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# EDITOR'S NOTE

*IIAM is taking up an ambitious project of setting up Community Mediation Clinics in Indian Villages. As stated by our Chairman, Hon'ble Mr. Justice M.N. Venkatachaliah, this is meant to be an exciting experiment of bringing justice between man and man in a society which is tending more and more towards strife and friction. We are grateful that our initiative of IIAM Community Mediation Service has been endorsed by the International Mediation Institute at the Hague. In this edition of "The Indian Arbitrator", we have made a request to all public spirited persons and institutions to support us in this initiative of social transition to make our world a safe, sustainable, peaceful and prosperous place to live.*

*Looking forward to your support and guidance.*



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# Am I stepping over the line?

: PHYLLIS G. POLLACK

When the parties settle a matter at mediation, I am usually very happy about it. But, I am also conflicted because the settlement creates issues internally that I have yet to resolve.

Usually, once the parties settle, they want to document it and leave very quickly. But often, they have not brought a settlement agreement with them. They do not want to spend another hour or so drafting one; they would rather leave and document the settlement over the ensuing days. But doing so provides a party with the opportunity to change her mind and back out. Unfortunately, a settlement is not a settlement until it is signed by all concerned.

Thus, my conflict! What do I as the mediator do? Require the parties to sit and draft an agreement in those instances where they have not brought one? Or, should I provide a template (which is copied from the court's own form) in which the "standard" provisions are provided but blanks are left for the details of the actual agreement to be filled in?

Based on my experience that once a matter settles, everyone is quite impatient to leave, I provide a template.

But, by providing a template, am I doing more than just mediating? Am I practicing law? Or mixing the roles of lawyer and mediator?

This question has been posed by many teachers in many training sessions. And, it is now the subject of an ethics opinion just issued by the ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance, SODR-2010-1 ("Opinion") (SODR_2010_1 ).

In its Opinion, the Committee focuses on a family law mediator in which a married couple seeking a no fault divorce but unrepresented by counsel, go to mediation to resolve the property, settlement, custody (there is one child) and support issues. Once they resolve these issues, they ask the mediator to prepare the agreement; they do not want to retain attorneys either to prepare the agreement or to review it.

The Committee asks: assuming the mediator is an attorney, what should she do?

The Committee answers: "A lawyer–mediator may act as a "scrivener" to memorialize the parties' agreement without adding terms or operative language. A lawyer-mediator with the experience and training to competently provide additional drafting services could do so, if done consistent with the Model Standards governing party self-determination and mediator impartiality. . . ."

*If, however, the mediator provides legal advice or performs other tasks typically done by legal counsel, the mediator runs a serious risk of inappropriately mixing roles of legal counsel and mediator.*

"The Model Standards arguably permit a lawyer-mediator to provide legal information to the parties. If, however, the mediator provides legal advice or performs other tasks typically done by legal counsel, the mediator runs a serious risk of inappropriately mixing roles of legal counsel and mediator. . . ." (Id. at 2). (Emphasis original).

The Committee notes that the core issue is whether "drafting the mediated settlement agreement. . . falls within the definition of mediation. . . ." (Id. at 4).

In answering this question, the Committee notes that the definition of mediation in the Model Standards does

not expressly include this task but rather defines the role of a mediator, ". . .as facilitating communication, negotiation and the voluntary decision making of the parties." (Id. at 5). Arguably, the Committee notes, reducing the agreement to writing constitutes "facilitation" (Id.) or "an additional dispute resolution role in the same matter." (Id. at 6).

Consequently, the Committee sees "no ethical impediment" to a ". . .mediator performing a drafting function that he or she is competent to perform by experience or training." (Id. at 8). A mediator may simply act as a "scrivener" and/or provide legal information to the parties. (Id.) Should the mediator do more, she may be mixing her roles of attorney and mediator requiring full disclosures of the implications this creates and the full consent of all parties to proceed in this new situation.

So. . . should I still be conflicted? Probably not, because by providing a template (duplicating the court's own form), I am providing "legal information" and merely continuing to "facilitate" the resolution of the dispute. As I do make it quite clear that the parties are free to add, delete or change any provision, I try to stay in the "scrivener" role and out of the "lawyer" role.

No doubt, some of my fellow mediators will agree with me while others will disagree and argue that I am practicing law. I invite your comment: this topic is truly a Pandora's box!

. . .Just something to think about.

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*(Author: Phyllis G. Pollack. Ms. Pollack is a full time neutral at PGP Mediation in Los Angeles,CA. and is president of the Southern California Mediation Association)*

## Think ... WHISPER OR BRICK?

A young and successful executive was traveling down a neighborhood street, going a bit too fast in his new Jaguar. He was watching for kids darting out from between parked cars and slowed down when he thought he saw something. As his car passed, no children appeared. Instead, a brick smashed into the Jag's side door! He slammed on the brakes and spun the Jag back to the spot where the brick had been thrown.

He jumped out of the car, grabbed the kid who was standing there and pushed him against a parked car shouting, "What do you think you are doing, boy?" Building up a head of steam he went on, "That's a new car and that brick you threw is going to cost a lot of money. "Why did you do it?"

"Please sir, please. I'm sorry, I didn't know what else to do," pleaded the youngster. "I threw the brick because no one else would stop..." Tears were dripping down the boy's chin as he pointed around the parked car.

"It's my brother, sir," he said. "He rolled off the curb and fell out of his wheelchair and I can't lift him up." Sobbing, the boy asked the executive, "Would you please help me get him back into his wheelchair, sir? He's hurt and he's too heavy for me."

Moved beyond words, the driver tried to swallow the rapidly swelling lump in his throat. He lifted the young man back into the wheelchair and took out his handkerchief and wiped the scrapes and cuts, checking to see that everything was going to be okay.

"Thank you and may God bless you, sir," the grateful child said to him. The man then watched the little boy push his brother toward their home.

It was a long walk back to his Jaguar...a long slow walk. He never did repair the side door. He kept the dent to remind him not to go through life so fast that someone has to throw a brick at you to get your attention.

God whispers in your soul and speaks to your heart. Sometimes when you don't have time to listen, He has to throw a brick at you.

It's your choice: Listen to the whisper... or wait for the brick.


# An invite for supporting a community initiative

**: ANIL XAVIER**

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. This has led to people settling scores on their own, resulting in a growing number of criminal syndicates and mob justice in various parts of the country and reflecting the loss of people's confidence in the rule of law.

The average pendency of a case filed will be 4-5 years and by the time it completes and reaches the verdict it would take a minimum of 7-8 years though this is the situation not strictly with India. Community mediation can be thus helpful not only for public for avoiding lengthy litigation process but also it gives a relief for Courts from meddling with trivial issues and thereby concentrate and devote more time and energy on other important matters which calls for its attention.

*"Both were happy with the result, and both rose in public estimation. . ."*

*Mahatma Gandhi on Mediation*

People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible. 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"***. The IIAM Community Mediation Service (IIAM CMS) is endorsed by the International Mediation Institute (IMI) at the Hague, Netherlands.

## IIAM COMMUNITY MEDIATION SERVICE

IIAM CMS is a process that can make for a more peaceful society. Community Mediations helps to maintain peace and solidarity among the members by facilitating settlements among conflicting parties. Community mediation means neighbours helping neighbours to solve problems and resolve disputes. IIAM CMS is viewed as an opportunity for citizens to participate in the prevention and early intervention of conflicts as an alternative to institutional mechanisms. The mission is to provide neutral and safe dispute resolution opportunities through which individuals are empowered to work collaboratively to develop creative and mutually agreeable solutions to conflicts. Researchers measure the effect of community mediation on decreasing repeat conflicts.

## MEDIATION CLINICS

The Clinic would be a small centre having about 150- 200 sq.ft area with one staff, viz., the Resident Coordinator. There will be an Honorary Legal Advisor for a group of 10-15 mediation clinics. The Mediation Clinics would function with an efficient team of mediators who are selected from the local community itself. 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. IIAM will also implement high standards of ethics as laid down by IMI.

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. Just about any conflict can be addressed through community mediation. The role of community 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. Community 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. The theme ***"Talk it Out, Not Fight it Out"*** in an attempt to portray the essence of mediation in real life situations.

> *"The thrust of Community Mediation Service is to promote reliance of mediation at the grass root level by way of local capacity building. This project is especially laudable since it seeks not only to provide mediation service but also to train individuals from the concerned local community as mediators."*
> *Mr. Justice K.G. Balakrishnan,*
> *Former Chief Justice of India*

Conflict management programs with the formation of such Mediation Clinics will serve to defray tensions in societies and prevent them from erupting into violence. A conflict free environment makes the community more focused, optimized and disciplined by setting up standards and values and principles. It would help to maintain peace and solidarity among the people by facilitating settlements among conflicting parties.

## PROMOTING COMMUNITY CLINICS:

IIAM is taking up an ambitious project of establishing Mediation Clinics in all Indian villages. This requires the support and blessings of public spirited persons, organizations and corporate houses interested in the welfare of society.

To promote the concept of IIAM CMS, we invite you to partner and contribute by adopting a clinic or donating for the cause of establishing such clinics. Such adopted clinic would be known in your name - "*Your Name* Mediation Clinic" in association with IIAM Community Mediation Service. IIAM directly operated clinics will display the names of contributors, who have donated for the cause. The names of partners of IIAM Community Mediation Service and the names of contributors will be shown in the IIAM website.

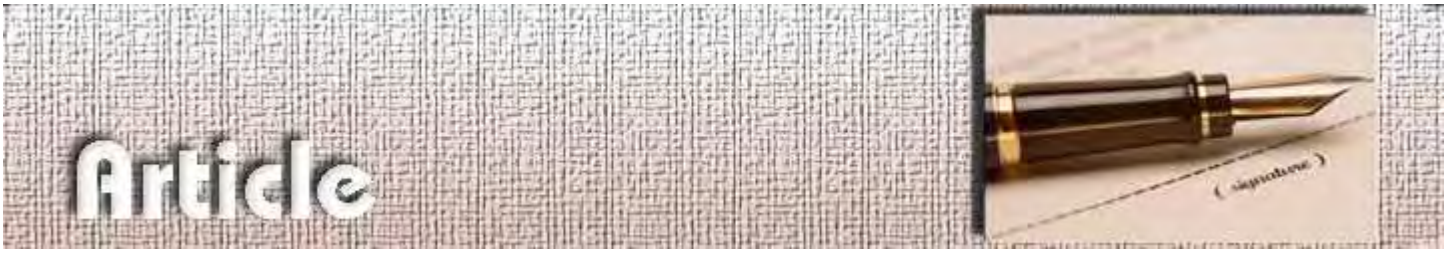
Evaluating the program essentially answers the question, "What good did we do?" As the former President of India, Mr. A.P.J. Abdul Kalam has said, "If nation is to have ethics; society has to promote ethics and value system. If society is to have ethics and value system, families should adhere to ethics and value system." The popularization of the Mediation Clinics will help to bring people together to work creatively on conflict resolution, instead of fighting each other and making those problems worse. It is also a process that can make for a more peaceful society. Thus IIAM Community Mediation Service has the potential for transforming our conflictual society into a collaborative, problem-solving one.

> *"I have great pleasure in commending to all Institutions, particularly Corporates and other public spirited persons interested in the welfare of society, to participate in this exciting experiment of bringing justice between man and man in a society which is tending more and more towards strife and friction."*
> *Mr. Justice M.N. Venkatachaliah,*
> *Former Chief Justice of India*

IIAM CMS Program gives you the opportunity to proclaim your social commitment and social responsibility. 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. We welcome you to take part in this exiting attempt of social transition to make our world a safe, sustainable, peaceful and prosperous place to live, by making an important contribution by adopting or supporting such Community Mediation Clinics. Let us jointly make this happen!

For more details about IIAM Community Mediation Service, please visit www.communitymediation.in

*(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)*




# Consensual Arbitration

: ATTORNEY ISRAEL SHIMONY

*Consensual arbitration is an arbitration proceeding which includes an arbitration agreement executed at the outset, an appeal instance, review, objection or re-examination (hereinafter: "appeal"), which is intended to review the arbitration award and instruct, if necessary, as to an appropriate rectification thereof.*

Consensual commercial arbitration focuses on consensual arbitration proceedings that are designed to resolve commercial disputes. We have elected to use the term "consensual arbitration" for this purpose.

The Arbitration Law in its new format represents a very real transformation in the new method it offers of resolving disputes. It creates a reliable, effective and safe manner of judicial adjudication, as follows:

1. It serves as a safety valve that enables a proper review where necessary and can be controlled by the litigants:

   1.1 Will permission be granted to intervene in the factual findings? And if so, when?

   1.2 Will there be authorization to rectify the arbitration award or will it be necessary to return it to the first instance?

   1.3 What will be the composition of the appeal panel?

   1.4 What will be the specialist area of the members of the appeal panel?

2. It streamlines the process in the first instance since, with no way back in the non-appeal arbitration route there is a tendency to "split hairs". The appeal instance gives litigants and their attorneys peace of mind and assurance that it is possible to focus on the gist of the matter and prove it, instead of grasping at every shred of evidence in hope that it will portray the picture better for the arbitrator. In the event that the arbitrator exercises his discretion in a manner that is unreasonable under the circumstances, the litigants have an option to refer to appeal. Unreasonable exercise of discretion does not depend on a shred of evidence that will occupy valuable time for which the litigants will be charged. Thus the arbitration proceeding will be conducted more efficiently.

## The Consensual Arbitration Revolution

In recent years not much attention was paid to arbitration. Broad social movement is afoot and it is appropriate for such social change – the "arbitration revolution" – to come into its own. After all, many are the perils along the road of the arbitration revolution; the greater the phenomenon, the greater the risks of its failure. Everything possible should be done to deter untrained arbitrators from infiltrating the field, while ensuring supervision and advanced qualification; at the same time arbitrators acting in good faith to fulfill their assignment should be guaranteed proper protection; the culture of out-of-court settlement of disputes should be disseminated at all levels of society; and a suitable level of training should be ensured for arbitrators.

This is a time of transition: if the arbitration revolution succeeds, it will flourish and the culture of arbitration

will spread to become an integral part of our overall business culture. To this end, all possible government bodies (the Knesset, the government and the courts) and private entities should be recruited to ensure the success of the revolution. The legislation of the new Arbitration Law must be supplemented, prescribing appropriate normative frameworks for conducting judicial proceedings and guaranteeing that arbitrators are trained to a suitable level. For their part, the courts should contribute to the success of the arbitration revolution – which in turn will contribute to the success of the courts – by increasing the volume of cases referred to arbitration proceedings. Academic research and education in arbitration should also be encouraged.

## The Principle of Consent

Consent forms the very foundation of arbitration proceedings - from beginning to end they are based on consent.

The essence of the new Arbitration Law – the promotion of certainty, autonomy and security in the world of commerce – requires a high degree of consent in the proceedings, along the lines of "informed consent". This type of consent is required in connection with the procedural aspects of the essence of the dispute in conducting arbitration proceedings, and in connection with material matters related to the content of the decision, which are significant to the commercial future of the litigants.

## The Concept of Consent in Civil Law

The concept of consent is relevant in a variety of contexts of civil law in the world of commerce. This refers to resolve in contracts law. The concept of "resolve" in contract laws refers to the presence of preparedness in a party to take upon itself the legal obligation embodied in the contract. Resolve is examined objectively; the question is whether a party appears to have assumed a contractual undertaking in order to protect the other party's reliance interest. Hence, it is not impossible that a contract may be signed and a party will find itself obligated thereunder, even if there were informative and voluntary disruptions in formulating the subjective resolve. It is true that in certain cases a party whose demands were not answered may be released from the contract pursuant to Chapter B of the Contracts Law (General Part), 5733-1973; however, the right to annul is limited to defects of sufficient severity and is also dependent on the mental status of the other party regarding the defect. In terms of form, consent to enter into a contract does not for the most part entail any special format and it may be done verbally or by conduct, expressly or tacitly.tration and where should it be positioned? What is the common and proper model for consent in the area of arbitration and where should it be positioned?

If a key rationale for favoring arbitration proceedings as a means of resolving disputes is the reinforcement of personal autonomy, as suggested above, then it follows that the level of consent required from the parties should be high, so as to reflect a fitting exercise of individual will.

And indeed, in light of such rationale American literature offers the opinion that arbitration proceedings require consent at a higher level than is usual in civil law.

One suggested version is the presence of "high quality consent". Another version is found in various ethical codices in the United States. The literature rightly points to the essentiality of informed consent in arbitration as an element protecting human dignity.

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*(Author: Attorney Shimony is the founder of ITRO – The Institute of Consent Arbitration)*


# Settlement Culture Required: Chief Justice of India

Chief Justice of India S.H. Kapadia underlined the need for spreading a settlement culture for the success of mediation as an alternative dispute resolution system. According to him, the absence of the settlement culture among litigants was the single most important factor in the flooding of courts with cases. Inaugurating a two-day national conference on 'Mediation' at New Delhi, Justice Kapadia regretted that the attitude of litigants in India was winning a case and not resolving it through settlement.

# New Arbitration Legislation for Bahamas

The Arbitration Act (42/2009) and the Arbitration (Foreign Arbitral Awards) Act (43/2009) came into force on May 20 2010. Both acts are the result of The Bahamas' commitment to adhere to the recommendations of the United Nations Commission on International Trade Law (UNCITRAL) in order to develop uniformity and harmonization in the law relating to arbitral procedures on a domestic level, as well as the specific needs of international commercial arbitration practice.

# Draft Law for Mediation in China

Legislators in China is reviewing a draft of the country's first law on mediation, hoping outside-court settlement of minor disputes could help ease the rising social tension.

The draft law on mediation makes it clear that a mediation committee, comprising of three to nine members, will be mainly set up under urban neighborhood or rural village committees with a term of three years. Members of such committees should be honest, fair and keen on helping others to solve problems. If they are found to be partial or taking bribes, they will be punished or even dismissed, according to the draft. Any disputing party can apply to the local mediation committee for help, which will be free of charge, the draft says.

**Correct Punctuation!**

The Lighter Side

Dear John:
I want a man who knows what love is all about. You are generous, kind, thoughtful. People who are not like you admit to being useless and inferior. You have ruined me for other men. I yearn for you. I have no feelings whatsoever when we're apart. I can be forever happy—will you let me be yours?
Gloria

Dear John:
I want a man who knows what love is. All about you are generous, kind, thoughtful people, who are not like you. Admit to being useless and inferior. You have ruined me. For other men, I yearn. For you, I have no feelings whatsoever. When we're apart, I can be forever happy. Will you let me be?
Yours,
Gloria

# Philippines Enhanced Justice on Wheels Program

The number of global arbitrations rose 16 per cent last year suggesting that the number of commercial disputes resulting in legal proceedings is increasing in the wake of the economic downturn. Research from Hogan Lovells showed that London had seen an almost 30 per cent increase in disputes between 2008 and 2009. The firm says the statistics are evidence that businesses and governmental entities are increasingly turning to alternative means of dispute resolution, as well as traditional litigation, to resolve contentious matters.

# US Supreme Court Reinforces Contractual Right to Arbitrate

The United States Supreme Court issued another important decision regarding contractual agreements to arbitrate, holding that an arbitrator, not a court, should decide whether the parties' agreement to arbitrate is enforceable, whenever the parties have delegated that question to the arbitrator. Under this ruling, a court may consider the validity of an agreement – even when challenged as "unconscionable" under state law – only when a party narrowly challenges the delegation clause and not the entire agreement. (Rent-A-Center, West, Inc. v. Jackson)

# San Jose Police Auditor Proposes Face-to-Face Mediation

San Jose's independent police auditor has proposed face-to-face mediation to settle rudeness complaints against police officers. The proposal by LaDoris Cordell is aimed at resolving dozens of complaints and to reduce expenses and litigation. Cordell's plan would have officers and people meet face-to-face in front of retired judges who would work for free. The idea is similar to one used in Washington D-C, Denver and New York City.

# 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

**Interested to start ADR Centre?**

Indian Institute of Arbitration & Mediation is looking for parties interested to start IIAM Chapters in various states and cities.

If you have a passion for dispute resolution and you are interested to start a Dispute Resolution Centre, please mail your details to: dir@arbitrationindia.com

**For details of IIAM activities visit website**