

# THE *Indian* Arbitrator

## THE INDIAN ARBITRATOR



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## EDITOR'S NOTE

*At last, after a period of more than 9 years there is a hope of change in the arbitration laws of India. Even though by its 176<sup>th</sup> Report, the Law Commission of India had proposed changes for the Arbitration & Conciliation Act, 1996 in the year 2001, the changes never happened. A Bill for amendment was introduced in the Parliament in 2003, but it was subsequently withdrawn for bringing in a fresh legislation. Now a Consultation Paper has been released by the Ministry of Law & Justice. The Paper focuses to improve institutional arbitration, fairness amongst the arbitrators, minimizing interference by Courts, clarifying domestic and international arbitrations (nullifying the effects of some controversial judgments of the Supreme Court) and speedy execution of awards. Comments are being called for. IIAM will be sending its comments. We would urge all of you to send us your comments on the proposed changes. You can get the details in the "News & Events" section of this magazine.*

*Looking forward....*



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# Application to Amend or Supplement Statements of Claim & Defence - Genuine Need or Delaying tactic

: ANKUR KHANDELWAL

## INTRODUCTION

Section 23 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') provides for the Statements of claim and defence.<sup>1</sup> Sub – section (3) of Section 23 of the Act provides for the amendment and supplementing of the statements of claim and defence (hereinafter referred collectively as 'the statements').

On a bare perusal of the section, it is clear that the arbitral tribunal has been given the discretion to allow or refuse an application for amendment or supplementing only on the ground of the delay in making such an application. However, other factors including the interest of the party, the materiality of the amendment or supplementing cannot be ignored. In absence of any

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explicit mention of other factors, the questions whether they should be considered and if considered, to what extent they should be taken into account are open and the law on the point remains unclear.

It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration<sup>2</sup> and Section 23 mirrors Article 23 of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as 'UNCITRAL Model Law').

## POSITION UNDER THE UNCITRAL MODEL LAW

Under the UNCITRAL Arbitration Rules,<sup>3</sup> Article 20 dealt with amendment or supplementing of statements of claim and defence.<sup>4</sup> Under this provision, three grounds, for the exercise of discretion by the tribunal, were explicitly

### (Footnotes)

<sup>1</sup> Section 23 of the Act reads as, "Statements of claim and defence.- (1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements. (2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit. (3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it."

<sup>2</sup> Rodemadan India Limited v. International Trade Expo Center Limited, AIR 2006 SC 3456

<sup>3</sup> General Assembly Resolution 31/98, Adopted by on 15 DECEMBER 1976, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (last visited March 20, 2010)

<sup>4</sup> Article 20 of UNCITRAL Arbitration Rules reads as, "During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement."

mentioned including, the delay in making it, the prejudice caused to the other party or any other circumstances. Thus it is clear that the scope of the discretion given to the tribunal was much wider than Section 23(3) of the Act and the UNCITRAL Model Law.

While the UNCITRAL Model law was being framed, different views were expressed as to the power of the arbitral tribunal to allow an amendment of a statement of claim or defence. Under one view, the parties should not be prevented from amending their statements of claim or defence since any limitation on that would be contrary to their right to present their case. Under this view, a full stop should be placed after the words, "arbitral proceedings". Recognizing that a late amendment might cause delay in the proceedings, it was suggested that the appropriate way of dealing with the problem was by apportioning the costs of the proceedings or by deciding on the issues presented in good time in partial award.

Under the prevailing view, the tribunal should have the power not to allow amendments. Any other circumstances were considered as too vague and should be replaced by any other relevant circumstances. Another view was deletion of 'prejudice to the other party.' This view was based on the fact that the meaning and scope of 'prejudice' was not clear.<sup>5</sup>

The Commission adopted the latter view and decided to delete the words "or prejudice to the other party or any other circumstances." Thus the discretionary power of the tribunal was restricted substantially and was granted only to consider the delay in making the application for amendment or supplementing of the statements.

## REQUIREMENTS UNDER SECTION 23(3) OF THE ACT

Since Section 23 has adopted Article 23 of the UNCITRAL Model Law, it can be said that as far as the

explicit wording of the section and its literal interpretation<sup>6</sup> are concerned, the discretionary power of the tribunal has been limited to the extent of examining only the question of delay in making the application for amendment or supplementing.

However, there are other factors that the tribunal may consider and other grounds on which it may refuse such an application. These factors and grounds have been implicit in the Section and have developed over years through case-law. There have been different views, including predominantly the liberal view and the restrictive view, as to the various interpretations that are given to the Section.

### LIBERAL VIEW

The liberal view is in favour of allowing amendment and supplementing of statements in a less restrictive manner and maintains that if a party fails to raise any objection to an amendment or supplement enlarging the scope of the arbitration agreement and proceeds with the arbitration that party may be said to have agreed to such enlargement. This construction has been based in view of Sections 4<sup>7</sup> and 16.<sup>8</sup> In absence of malafides the arbitral tribunal should not lightly disallow the amendment or supplement. In

the absence of malafides or injury to the opponent, which cannot be compensated in terms of costs, amendment or supplement should be allowed. The arbitral tribunal must of course see whether the amendment or supplement is necessary for determining the controversy.<sup>9</sup>

Where after statements of claims and defence were submitted and at the time the parties met for the first time before the arbitrator, one of the parties desired an amendment to add a new point, it was held that the arbitrator had the discretion to allow such an amendment.<sup>10</sup>

*Under the prevailing view, the tribunal should have the power not to allow amendments. Any other circumstances were considered as too vague and should be replaced by any other relevant circumstances.*

#### (Footnotes)

<sup>5</sup> P.C Markanda, Law Relating to Arbitration and Conciliation, Seventh Edn., (Nagpur: Lexis Nexis, 2009) p. 525.

<sup>6</sup> See for eg. Fisher v Bell (1960) 3 All ER 731

<sup>7</sup> Section 4 reads as, "Waiver of right to object.- A party who knows that-(a) any provision of this Part from which the parties may derogate, or (b) any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

<sup>8</sup> Section 16 of the Act provides for Competence of arbitral tribunal to rule on its jurisdiction

<sup>9</sup> V.A. Mohta, Anoop & V. Mohta, Arbitration, Conciliation and Mediation, (Noida: Manupatra, 2008), p. 270.

<sup>10</sup> Re Crighton & Law Car and General Insurance Corp. (1910) 2 K.B. 738



In another case, the petitioner submitted his claim statement before the arbitrator and thereafter he noticed some mistakes in claim statement. It was held that the arbitrator has the power to allow a part to make corrections of apparent errors in statement of claim as well as in affidavit.<sup>11</sup>

Where the objecting party had suffered no prejudice by amendment of an issue and the parties well knew the amended claim and have contested the case before the arbitrator on that footing, the contention of the objector that by amending the issue behind his back, the arbitrator was guilty of misconduct, was considered to be of no force.<sup>12</sup>

The narrow view holds that, *in general*, bonafide amendments should be allowed freely, unless the arbitrator is satisfied beyond doubt that the amendment is not bonafide (eg. designed to secure delay being the predominant, if not the only, ground.) and that the adjournment must inevitably seriously prejudice the other party in some way which cannot be met an award of costs thrown away, or in appropriate cases by award of interest on any eventual sum awarded.<sup>13</sup> In this regard, the liberal view takes support from the observation of Bowen L.J., “*there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever been, unfortunate enough to come across an instance where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing machine.*”<sup>14</sup>

This view also argues that the discretion given to the arbitrator should be exercised to allow applications rather than to refuse them. Where it was agreed between the parties that all points in dispute in reference to a contract for the sale and purchase of a certain property should be referred to arbitrator, it was held that the arbitrator had the widest powers of allowing amendments in order that the parties might raise points not disclosed in the documents produced before him, and to allow evidence to be given before him to entitle one of the parties to claim a rescission of the contract.<sup>15</sup>

## RESTRICTIVE VIEW

This view is based on the argument that if amendments are allowed, the parties may amend their written submissions anytime in the course of the reference. Another basis of this view can be seen in the argument that amendment of written submissions is more restricted in the arbitration context than in Court proceedings, in that it is subject to the further constraint that the proposed amendment cannot, without agreements from both parties and the tribunal, extend the issue beyond the scope of what has been submitted to arbitration in that reference. In other words, the tribunal’s jurisdiction is defined by the issues that have been referred to arbitration and the jurisdiction cannot be enlarged by subsequent amendment of the parties’ written submissions without the agreement of both parties and the tribunal. Conversely, the scope of the issues that fall within the reference to arbitrator is not narrowed by the parties, written submissions so as to preclude subsequent amendment within fall within the reference to arbitration.<sup>16</sup>

Amendments should be refused only when the other party cannot be placed in the same position as if the pleadings had been originally correct, and the amendment would also cause him an injury which cannot be compensated in costs.<sup>17</sup>

It must always be borne in mind that the arbitrator has no power to allow an amendment, the effect of which would be to alter the terms of the submissions under which his power arise; that is to say he cannot, without the agreement of the parties in writing, allow a fresh dispute to be introduced as an amendment, which is not comprised in the submission.<sup>18</sup>

## COMPARISON OF SECTION 23(3) WITH THE AMENDMENT OF PLAINT UNDER CODE OF CIVIL PROCEDURE, 1908 UNDER ORDER VI RULE 17 CODE

It has also been argued by some scholars that in dealing with amendments generally the arbitrator should follow

### (Footnotes)

<sup>11</sup> Maharashtra Industries Dev. Corp. Ltd. v. Goverdhani Const. Co. AIR 2008 NOC 1678 (Bom) (DB)

<sup>12</sup> Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd. AIR 1967 SC 1030; Jayashree Patnaik v. Urban Cooperative Bank, Bhubaneshwar 2003 (2) Arb. LR 294 (Orissa – DB).

<sup>13</sup> Hudson’s Building and Engineering Contracts, 11<sup>th</sup> Edn., Vol. 2, p. 1682; Jayashree Patnaik v. Urban Cooperative Bank, Bhubaneshwar 2003 (2) Arb. LR 294 (Orissa – DB)

<sup>14</sup> Cropper v. Smith (1884) 26 Ch. D. 700

<sup>15</sup> Edward Llyod v. Sturgeon Fulls Pulp Co. Ltd. (1900) 85 L.T. 162.

<sup>16</sup> Alan Redfern, Martin Hunter, Law and Practice of International Commercial Arbitration, 21<sup>st</sup> ed. (London : Sweet & Maxwell, 2004) p. 216

<sup>17</sup> Pirgonda Hongonda Patil v. Kalgonda Shigonda Patil, AIR 1957 SC 363

<sup>18</sup> Wilson v. Conde d’Eu Ry. (1887) 51 J.P. 230

the procedure adopted by the courts.<sup>19</sup> However, the tenacity and strength of the argument can be tested by comparing the requirements of Section 23 with the requirements of the relevant provision under the Code of Civil Procedure, 1908. Under the Code of Civil Procedure, Order 6, Rule 17<sup>20</sup> provides for Amendment of Pleadings.

On a bare perusal of the two provisions mentioned above, it is clear that there is a fundamental difference between the requirements there under. This fundamental difference is that of the ground of '**delay**' under the Act. Further, the Supreme Court in *Andhra Bank v. ABN Amro Bank N.V. and Ors.*<sup>21</sup>, in relation to amendment of plaint under CPC, held that "*it is well settled that delay is no ground for refusal of prayer for amendment and that delay in filing the application for amendment of the written statement cannot stand in the way of allowing the prayer for amendment of the written statement.*" Regarding the amendment or supplementing of written submissions under CPC, the Courts have been of the opinion that a delay in making an application may be ground for genuineness of the acknowledgement, but not good ground for refusing the application.<sup>22</sup>

However, in light of the specific statutory condition of '**delay**' under the Act, delay cannot be accepted in an arbitration proceeding, however, the conclusion that "*delay in making an application may be ground for genuineness of the acknowledgement*" would apply to arbitration proceeding as well and in fact this presumption would be stronger in an arbitration proceeding owing to the above mentioned statutory condition.

The Supreme Court in *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Ors.*<sup>23</sup> laid down various factors to be looked into, to decide on an application to amend or supplement the submissions under the CPC:

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

Since the Supreme Court did not incorporate delay as a factor, it can be stated that under the CPC, delay cannot be a ground for rejection of such an application.

## CONCLUSION

Thus it is clear that ground of *delay* differentiates between the Section 23 of the Act and Order VI, Rule 17 of the CPC. Further it may be stated that other factors mentioned above may be considered in an arbitration proceeding; however in arbitration proceeding the restrictive view should be adopted so that the main objective of arbitration, that is speedy disposal of disputes<sup>24</sup> may be upheld.

In this regard it is important to note the following statistics, "*80% applications under Rule VI Order 17 are filed with the sole objective of delaying the proceedings, whereas 15% application are filed because of lackadaisical approach in the first instance, and 5% applications are those where there is actual need of amendment. Out of 100 applications, 95 applications are allowed and only 5 (even may be less) are rejected in Courts.*"<sup>25</sup>

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### (Footnotes)

<sup>19</sup> Supra n.5, p. 528

<sup>20</sup> Order VI Rule 17 reads as, "Amendment of Pleadings – The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties: Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

<sup>21</sup> AIR 2007 SC 2511

<sup>22</sup> *Kishan Lal v. Ram Chandra*, AIR 1933 All 374; *Ahmed Abdul v. HK Sehgal*, AIR 1965 Bom. 32; *Estralla Rubber v. Dass Estate*, (2001) 8 SCC 97<sup>1</sup> (2009)10 SCC 84

<sup>23</sup> Law Commission of India, 176<sup>th</sup> Report on The Arbitration and Conciliation (Amendment) Bill, 2001, available at <http://lawcommissionofindia.nic.in/arb.pdf> (last visited March 15, 2010)

<sup>24</sup> Arun Mohan, "Justice, Courts and Delays", (New Delhi: Universal Law Publishing, 2009)

<sup>25</sup> Supra n. 5, p. 528

These statistics relate to amendment of claims under the CPC and thus the dilatory tactics employed in arbitration proceedings can be easily imagined. To check this tactic, the application for amending or supplementing of the statements may be allowed by the arbitral tribunal if the request for such amendment/supplementing had been made without any unreasonable delay.<sup>26</sup>

Where there is no dispute as to the validity of the arbitration agreement, it shows that the parties have consented to resolve their dispute by Arbitration,<sup>27</sup> and concomitantly time-saving resolution of dispute and thus undue amendment of the statements is in fact in contravention of the Arbitration Agreement. Further, since it is settled that the amendment or supplement must not exceed the scope of the arbitration agreement,<sup>28</sup> this point is further corroborated.

In this regard, it is also important to understand the function and importance of written Submissions in an Arbitral Proceeding. The most immediate function of the exchange of written submissions is to identify the scope of the arbitral tribunal's mandate. Another important reason is to have an adequate definition of the issues to be determined to devise an appropriate procedural structure.<sup>29</sup> By delayed amendments, this procedural structure of the arbitration proceedings would fall apart.

Section 23 deals with an early stage of arbitration proceedings which generally begin with one or more preliminary meeting<sup>30</sup> and thus the application for amendment or supplementing cannot be filed at a later stage, that is after considerable delay.

If the parties to the contract have not placed any restrictions on themselves regarding amending, supplementing of the statements and if the application for doing so is filed without unreasonable delay, then all amendments ought to be allowed which satisfy two conditions,

- a) of not working injustice to the other side and
- b) of being necessary for the purpose of determining the real questions between the parties.

In a plethora of judgments, the Courts have repeatedly held that only when the amendment or supplement is not prejudicial to the interest of the other party and when delay is not caused, can the application for it be accepted.<sup>31</sup>

The role of courts is also important to be understood in this regard. An application can not be made to the court to allow an amendment of pleadings if an arbitrator refuses to do so and the only power of the court to intervene in an arbitration proceeding is the statutory power contained in the Act,<sup>32</sup> and there was no inherent power found with the High Court to supervise arbitrators.<sup>33</sup> In light of the above reasons, it may be stated that to cure arbitration of the evil of delaying tactics, the restrictive approach in allowing applications for amendment or supplementing of statements should be adopted.

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#### (Footnotes)

<sup>26</sup> Supra n. 5, p. 528

<sup>27</sup> Supra n. 16, p. 9

<sup>28</sup> R.S. Bachawat, Law of Arbitration and Conciliation, 4<sup>th</sup> ed. (Nagpur: Wadhwa, 2005) p. 760

<sup>29</sup> Supra n. 16, p. 344

<sup>30</sup> Supra n.9, p. 270.

<sup>31</sup> N.S. Nayak and Sons, Heera Constructions and Rani Constructions Pvt. Ltd. v. State of Goa and Anr. 2003(3)ARBLR109(SC); New Model Industries Ltd. v. Union of India (UOI) 1999 VIAD (Delhi) 270; Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore AIR 1967 SC 1030

<sup>32</sup> Section 5 of the Act relates to judicial intervention and reads as, "Section 5 declares: "Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (Part I), no judicial authority shall intervene except where so provided in this Part."

<sup>33</sup> Supra n. 28, p. 763

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## Mediation is here to stay! - Part II

: ANIL XAVIER

*The legal system rarely takes the psychological or emotional factors of either party into account. Litigation is said to be cold, hard, and uncaring. Both parties are instructed not to talk to each other and neither side gets to voice their concerns. Mediation uses the psychological power of empathy to create mutual understanding between parties to address concerns, promote emotional healing, and preserve ongoing relationships.*

### TECHNIQUES OF MEDIATION:

**Facilitative style of mediation:** In a classic mediation, the mediator's mission is purely facilitative. The mediator does not give an opinion on the likely outcome at trial or legal issues, but only seeks to help the parties find solutions to the underlying interests or problems giving rise to the litigation. Generally, in this kind of mediation, the mediator's expertise in the process of mediation, rather than in the subject matter of the litigation, is viewed as paramount. Some mediation professionals view facilitative mediation as the preferred approach because the mediator preserves the principle of complete impartiality by not giving an assessment or prediction of the outcome of the case at trial. A facilitative mediator creates an environment in which parties work together collaboratively as problem-solvers. The mediator uses techniques that place full responsibility for resolving the dispute on the shoulders of the participants.

**Evaluative style of mediation:** In the evaluative approach, the mediator is more likely to give a view of the case. The mediator's opinion – including, for example, a legal and/or factual evaluation of the case, and sometimes an assessment of potential legal outcomes – is used as a settlement tool. An evaluative mediator assists the participants in breaking impasses by

contributing her views of the merits of the legal case, the consequences of failure to settle, and the benefits of particular settlement proposals. For instances, if each side has strongly conflicting views of the legal merits, the neutral might try to break the impasse by giving an evaluation of the merits of the dispute. By predicting the likely outcome in the adjudicatory forum, the neutral gives the participants a basis against which to assess the attractiveness of emerging options for settlement. If the case is not settling, the neutral might suggest how failure would impact on the interests of each party. If each side has strongly conflicting views of the benefits of a particular settlement proposal, the neutral might give an assessment of how the proposal benefits each side. The neutral might even present a proposal for adoption by the participants. This approach generally requires mediators who are experts in the subject matter of the case. Most evaluative mediators also consider the interests of the parties in attempting to facilitate a settlement.

Many mediators blend facilitation and evaluation, applying each approach in varying degrees at different times during the mediation process, depending on the needs of a given case.

There is a third model, which is also popular, called the Transformative style. In their 1994 publication, “*The*



*Promise of Mediation*<sup>1</sup>, Robert A. Baruch Bush and Joseph Folger explicitly outlined a framework for the practice of transformative mediation. As stated earlier, problem-solving mediation is aimed at resolving specific disputes between parties and coming up with a mutually acceptable solution to the immediate, short-term problem. In problem-solving mediation, the mediator normally plays a very active role in guiding the process. Instead, Bush and Folger proposed that mediation can effect much deeper changes in people and their interpersonal relationships, beyond just remedying a short-term problem. They proposed a way of practicing mediation that seeks to address deeper levels of social life. In the preface of their seminal work, they stated that, “mediation’s greatest value lies in its potential not only to find solutions to people’s problems but to change people themselves for the better, in the very midst of conflict”. By employing a specific perspective on mediation practice as well as specific techniques, they believe mediation possesses the power to change how people behave not only toward their adversary in a particular conflict, but also in their day-to-day lives thereafter. Mediation, in their opinion, can transform individuals. For mediators who adhere to the framework of transformative mediation, achieving this type of long-term change is more important than solving a specific problem between parties.

*Mediation’s greatest value lies in its potential not only to find solutions to people’s problems but to change people themselves for the better, in the very midst of conflict*

Typically, settlement-oriented mediation is not considered successful unless a settlement is reached. Transformative mediation, however, is successful if one or both parties becomes empowered to better handle their own situation or the parties better recognize the concerns and issues of the other side. Transformative mediation is a relatively new concept, though many mediators had been acting in this way for a long time, but did not have a name for their style until Bush and Folger defined transformative mediation as a concept. Because empowerment and recognition are phenomena that happen to people, the transformative approach is usually thought to be useful in interpersonal conflicts such as family conflicts, conflicts between neighbors, and conflicts between co-workers.

## INDIAN PERSPECTIVE:

**History:** Mediation is not something new to India. Centuries before the British arrived, India had utilized a system called the *Panchayat* system, whereby respected village elders assisted in resolving community disputes. Such traditional mediation continues to be utilized even today in villages. The mediator, an expert in the process of dispute resolution, controls the proceedings, much like a tribal chief serving in the role of peace-maker. But under the ancient methods if mediation failed, the same person was authorized to render a binding decision.

Another dispute resolution process, *lok adalat*, has received more favorable attention since its re-introduction in the 1980s. Originally, *lok adalat* was an ancient method for dispute resolution used by tribal people. The Legal Services Authority Act (1987) promoted the resurgence of *lok adalat* to provide litigants with the means to resolve their disputes early and affordably. The ancient concept of settlement of dispute through mediation, negotiation or through arbitral process known as “Peoples’ Court verdict” or decision of “*Nyaya-Panch*” is conceptualized and institutionalized in the philosophy of *Lok Adalat*. In essence, *lok adalat* may

be compared to settlement conferences as they are traditionally conducted in the United States, except that the neutrals in *lok adalat* are senior members of the Bar.

Mediation is, in fact, the oldest and historically most effective way that societies have resolved their differences outside of resorting to the courts or violence. Today, it has become the new buzzword in law.

**Present Scenario:** According to recent statistics, in India, the judge population ratio is 12 - 13 judges per million. This is the lowest in the world, as compared to 135 to 150 per 10 lakh people in advanced countries. A study conducted by the Ministry of Finance reveals that at the current rate it will take 324 years to dispose of the backlogs of cases in Indian courts<sup>2</sup>. “*California’s population was almost touching 38 million. In India, that’s the number of cases pending in courts across the country*”<sup>3</sup> – providing this peculiar comparison was none

### (Footnotes)

<sup>1</sup> The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition Robert A. Baruch Bush and Joseph P. Folger

<sup>2</sup> The written statement of the Asian Legal Resource Centre (ALRC) on ‘Delayed justice dispensation system destroying rule of law in India’ (E/CN.4/2005/NGO/107) was distributed on March 31, 2005, at the Sixty-first Session of the UN Commission on Human Rights in Geneva

<sup>3</sup> “My Nation Foundation – News” – Dec 22, 2007



other than the Chief Justice of India, Mr. Justice K G Balakrishnan.

The denial of justice through delay is the biggest mockery of law, but in India it is not limited to mere mockery; the delay in fact kills the entire justice dispensation system of the country. The legal system is simply not equipped to handle the number of cases filed. It is often said that litigation is an unwelcome houseguest that stays for years or decades together. This has led to instances of people settling scores on their own, resulting in a growing number of criminal syndicates and mob justice at least in some parts of the country reflecting the frustration of the people and loss of confidence in the rule of law.

A recent study also concluded that 70 percent of the “winners” in litigation were unhappy in the end. One can safely assume that close to 100 percent of the “losers” in litigation were also unhappy. To make rule of law a reality, the arrears will have to be reduced. Speedy justice is an assurance extended to a citizen under the right to life guaranteed by the Constitution.

The present India faces corruption, dowry death, rape, thugs and dacoit, thefts, unemployment problems like suicide, drugs which also leads to social insecurity and anarchy. As per National Crime Record Bureau, New Delhi the total crime recorded in India in the year 2006 is 5102460 which forms 455.7 % of the total IPC crimes recorded. These figures can form only a part of the reported cases. In many places in India people are so uneducated that they are scared to call for legal aid and so many fades away as unreported deaths/crimes. This is almost 3-4 times higher than the rates of crimes in Foreign Nations. The Prison Statistics (2005) of the country shows alarming results of 358368 inmates against the capacity of 246497 in 1328 prisons. Whether it is due to the lack of proper legal system or social systems and customs prevailing, it is high time to find a solution for it.

### **ROLE OF MEDIATION:**

The legal system rarely takes the psychological or emotional factors of either party into account. Litigation is said to be cold, hard, and uncaring. Both parties are instructed not to talk to each other and neither side gets to voice their concerns. Mediation uses the psychological power of empathy to create mutual understanding between parties to address concerns, promote emotional healing, and preserve ongoing relationships.

The role of mediation is not confined to bring in social harmony but also communal harmony. The development of a more proximate, indigenous mediation mechanism will help to prevent deeply rooted conflicts

from erupting into communal violence. Mediation seeks to handle such situations more effectively than the courts which end in a win for a section at the expense of the other section. However in the case of mediation, it is a win-win situation that is involved which benefits both sections. Here again, the aspect of peaceful and amicable settlement of disputes becomes the best way to tackle such sensitive and volatile issues affecting the people at large. Mediation also helps in restorative justice through its variety approaches and restoring the offender in community by giving correctional practice thereby giving everyone a second chance. Sometimes victims of crime need answers and apologies more than they need to know perpetrators are being punished; and sometimes offenders need to find out just who they've hurt to realize what they've done is wrong. There is no conflict without emotion. There can be no resolution of a conflict without addressing the underlying emotions that gave rise to it and sustained it.

Matrimonial disputes can shake the entire social fabric of existing families. They have such an effect upon the society and impact the whole society as such. Such matrimonial disputes arise mainly out of minor differences which seeks adjustment from husband and wife or even parents. These disputes when coming to the court will assume such dangerous proportions that leads to an adverse result. It is essential for the sustenance of a family which has been declared by many international conventions as the basic fabric of the society. It is here the role of mediation comes to the forefront. Through mediation such minor differences are solved amicably even before attaining dangerous proportions.

Through the confidential private meetings with the parties, the mediator is able to understand the needs of the party and the mediator assists the parties to arrive at a “win-win” situation and thus not only resolves the problem but also strengthen the relationship among them. This avoids hostility within the community and improves harmony. A conflict free environment makes the community more focused, optimized and disciplined by setting up standards and values and principles. Mediation helps to maintain peace and solidarity among the members by facilitating settlements among conflicting parties.

### **COMMUNITY MEDIATION:**

The roots of community mediation can be found in a community which is concerned to find better ways to resolve conflicts, and efforts to improve the system. It gives people in conflict an opportunity to take responsibility for the resolution of their dispute and control of the outcome.

But where do people go to get the problem resolved by mediation? The system has to be authentic, legally acceptable and the mediators should be trained and under ethical guidelines and review. Even though, presently there are court-annexed mediation centres, they cater the requirements of litigants, whose cases are pending before courts and referred to the centre. Where do people find good mediators, who can assist the parties to settle the issue before it aggravates to a litigation? Moreover the system should function as a vehicle to create harmony in the society and promote legal compliance in general.

Community Mediation service should not be too late or too remote from the community level to nip the budding emergence of conflicts. It is in this context that the Indian Institute of Arbitration & Mediation (IIAM) thought of the possibility of establishing Community Mediation Clinics as an inexpensive option. The motto is; ***“Resolving conflicts; promoting harmony”***.

IIAM Community Mediation Service will serve as a mechanism in bringing into the consciousness of the society the effectiveness of grassroots-level arrangements to bring forth harmony in community, providing a safe environment for people to air grievances to reach a peaceful resolution. Community mediation means neighbours helping neighbours to solve problems and resolve disputes.

Setting up of Community Mediation Clinics in all villages of each state with a view to mediate all disputes will bring about a profound change in the Indian Legal system. Conflict management programs with the formation of such centres will serve to defray tensions in societies and prevent them from erupting into violence. It is also a process that can mould a more peaceful society. Community Mediation Clinics enhances access by helping to bring justice to the society. It aims to prevent the underlying conflict (or the need to go to court) and advance compliance with the law in general. People would get a platform near home to settle their cases without the trappings of a court. It helps preserve relationships by avoiding the embarrassment of being hauled into court, and by giving people the opportunity to air concerns that a court would rightly ignore when evaluating a legal claim. Through a system that resolves disputes before it requires adjudication, it is hoped the legal system will be freed up to deal with more serious cases.

The Mediation Clinics would function with an efficient team of mediators who are selected from the local community itself. The people so selected would be given

an orientation program by IIAM, and a certificate of recognition would be issued. IIAM will also implement high standards of ethics as laid down by the International Mediation Institute (IMI), The Hague, Netherlands (which has endorsed the IIAM Community Mediation Service). The mediators so selected will be persons who will be having a good repute in the local area to whom people shall have faith because of his/her integrity and sense of fairness in public dealing; and shall include educated youth, ladies and elders. People having experience in dispute resolution and community interactions will be preferred. Peacekeeping is a profession and can be a vocation. It is a belief, a value and a way of life. We have many people in our community who believe in peace and practice peace making.

IIAM Community Mediation Service has the potential to shape powerful conflict transformation partnerships. Such approaches often have the power to heal even profound social wounds, so that the system can become a vehicle for creating a loving and caring world.

We are mindful that cultural “clicks” do not happen overnight. We must devise workable ways of implementing them and build broad public support for those changes. As Mahatma Gandhi has said, *“There is not a single virtue which aims at, or is content with, the welfare of the individual alone. Conversely, there is not a single moral offence which does not, directly or indirectly, affect many others besides the actual offender. Hence, whether an individual is good or bad is not merely his own concern, but really the concern of the whole community, nay, of the whole world.”*<sup>4</sup>

While launching the IIAM Community Mediation Service, the Chief Justice of India, Hon’ble Mr. Justice K.G. Balakrishnan had hoped that Community Mediation Clinics could be established in at least 100 villages by 2010 and in every village by 2015. Such peace building processes could be greatly strengthened if organizations, people and society join together and cooperate. As a business opportunity and simultaneously to fulfill the Corporate Social Responsibility, we urge corporate houses, public spirited individuals, associations and clubs to join in implementing the IIAM Community Mediation Program, which has a clearly defined mission and a vision statement, combined with a sound implementation strategy and a plan of action firmly rooted in ground realities. We can join together for an enduring process of positive social transition. Partner with us to create a loving and caring world. For more details about the program visit, [www.arbitrationindia.org](http://www.arbitrationindia.org)

#### (Footnotes)

<sup>4</sup> Ethical Religion 1930 – Mahatma Gandhi

**CONCLUSION:**

India has huge potential to become an economic superpower. Its population stands at over a billion, making it the second largest population in the world. The middle class alone is greater than the population of the United States or the European Union. India is also the fourth largest economy in the world and has the second largest GDP of developing countries. But in spite of all this, India has failed to live up to expectations, and foreign investment has not been as high as expected. No amount of prosperity or development is either possible or worthwhile, if it is not accompanied by social infrastructure, one of which is a good legal system and an efficient dispute redressal mechanism, which provide the citizenry the assurance that they live under the protection of an efficient legal regime.

The expectations of parties of legal services are changing. The new requirement is “resolution” and not “litigation”. Mediation is now being projected as a truly global

profession. ADR is thought of as the alternative to going to court. Yet, a good case can be made that one or more of these so-called “alternatives”, especially mediation, have become the commonly accepted way of resolving legal disputes and that going to court is now the true alternative. Inevitably, negotiation and mediation are becoming the most commonly accepted vehicles for the resolution of lawsuits in the United States and perhaps around the world.

So let us welcome the new world of dispute resolution and the new alternatives!

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*(Authot: Anil Xavier is a lawyer and an IMI Certified Mediator. He is a Member of the Independent Standards Commission of the International Mediation Institute at The Hague. He is also a Charter Member and currently the President of the Indian Institute of Arbitration & Mediation. Article first published in the “Indian Yearbook of International Law and Policy 2010”)*

**Think ... Mathematics!**

If: A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

Is represented as:

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26.

Then:

H-A-R-D-W-O- R- K

$8+1+18+4+23+ 15+18+11 = 98\%$

And:

K-N-O-W-L-E- D-G-E

$11+14+15+23+ 12+5+4+7+ 5= 96\%$

But:

A-T-T-I-T-U- D-E

$1+20+20+9+20+ 21+4+5 = 100\%$

THEN, look how far the love of God will take you:

L-O-V-E-O-F- G-O-D

$12+15+22+5+15+ 6+7+15+4 = 101\%$

Therefore, one can conclude with mathematical certainty that:

While Hard Work and Knowledge will get you close, and Attitude will get you there, It's the Love of God that will put you over the top!

Experience is a hard teacher,  
because she gives the test first,  
the lesson afterwards





## Amendments to the Indian Arbitration Act

A Consultation Paper has been published by the Ministry of Law & Justice, Government of India. In the year 2001, the Law Commission of India undertook a comprehensive review of the working of the said Act and recommended many amendments to the Act in its 176<sup>th</sup> Report submitted to the Government. The Government after considering the recommendations of the Report and after consulting the State Governments and certain institutions, decided to accept almost all the recommendations. Accordingly the Arbitration and Conciliation (Amendment) Bill 2003 was introduced in Rajya Sabha on 22<sup>nd</sup> December, 2003. The Bill was then referred to the Departmental Related Standing Committee on Personnel, Public Grievances, Law and Justice for examination and report. The Committee expressed the view that since many provisions of the Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering the recommendations of the Committee. In view of the large number of amendments recommended by the Committee and because many provisions of the Bill were contentious, the said Bill was withdrawn from the Rajya Sabha.

Now certain changes are contemplated in the Arbitration & Conciliation Act, 1996, which could improve the purpose of arbitration, support the cause of institutional arbitration and minimize the interference of courts.

Comments are invited on aforementioned proposed amendments in the Arbitration & Conciliation Act, 1996. Any other suggestion regarding amendment in the said Act can be send to the ministry. You can also send us your comments, so that we can forward a compilation of comments to the proposed amendments. For details of proposed changes, see [http://www.arbitrationindia.com/pdf/arbitration\\_amendment\\_2010.pdf](http://www.arbitrationindia.com/pdf/arbitration_amendment_2010.pdf)

## Arbitration gains constitutional recognition in Kenya

The popularity and importance of arbitration as an alternative dispute resolution process has been recognized in Kenya by its inclusion in the harmonized draft Constitution. Article 197(2)(c) of the harmonized draft Constitution, which was recently passed in Parliament, provides that alternative forms of dispute resolution, including reconciliation, mediation and arbitration as well as traditional dispute resolution mechanisms, will be promoted. Use of these alternative processes will not contravene the Bill of Rights as provided under Chapter 6 of the harmonized draft Constitution.

The need for parties to resort to alternative means of settling disputes has become prominent due to considerations such as the cost of litigation, the length of time taken for disputes to be resolved through the conventional legal process, legal technicalities and procedures and the affordability of legal services.

## German Courts decide not to enforce foreign judgments confirming arbitral awards

The Federal Supreme Court ended the German practice of permitting claimants to seek the enforcement of foreign judgments confirming arbitral awards. Overturning a 25-year-old ruling, the court no longer offers claimants a choice between the enforcement of the original arbitral award and the recognition of its exequatur from jurisdictions following the procedural merger doctrine.

Prior to this decision, they effectively gave claimants a choice of standards against which the courts would judge the enforceability of arbitral awards – that is, a choice between the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and ordinary statutory standards for the enforcement of foreign judgments. By the present decision, the court abandoned this position.

From now on, claimants in Germany must exclusively seek the recognition and enforcement of arbitral awards under the provisions of the convention. Henceforth, the only way of declaring arbitral awards enforceable in Germany is under Section 1061 of the code, in conjunction with Article V of the convention. One key benefit of this decision will be that, in Germany, arbitral awards will continue to be dealt with by only a limited number of specialized courts. Thus, the decision will help to ensure the key advantages of arbitration at the enforcement stage: unified and simplified procedures of recognition and enforcement under the convention, as well as clear and foreseeable procedures conducted by experienced judges.

## Certificate in Dispute Management (CDM)

CDM is a 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 on CDM, mail to [training@arbitrationindia.com](mailto:training@arbitrationindia.com)

### *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-209, Main Avenue, Panampilly Nagar, Cochin - 682 036 or [editor@arbitrationindia.com](mailto: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.*

### **The Lighter Side**



A beggar: O beautiful lady, give me 5 rupees.  
Husband (to wife): give him Rs.5/-. If he calls you beautiful lady, he must be really blind.

Son: dad, how much does it cost to be getting married ?  
Dad: I never calculated, I'm still paying for it.