, now ... So that's why no one was at church today."



An Architects Perspective

: PROF. AR. K. JAISIM

Evaluating non-tangibles is a very trying process. Guidelines are not easy to come by. Only two parties really know the depth and truth. Therefore it is necessary to establish credibility and confidence. And both must trust the arbitrator to the point that they are honest with their claims.This approach to arrive at solutions will assist the professional and the client to carry on with their work positively without being hindered with time and cost consuming court and legal procedures which will tie them up.

Every man who is in the pursuit of his goals has many claims. To settle these claims without confrontation and amicably becomes paramount.

The Building Industry in India is the largest employer of Human beings next only to agriculture. And if you look deeper, you will notice that even there the agriculture labour gets into intensive building material production and building during the non-harvest season.

Zillion years ago people worked in the land during the season for growing food, and in the off-season cleared the same soil for making bricks and from that created the built environment.

Almost all civilization cropped up along riversides and basins. Very soon the single occupancy became a double profession. Later as more people got involved and the first steps of specialization took roots, a sea change took place.

The people who tilled the soil and the people who made the bricks from the soil were no longer a single people. They had different pursuits. Different pursuits but from the same soil. Initially it was beneficial to both, as divided inputs meant greater production. But, a big but, the resource is a limited factor. Depletion leads to conflict of interest. So claims of rights started. Property rights, never heard of before becomes statutory. Like today Intellectual Property rights are becoming a very significant part of Human conflict.

Whose is What? Who has the right and by what law.

The Human being has entered into a whole new game. Giving rise to a third professional – the Judge.

From that day every interest man has shown in the pursuit of his goals has many claims. To settle these claims without confrontation and amicably becomes paramount. This is today very obvious in the arena of the building industry.

Going more specific, the subject of building Design gets even murkier. From the Idea stage to the preparation of a design detail can be questioned by every other person. Again it becomes more crucial during the interpretation of the detail. Specifications and Estimation become subject to scrutiny. Architects make design and detailed drawings and then extract from these a set of specifications and estimations. Together the implementing agency builds and delivers to the client upon a payment.

Every step is an involved one. Interpretation becomes important. What was imagined and what was delivered - many a time a big gap appears. The simple reason being the Party that imagined and promised is different from the Party that consumed. From the Intangible to the tangible the process is full of interpretations.

This Delivery and Acceptance has to be resolved. And resolved to the acceptance of both parties. This is no easy task. It has all sorts of values, each as appreciated from different facets. If there was no value difference there would be no conflict.

From preparation to acceptance is a chasm, especially in the field of Design. Unlike even the builder who has built a concrete tangible building, the architect has only provided ideas, sometimes on paper and many a time purely as an intangible concept. At this stage the consumer can simply ignore the architect, especially after the completion of the project. This is like walking into a restaurant ordering from the menu, consuming the food and refusing to pay on the point that what one consumed is not what one expected of the order. Now there is no way of ret riving the food, and no way of even evaluating it. Unless it is bad stuff and leads to a health hazard of the patron.

This is where an organization like the ADR Institute comes into play. One can go into legal court based judgments, but they are not only time consuming but also not suited to this type of activity. The Judge or the Jury is neither capable nor competent to serve an order on these problems. It needs expertise, and they have to be sought from the profession and have to be impartial. It needs both ARTISTIC and TECHNICAL qualification in addition to knowing the interpretation of law.

Evaluating non-tangibles is a very trying process. Guidelines are not easy to come by. Only two parties really know the depth and truth. Therefore it is necessary to establish credibility and confidence. And both must trust the arbitrator to the point that they are honest with their claims.

Arbitration in architecture is in its infancy in India. Most Architects throw up their hands and give up. And sometimes many a client accepts deficient work not knowing what to accept. A knowledge based Institution can give growth and maturity to this scenario.

I am confident that in the years to come, there will be many a complex situation that will need to be handled. This approach to arrive at solutions will assist the professional and the client to carry on with their work positively without being hindered with time and cost consuming court and legal procedures which will tie them up.

We await the future, which will resolve situations amicably and make for a more happier environment. With this confidence the profession of Architects can concentrate on their real work and make their worth more visible and create with confidence that values will be honored.

(Author: K. Jaisim is a consultant architect and the Director of Jaisim Fountainhead, Bangalore)

The Lighter Side

A man was stopped by a game warden in Northern Minnesota recently with two buckets of fish leaving a lake well known for its fishing.

The game warden asked the man, “Do you have a license to catch those fish?”

The man replied, “No, sir. These are my pet fish.”

“Pet fish?!” the warden said.

“Yes, sir. Every night I take these fish down to the lake and let them swim around for a while. I whistle and they jump back into their buckets, and I take em home.”

“That’s a bunch of hooey! Fish can’t do that!”

The man looked at the game warden for a moment, and then said, “Here, I’ll show you. It really works.”

“O.K. I’ve GOT to see this!” the game warden replied.

The man poured the fish into the water and stood and waited. After several minutes, the game warden turned to the man and said, “Well?”

“Well, what?” the man asked. “When are you going to call them back?” the game warden prompted.

“Call who back?” the man asked.

“The FISH.” “What fish?” the man asked.

Seminar on Legal Contract Excellence

IIAM endorses the seminar on Legal Contract Excellence hosted by Marcus Evans. The Seminar will be on 13-14 August 2009 at Le Royal Méridien Mumbai. The Seminar will address the current challenges in managing contracts during this global financial crisis.

This two-day ground breaking conference is complete with excellent presentations, extended sessions and panel discussion from top-notch industries players. Delegates will gain first-hand information on various innovative techniques in legal contract management. Attendees will also discover ways of avoiding unnecessary disputes, strategies in drafting contracts and risk involved in contract management. For more details about the program, log on to: www.arbitrationindia.com/htm/iiam_law_lectures.html

Mediation Seminar in Copenhagen

During eleven days in December 2009 delegates from throughout the world will meet in Copenhagen for the 15th Conference of the Parties - COP15 - to the United Nations Framework Convention on Climate Change, UNFCCC. The Denmark meeting is crucial for the international climate change negotiations. The climate change crisis challenges people throughout the world to invent and implement innovative ways to mitigate and thwart climate changing causes and effects. The crisis calls for new methods for nations and people to overcome differences and work together with the objective of preventing and resolving conflict arising because of limited resources and/or the effects of climate change.

In a Manifesto from 9th July 1955 issued in London, Albert Einstein and other leading scientists urged humanity to find peaceful means for the settlement of all matters based on new ways of thinking. An important new way of thinking features the use of the collaborative, participatory, and pluralistic conflict resolution processes like mediation and facilitation.

No particular form for Arbitration Agreement

The Supreme Court of India, while deciding an application under Section 11 of the Arbitration and Conciliation Act 1996, (Nandan Biomatrix Limited v. D-1 Oils Limited) held that the Act prescribes no particular form for an arbitration agreement. If the parties' intention to refer the dispute to arbitration can be ascertained from the terms of the agreement, it is immaterial whether the terms 'arbitration', 'arbitrator' or 'arbitrators' have been used in the agreement. This in turn depended on the parties' intention, as expressed in the correspondence exchanged between the parties, the agreement in question and the surrounding circumstances, the court held.

Phase 1 of IMI Certification over by June 30

IMI certification of mediators by the International Mediation Institute, The Hague, Netherlands under the Experience Qualification Path is due to end on June 30. However, mediators who have registered on the IMI portal by June 30 will have a further three months (until September 30) to complete their Profiles. IMI Certification will be available to any mediator after June 30th by gaining a certificate from an experienced credentialing organization as a result of a performance-based assessment program approved by the IMI Independent Standards Commission (ISC).

Mediation saves time, money

Eight out of Ten people surveyed after using mediation indicated that they saved time and money by not fighting in court. This was informed by the Law minister of Singapore, K. Shanmugam to the 260 mediators and lawyers attending the opening of the inaugural Asian Mediation Association Conference. He said that 81 per cent of the 1,911 parties surveyed said they saved costs, and 85 per cent of them saved time.

The response from lawyers was equally positive. Out of the 1,590 lawyers who responded to the survey, 82 per cent noted that their clients were likely to have saved costs and 81 per cent felt their clients had saved time. 93 per cent of the parties and 98 per cent of the lawyers said that they would recommend the use of mediation to others in similar situations, added Mr Shanmugam.

New ICC Arbitration Court members named

The ICC World Council has named 12 new vice presidents and 41 new members to the ICC International Court of Arbitration. The new appointments bring the total number of Court members to 125. In addition to the new appointments, the World Council renewed the terms of 56 other members and 12 alternates. Court members serve three-year terms. The Court will have 125 members from 86 countries when its new term begins 1 July.

Upcoming courses & training programs from IIAM

Community Mediator Training Program

The Mediation Clinics established under the IIAM CMS would function with an efficient team of mediators who are selected from the local community itself. People from a wide variety of backgrounds can make good mediators. The mediators so selected will be persons who shall be having a good repute in the local area to whom people shall have faith and shall include educated youth, ladies and elders. The people so selected would be given an orientation program by IIAM, and a certificate of recognition would be issued. The selected community mediators will be empanelled with the clinic.

With the skill of an excellent mediator and the willingness of each of us to communicate, we have resolved conflicts and that resolution is as strong today as it was years ago. But it takes courage and patience to take up the responsibility of becoming a mediator. Apart from the acceptance and honour given by the community, it also gives absolute satisfaction of becoming peace builders in our community. Are you willing to become one? If so, we are looking for people who are interested in becoming community mediators for our clinics. IIAM offers free training for mediators.

Certificate in Dispute Management (CDM)

CDM is a distance learning course 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 details on courses and training programs; mail to: training@arbitrationindia.com