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EDITOR'S NOTE

We have received umpteen numbers of comments on the article by Mr. Michael McIlwrath on "Can Mediation evolve into a Global Profession?" The general opinion was to remain committed to evolving and practicing mediation & follow the fundamental philosophy of mediation. Mr. Rajiv Chelani, Advocate and Mediator practicing in London has provided an article commenting on the subject, which we are publishing in this edition. A similar idea elaborating the need for specialization for mediators can also be found in the View Point article, "A Perfect Storm is Gathering".

We have also received some queries about the availability of the previous editions of "The Indian Arbitrator". Considering the suggestions, we have provided archives of the previous editions of the journal in the IIAM website. You will get the same at www.arbitrationindia.com/htm/about_magazine.htm.

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.

For previous editions of the Indian Arbitrator, log on to:
http://www.arbitrationindia.com/htm/publications.htm

A Perfect Storm is Gathering

: JAN EIJSBOUTS, HANS PETER FRICK, BENGT GUSTAFSON, MARINA KALDINA, WOLF VON KUMBERG, MICHAEL LEATHES, DEBORAH MASUCCI, ERIK B. PFEIFFER, PHILIP RAY, ROLAND SCHROEDER, STEVE WEATHERLEY & R. BRUCE WHITNEY

A Perfect Storm is gathering, comprising the effects of severe economic downturn, the alacrity with which corporate law departments seek greater transparency and outcome certainty, and new tools in the field of information and communication technology. This convergence provokes serious changes in attitude and approach by all dispute resolution stakeholders – especially trial lawyers, mediators and mediation provider organizations. The status quo has had its day. Good news for those nimble enough to adapt quickly. Money is a scarce commodity. Traditional litigation is a money-consumption machine. Technology can disseminate, instantly and globally, useful feedback about dispute resolvers' styles, making the mediator best suited to resolve a dispute easily identifiable. The dire economic climate and the increasing growth of mediation have made the early use of mediator not just good practice, but economic necessity. A wonderful snippet of homiletic wisdom is found in the writings of Og Mandino, author of *The Greatest Salesman in the World.* It was so obvious we were bound to ignore it. *Do not allow yesterday's success to lull you into today's complacency, for this is the great foundation of failure.* Never have these words rung more true, and demanded more attention and action, than in 2009.

Do not allow yesterday's success to lull you into today's complacency, for this is the great foundation of failure. Never have these words rung more true, and demanded more attention and action, than in 2009

The hurricane of an economic and financial turmoil of unprecedented proportions is roaring into every vested domain. Gone are the days when corporate leaders can feel at liberty to play Russian roulette with shareholder – now read stakeholder – interests and get their way mainly by force and bluster. The economic meltdown of the last eighteen months has left an empty theater. Enter, stage right, the eight choreographers of the New Economy – responsibility, transparency, authenticity, trustworthiness, certainty, competency, sustainability, and frugality.

These are critical factors that, in the post-meltdown world are capable of injecting confidence into markets, trust into businesses and value into stock markets.

Simultaneously a second wind of change is blowing, bringing a deepening cold front to the legal professional services industry: more demanding in-house counsel. Under corporate governance pressure to manage legal risks, General Counsel and their Corporate Law Departments (CLDs) face severe "in control" requirements. Expected to deliver positive outcomes and therefore cut costs while enhancing (not just protecting!) the corporation's reputation, CLDs are becoming intolerant of service providers that milk their clients' predicaments for their own fee earning benefit. The days when CLDs are happy to delegate and even abandon a case to a law firm with instructions to let it follow its path, are history. Now they want transparency and greater control. Lawyers who are reluctant to give clients a clear vision of the risk and cost consequences, or who delay proposing alternative strategies to the desired outcome, will face a reducing workload at a time when their income streams are under pressure.

And there is a third tempest, converging at the very moment the first two collide. Information and communication technology is eroding traditional legal work. An increasing proportion of legal work is now commoditized. Document assembly systems and e-Discovery are big business, creating cost-saving opportunities. Better, quicker, simpler and less costly ways are emerging for accomplishing many traditional tasks. ODR – online dispute resolution – was one of the big growth areas in 2008. Technology is making true transparency possible, and therefore vital.

These global climatic forces, plus other market developments such as the increasing acceptance of non-litigious forms of dispute resolution and the emergence of more, and more credible, mediators, will force lawyers to change their attitude and perspective. New York Times columnist and author, Thomas Friedman, sees this as the market becoming more adaptable to market needs. In his bestseller *The World is Flat* he talked of *triple convergence*.

For those who read the signals, change their mindsets and prepare well, this is not Armageddon. There will always be a certain place for court action, but dictionaries will be re-written to cite litigation, not mediation, as the definition of Alternative Dispute Resolution.

There will always be a certain place for court action, but dictionaries will be re-written to cite litigation, not mediation, as the definition of Alternative Dispute Resolution.

Change always accelerates at times of economic stress. Almost everyone now views risk with increasing alarm. Interests consciously predominate over positions. The cast iron case never existed, but now pragmatism, reality and risk factors are weighing more heavily, emphasizing prevention, avoidance and the earliest possible resolution of disputes. Back-to-basics instincts render brash bravado outdated and unacceptable to stakeholders. This will endure long after the world emerges from economic hardship. Such 20th Century business people are a dying breed. Replacing them is a new entrepreneurial mindset exuding *glasnost*, humility, reality, resolve, delivery and simplicity.

Attorneys will have longer careers if they are artistic engineers with a highly adaptable toolbox of process and substantive approaches to every predicament, using those tools without being told. Aggression, force, rigidity and a win-lose mindset will no longer address client needs. Gary Hamel, a leading business strategy guru, put it unforgettably: "*Those who live by the sword will be shot by those who don't*".

"Resolvers" will replace "litigators". What some still call "ADR", the field once likened to *homeopathy* and ridiculed as *Alarming Drop in Revenue*, will become mainstream. The need now is to re-focus courtroom skills and put them to better use as creative resolvers, adept at making and saving deals, resolving disputes and preserving relationships.

Unlike litigation, mediation and other forms of private dispute resolution offer versatility. They will be used by businesses not just to resolve disputes, but to make deals. Settlement counsel and collaborative law will flourish. Neutrals will be co-funded by the parties to act as "Counsel to the Deal" and as "Dispute Boards". Early Neutral Evaluation, Non-Binding Arbitration, Mini-Trial, Evaluative, Transformative, Facilitative Mediation, and hybrids like Arb-Med will grow as parties tailor process to their precise requirements. For CLDs, selecting the right horse for the course is the name of the game – in terms of the choice of professional and choice of process.

And here comes the rub. How do corporate counsel select the right horse for the course without the right information about the available riders? It's difficult. Transparency comes into play. That is why the Perfect Storm heralds change for mediators and provider bodies, accustomed to operating behind a privacy screen. Only the parties, their representatives and provider entities involved in a mediation can really tell how "good" the mediator is, but most never make public that they even took part in a particular mediation. All very secretive and whispered. So too is typically-available information about mediators' performances.

What worked for a few mediators and providers in the past in terms of vague and general reputation will not sustain them for the future. In the past, the parties' choice of mediator was based on perception – word of mouth, anecdotal impressions, whether someone they knew thought they were "good". Hearsay. The world has changed. Uncertain and imprecise forms of endorsement will no longer be adequate for discerning General Counsel and their staffs.

Corporate counsel's growing appetite for transparency and authenticity will drive demand for access to prior user feedback before making a choice of an individual mediator or a provider institution. Those wishing to maintain the status quo, who are unwilling or unable to offer credible independent feedback from prior users up

front, risk being selected less often, however well-known or experienced they may be. Transparency, authenticity and trust are three of the eight choreographers of the New Economy.

Mediators and their provider institutions cannot deny or escape these changes. Their task now is to lead their colleagues by example and validate their profession. This requires stepping out from behind the privacy screen into daylight, meeting the new market expectations head on and turning them to advantage by showing the world's users how very good they are via the credible, transparent endorsement of prior user feedback. Becoming IMI Certified (www.IMImediation.org) with a Profile and a Feedback Digest, fits the bill. That's how to enhance credibility, gain recognition, get selected and generate growth.

All of this is obvious to users of mediation services; the proverbial no-brainer. *Do not allow yesterday's success to lull you into today's complacency.*

Act now to take advantage of The Perfect Storm.

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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 ...

"Most people give up just when they're about to achieve success. They quit on the one yard line. They give up at the last minute of the game, one foot from a winning touchdown."

~Ross Perot~

The Role of Arbitration in Securities Market

: SOUMYA PATNAIK & VINAY SUBRAMANIAN

Despite all the criticisms, it cannot be denied that securities arbitration has proven itself to be a fair and expedient method of resolving a large number of customer disputes, and has served tens of thousands of participants over the years. A recent study has indicated that cases filed in securities arbitration are resolved, on average, approximately 40 % faster than cases filed in court.

INTRODUCTION

Arbitration has been observed as an effective alternative to the traditional and cumbersome process of lawsuits in courts.[1] It is seen as a speedier process, which expedites the settlement of claims between parties.

Within the securities market, the New York Stock Exchange has used the arbitration process to settle claims between investors and brokers for the past one-thirty years.[2] Thus, the dispute, instead of being subjected to the process of the court would be submitted to a panel of arbitrators, who would adjudicate upon the issue.

Thus, securities arbitration can be defined as a type of Alternate Dispute Resolution Mechanism, wherein disputes are solved between trading members and their clients in respect of trades done on the exchange.[3] The process for carrying out such arbitration is generally provided within the bye-laws of the Exchange themselves.[4]

However, it was not until the case of *Shearson/American Express, Inc.* v. *McMahon*[5], that arbitration became a benchmark for settlement of disputes within the Securities Industry. Herein, the Supreme Court recognized the importance of agreements for submission of securities disputes to arbitration. It was stated that the Securities Arbitrators are *"readily capable"*[6] of handling complex claims. Further, limited judicial scrutiny of arbitration awards was sufficient to ensure that arbitrators meet the required statutory obligations.

During the last twenty years, the popularity of securities arbitration has soared to high levels. The Perino Report suggests that generally parties involved in the arbitration process with respect to securities have found it to be *"fair and impartial"*.[7] Another study conducted stated that arbitration is faster than litigation and that the presence of an industry arbitrator has no material impact on customer wins.[8]

PROCESS WITHIN USA:

There are several arbitration forums maintained by the various stock exchanges throughout the United States of America that regulate arbitration facilities between the brokers and their consumers. They share similar

(Footnotes)

[1] Stephen H. Kupperman & George C. Freeman, *Achieving Justice in Arbitration*, (Tulane Law Review June, 1991) Tul. L. Rev. 1547

[2] Jill I. Gross, *Securities Mediation: Dispute Resolution for the Individual Investor,* 21 Ohio St. J. on Disp. Resol. 329, 336 (2006).

[3] The Editorial Group, *What is Arbitration*, *The Hindu, Business Line*, 25th September, 2005

[4] Fletcher, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393 (1987)

[5] 482 U.S. 220 (1987)

[6] *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633-34 (1985)

[7] Michael Perino, *Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitration* (Nov. 4, 2002), *available at* http://www.sec.gov/pdf/arbconflict.pdf

[8] Securities Industry and Financial Markets Association, *White Paper on Arbitration in the Securities Industry* (2007), available at http:/ / www. sifma.org/regulatory/pdf /arbitratonwhitepaper.pdf.

arbitration rules, and thus inconsistency between the procedure and action is prevented.[9]

Some of the most important arbitration providers within the USA are SICA (Securities Industry Conference on Arbitration), AAA (American Arbitration Association) and the FINRA (Financial Industry Regulatory Authority) formerly the NASD (National Association of Securities Dealers).

The arbitration process begins with the creation of a contractual agreement. In simple terms, the party must bind himself to the process of arbitration by waiving away his right to approach the court.[10] Membership to a particular exchange itself authorizes the claim for arbitration to a particular dispute.[11] For instance, rules under NASD [12] provide for specific arbitration clauses so as to regulate the relationship and settle any disputes between the customer or any member-firm.

After the case of *Rodriquez de Quijas* [13], the Courts in USA allowed for arbitration of claims even brought under Securities Act of 1933, subject to a prior pre dispute agreement made between the brokerage firm and the investor. Thus, the *MacMohan* [14] decision combined with this one, allowed for wide acceptance of pre-dispute agreements.

Nowadays, all the Exchanges use what is referred to as a Uniform Submission Agreement. It is mainly a written agreement wherein the parties submit to resolve their disputes by way of arbitration.

The Arbitration rules are mainly governed by state and federal laws. Though several states have adopted a Uniform Arbitration Act, many states like New York have opted out of this and have meant to provide their own general guidelines.[15]

The importance of the Securities Exchange Commission (SEC) needs to be highlighted with respect to oversight of the exchange commissions. After 1971, the Securities Exchange Commission has been given wide, encompassing powers to ensure adequacy of various exchanges and regulate the NASD.[16] Therefore, the SEC has used this power in the interests of the investors and provided for fairness and neutrality of the forum at various points of time. For instance, in 2007, the SEC used this power to ensure the amalgamation of the NASD and New York Stock Exchange (NYSE) forums, so as to bring in uniformity for redressal of disputes.[17]

Any arbitration proceeding with respect to securities begins with the filing of the Statement of Claims by the Applicant. It is served and submitted to the exchange arbitration forums. There is no rigid format that is followed with respect to filing of such claims. The claim must mention the facts and circumstances with respect to the dispute. The Respondents are then given approximately forty five days to reply to the Statement of Claim. They should mention their version of the facts and why the Applicant should not be entitled to relief.[18]

The next step is the procedure is to select the arbitrators. The NASD Rules provide for a Neutral List Selection System,[19] whereby the securities attorneys are allowed to check the history of the various arbitrators. Each party is provided with certain biographical information for each proposed arbitrator. Interests and potential conflicts are sought to be disclosed, and previous Awards decided by that arbitrator are also available for review.[20]

Under the NASD rules, the first list consists of a "pre-emptory" list, wherein the parties are allowed to strike off certain arbitration from their list, without any assignment of reasons.[21] Thus, after cancellation, if more than three arbitrators remain, then they are listed in order of preference to determine who shall arbitrate. At this stage, any arbitrator could be moved only if there arises a personal conflict or a cause of action is shown with respect to that particular arbitrator.

(Footnotes)

[9] Reder, *Securities Law and Arbitration: The Enforceability of Predispute Arbitration Clauses in Broker-Customer Agreements*, 1990 Colum. Bus. L. Rev. 91 (1990)
[10] James A. Fanto, *Justice Blackmun and Securities Arbitration: McMahon Revisited*, (North Dakota Law Review, 1995) 71 N.D. L. Rev. 145
[11] *Goldberg* v. *Bear, Stearns & Co.*, 912 F.2d 1418.(1998)
[12] Sections 1, 8 and 12 of the NASD Code of Arbitration Procedure
[13] 490 U.S. at 481
[14] *Supra*, see note 6
[15] Grant, *Securities Arbitration: Is Required Arbitration Fair to Investors?,* 24 New Eng. L. Rev. 389 (1989).
[16] *Supra* see note 9
[17] Securities and Exchange Commission, Release No. 34-56145, 77-78 (July 26, 2007), *available at* http://www.sec.gov/rules/sro/nasd/2007/34-56145.pdf.
[18] *Supra*, see note 20
[19] Susan Dillon, *Securities Arbitration-An Overview*, (Securities Arbitration Commentator, Inc., 2005), available at http://www.sacarbitration.com/securities.htm
[20] Nicholas J. Guiliano, *Arbitration Myths*, 2004, available at http:// www. stock broker fraud. com/ disclaimer.html.
[21] Barbara Black & Jill Gross, *The Explained Award of Damocles: Protection or Peril in Securities Arbitration*, 34 Sec. Reg. L.J. 17 (2006)

Arbitrators are of two types: Industry Arbitrators and Public Arbitrators. Industry Arbitrators refer to those with a current affiliation with the securities industry, and for the most part are registered representatives, floor traders, or support personnel [22], while Public Arbitrators are typically lawyers, retired judges and professional mediators.

In the pre-hearing stage, arbitrators and the parties decide the dates, the time frame within which the arbitration procedure has to be completed. The most important contribution of this stage is with respect to pre hearing discovery documents. Earlier, every arbitration proceeding used to get delayed, as the applicant was unable to produce important documents belonging to the brokerage firm at the beginning of the proceedings. After 1989, the various exchange forums amended their provisions and provided specific guidelines for provision of pre-hearing discovery.[23]

But it was not until 1999, that a comprehensive guideline was provided with respect to discovery. In 1999, the NASD formalized a Discovery Guide setting forth those documents and information that are discoverable in customer cases.[24] Thus, pre-hearing stage has now become a very important stage within this form of arbitration as it provides the evidence to be adduced.

Securities Arbitration is conducted primarily in the same manner as any court trial. However, the procedural rigidity and complexity found within trial courts is absent here. Cross-examination is not limited to the areas covered within direct examination.[25] Thus, question outside the scope of direct examination can also be put forward.

Preparation is the key to resolve the nature and kind of evidence to be admitted within the proceedings. Even though there is no specified formulation of nature of evidence admission, generally the arbitrators have used a liberal approach. Thus, evidence in forms of hearsay, in certain conditions has been admitted.[26]

The only requirement stringently followed is that with respect to exchange of documents. Under the NASD rules, a mandatory exchange of documents for a period of twenty days has to be necessarily followed.[27]

Generally, the awards are rendered within a period of thirty days from the date of the last submissions. The rules also provide for post-hearing conferences, if the Arbitrators feel the necessity to convene. The Rules suggest that the award must be necessarily signed by the Arbitrators. Usually, the awards made are very short and extend only up to one or two sentences.

There are very little circumstances which allow appeals to the court. Thus, the scope of appeal is limited to grounds including fraud, corruption or serious miscarriage of law.

PROCESS WITHIN INDIA:

The Securities and Exchange Board of India (SEBI) defines arbitration as an alternative dispute resolution mechanism provided by a stock exchange for resolving disputes between the trading members and their clients in respect of trades done on the exchange.[28]

Securities Arbitration was introduced by the SEBI as part of their risk management system. It is now incorporated in the bye-laws of the various stock exchanges.[29] Even though most of the process is similar to that of the USA, within India, certain procedures are distinct. Firstly, with respect to registration of complaints, there are two conditions under which a complaint can be set forth against the broker: firstly in cases of non-payment and secondly in cases of misconduct. However, in cases of delay, the complaint could be referred to the Secondary Market Department of SEBI which would in turn refer the case.

The existence of the contract note or purchase of sale note is essential to allow commencement of arbitration process. It is the reverse of such a note that provides the option for arbitration process if there is a dispute between the parties.[30]

(Footnotes)

[22] Stephen Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731 (1996)
[23] Daniel Q Posin, *Literature Review: An Appraisal of Securities Arbitration*, (World Arbitration and Mediation Report, September, 2002), 13 World Arb. & Mediation Rep. 246
[24] Discovery Guide and Document Production Lists, NASD Code of Arbitration Procedure for Customer Disputes ("NASD Customer Code.") (See Rules 12505-12511.), available at http: //www.finra.org/ web /groups/arbitrationmediation/@arbmed/@arbrul/documents/arbmed/p018922.pdf
[25] *Supra,* see note 23
[26] *Supra*, see note 29
[27] *Ibid*
[28] http://www.sebi.gov.in/bulletin/glossary.pdf.
[29] Chapter IX, National Stock Exchange of India Ltd. Bye-Laws; Section 248(a), (b), (c), Section 249 (a), (b), Rules, Bye - Laws & Regulations of Bombay Stock Exchange, 1957, available at http: //www. bseind -ia.com/about/downloads.asp.
[30] *Viraj Holdings, Mumnai* v.. *Motilal Oswal Securities Pvt Ltd*, 2003(4) RAJ 176 (Bom).

Apart from arbitration and the court litigation, the member also has the option to report the broker to either the Stock Exchange or Office of Investor Assistance and Education (OIAE). The OIAE is part of the Market Intermediaries Regulation and Supervision Department (MIRSD). He is responsible for receiving complaints with respect to investor grievances. He deals with basic issues like delay of payments, refund orders etc.[31] The Stock Exchanges deal with issues related to the broker directly like non-payment and misconduct. Thus, if the member wants to choose the path of arbitration, he has to procure a form from the concerned Stock Exchange, and report his complaint.

Within India, there are two basic steps that have been formulated for selection of arbitrators. Firstly, every exchange maintains its own panel of arbitrators. Thus, the investor has a direct option to choose from this panel. If the broker selects the arbitrators, the names are forwarded to the member for his approval. If there is a disapproval or disagreement, the concerned stock exchange steps in. It then selects the arbitrators required for the settlement of the dispute.

The SEBI bye-laws provide for a period of three months from the date of entering upon reference, within which the award has to be conferred, and a decision has to be reached.[32]

However, in certain cases, an additional three months has been provided for conferment of the award. Thus, the maximum period within which an award must be necessarily conferred is six months from the date of reference.

CONCLUSION:

A recent study conducted within USA provided various drawbacks and lacunae creeping through the system.[33] The rate win for investors over the past decade had considerably reduced from 59% in 1999 to 44% in 2004.[34] Further, award percentages themselves had been considerably reduced, and larger the brokerage firm, it was observed that smaller was the recovery made through the process of arbitration.

Despite all the criticisms, it cannot be denied that securities arbitration has proven itself to be a fair and expedient method of resolving a large number of customer disputes, and has served tens of thousands of participants over the years. A recent study has indicated that cases filed in securities arbitration are resolved, on average, approximately 40 % faster than cases filed in court.[35] Also, whatever said and done, this platform is much more accessible than court room litigation proceedings.

In conclusion, therefore, the existing system developed is in the best interests of investors. Pre dispute arbitration agreements make it possible for investors to pursue small claims. It lowers costs for the investors seeking redressal of grievances. It involves highly trained and expert arbitrators who are well versed with the world of securities. Thus, impartiality and fairness is served. Therefore, such form of arbitration within the various stock exchanges in India must be developed at a faster pace, with additional provisions and guidelines, so as to allow for the consolidation of an investor friendly market.

(Co-Authors, Soumya Patnaik & Vinay Subramanian are law students of the National Law University, Jodhpur, India).

(Footnotes)

[31] http://www.sebi.gov.in/acts/OrgStru.html.
[32] *Supra*, see note 4
[33] Edward S. O'Neal & Daniel R. Solin , *Mandatory Arbitration of Securities Disputes: A Statistical Analysis of How Claimants Fare,* 2007, available at http:/ /www.retirementplanblog .com /Mandatory%20Arbitration%20Study.pdf.
[34] Sucheta Dalal, *Study Finds Investors Fare Poorly in Securities Arbitration*, *Money Life,* 23rd June, 2007
[35] *Supra,* see note 10, statistics available at http: //www.finra.org/ Arbitration Mediation/ FINRADisputeResolution/Statistics/Index.htm

Promoting Mediation as a Conflict Resolution Tool

: RAJIV CHELANI

I read with great interest article written by Michael McIlwrath in the April issue of The Indian Arbitrator where he talked about the growth of mediation and what are the possibilities for making the mediation practice grow. I for one being a mediator would like more and more people to make use of mediation not only because it adds to the growth of my trade but also my being a strong proponent of mediation as I consider it to be superior form of conflict resolution.

The statistics provided by Michael mentioned about the referrals of mediation and the success of mediation (Agreement reached in 40% of cases) being 1 out of 20 and 1 out of 50 respectively. That doesn't give anyone (specially mediators) any joy. Going by these tiny numbers, what does the future look like? From the above statistics, it doesn't sound exciting, does it?

So what can one do to promote the profession? I would say Nothing! Apart from creating visibility about mediation as a possible means of conflict resolution amongst the user, referral and influencer community.

I am a strong believer in people's power, if people feel that they are not happy with something, they will make changes. No sales person can promote anything, on a sustained basis, if the clients genuinely don't want something. Sooner or later people will realise what is good for them and changes would happen naturally.

If people feel that they are not happy with something, they will make changes. No sales person can promote anything, on a sustained basis, if the clients genuinely don't want something. Sooner or later people will realise what is good for them and changes would happen naturally.

The only thing we can do as practitioners is to remain committed to evolving and practicing mediation & follow the fundamental philosophy of mediation, which is to

- Listen to people
- Empower them to make changes if they feel they wish to
- Help them evolve their solutions which are owned by them

This is whilst remaining committed to the principles of mediation, being, impartial, non-prejudicial & non-judgemental. Simple as though it may sound.

The only thing which I am interested in knowing is whether people are willing to give mediation a voluntary try and they haven't been forced to consider it. Mediation could lead to parties getting empowered to think for themselves & choosing what is right for them with the option to walk-away anytime they wish to. They own the responsibility of arriving at their own decisions rather than a judge or an arbitrator deciding for them.

Such instances where Mediation has been a success will spread the word and I am sure that people know what's right for them. To hand-hold, force or cajole people eventually doesn't work and goes very much against the principle that "people know what is good for them". Best of the solutions whether achieved via litigation or mediation is not going to hold if it is not owned by the parties.

The elections in America, India, etc. are recent examples of the mandate which people have given. I for one am a strong believer that something which doesn't meet the need of people is not going to last.

It doesn't make mediators any different from litigators if all we are interested is in "ensuring to reach an

agreement" and making our CVs look good. Lawyers as a rule of thumb are interested to make a win for their client and mediators are interested in reaching an agreement. Both need an output and a positive result for themselves. More often than not the focus of the mediators is on achieving "the output" which is normally an agreement, irrespective of whether it is a solution owned by their clients. So long as it looks good on my CV that how many successful closures have I had, does it really matter whether or not the party / ies have a buy-in?

What in case if only one of the parties engages? Do we say that we can't do anything about such situations?

To me, Mediation is about empowering the party/ies to have belief in themselves and decide how could they come out of the situation which they are in.

Mediator plays only the role of facilitator and helps the clients explore their own solutions. This process is helped by the mediator in helping them explore, own and be responsible for their own actions. Sometimes the emotional imbalance is extremely high and mediators could help the clients by way of engaging with them and listen to their issues. Some mediators call it "Narrative Mediation, Transformative mediation", etc. To me mediation is simple, its listening, conveying your understanding and helping them explore what they could possibility do and own their solution.

I digressed somewhat from the subject, however the service we can do in promoting mediation is to have the belief that it is the most effective conflict resolution mechanism and secondly to follow the philosophy and principles of mediation. In addition create visibility of mediation as a viable option.

(Author is a lawyer and an accredited & practicing Mediator in England).

The Lighter Side

Father Norton woke up Sunday morning and realizing it was an exceptionally beautiful and sunny early spring day, decided he just had to play golf. So... he told the Associate Pastor that he was feeling sick and persuaded him to say Mass for him that day.

As soon as the Associate Pastor left the room, Father Norton headed out of town to a golf course about forty miles away.

This way he knew he wouldn't accidentally meet anyone he knew from his parish. Setting up on the first tee, he was alone. After all, it was Sunday morning and everyone else was in church!

At about this time, Saint Peter leaned over to the Lord while looking down from the heavens and exclaimed, "You're not going to let him get away with this, are you?"

The Lord sighed, and said, "No, I guess not."

Just then Father Norton hit the ball and it shot straight towards the pin, dropping just short of it, rolled up and fell into the hole.IT WAS A 420 YARD HOLE IN ONE!

St. Peter was astonished. He looked at the Lord and asked, "Why did you let him do that?"

The Lord smiled and replied, "Who's he going to tell?"

London Court of Arbitration now in India

The Indian branch of London Court of International Arbitration (LCIA) was inaugurated at New Delhi. Realising the importance of India as an emerging economy and its strategic geographical location of immense convenience, LCIA decided to set up office in India in the form of a new entity controlled and regulated by Indians entitled as LCIA India.

Supreme Court snubs retired Judges for charging heavy fee in arbitration cases

The Supreme Court of India has disapproved retired judges charging exorbitant fees in arbitration cases. A bench comprising Justices R V Raveendran and H L Dattu, dismissed the appeal of the Centre challenging a Delhi High Court order appointing a retired judge of a High Court as sole arbitrator in a dispute between the Railways and a contractor.

The Court noted, "It is necessary to find an urgent solution for this problem..., Institutional arbitration has provided a solution as the arbitrators fees is not fixed by the arbitrator themselves on a case to case basis but is governed by a uniform rate prescribed by the institution under whose egis the arbitration is held… What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such arbitrator", the bench said.

Arbitration Fairness Act: Franchisees Pushing US Congress to Pass Bill

Former franchise owner Deborah Williams and consumer advocates lobbied Capitol Hill on Wednesday, April 29 to ask that Congress pass the Arbitration Fairness Act, a pending bill that bans mandatory arbitration clauses in franchise and other contracts. It was part of an event designated "Arbitration Fairness Day". The bill aims to make pre-dispute agreements requiring arbitration for any employment, consumer, franchise, or civil rights disputes unenforceable to allow a choice between arbitration and the civil court system.

Consumer advocates say there is widespread support across party lines for the Arbitration Fairness Act. They cite a recent poll from Lake Research Partners that shows that some six in ten voters support the act and that 59 percent of likely voters oppose the use of mandatory binding arbitration clauses like those found in franchise contracts and credit card agreements.

Arbitration Fairness Act could nullify millions of existing contracts, causing widespread uncertainty of their recourse should a dispute arise among consumers, employees and franchised business owners.

Upcoming courses & training programs from IIAM

Certified Legal Auditor (CLA) Training Program

Knowledge of legal issues affecting business is increasingly important in today's environment. Law is probably the most important external factor affecting business operations. Ever-larger numbers of business decisions are influenced by government rules, regulations, and policies. The Certified Legal Auditor (CLA) Training program is a customized training program conducted by IIAM, which enables the auditor to be a professional who understands the standards and principles of auditing and the auditing techniques of examining, questioning, evaluating and reporting to determine a quality system's adequacy and deficiencies. It gives auditors in depth training on legal audit principles, iCLA audit procedure and techniques, to prioritize and focus on matters of significance, to familiarize with iCLA Legal audit software, current legal issues and trends affecting business, organizations, contracts and property, dispute prevention and management options and ADR techniques.

The Auditors have to be basically law graduates, chartered accountants or company secretaries qualified from recognized institutions. The training is designed to have a clear view of the legal environment of business, enhance their abilities to think and communicate effectively, conduct interviews, make presentations effectively and develop effective strategies for managing legal risks. It will also provide basic instruction in legal research and critical reasoning skills.Professionals who successfully complete the CLA training program will be certified by IIAM and empanelled for iCLA audit. The names of CLA's empanelled with IIAM shall be placed on the website.

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