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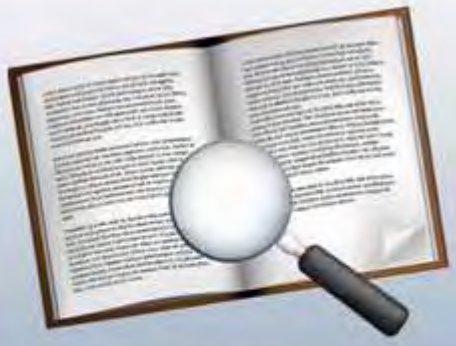

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## EDITOR'S NOTE

*The latest Report by the World Bank says that it takes nearly four years on an average to resolve a commercial dispute in India, making the country the world's third worst place on this front. India is placed at 186 out of the 189 countries. This emphasizes the need for adopting ADR and more particularly mediation as the primary option in resolving commercial dispute. It is not by accident that mediation is now referred as the Appropriate Dispute Resolution (ADR) method rather than Alternative Dispute Resolution (ADR). IIAM is bringing out the concept of "Pledge to Mediate" among the corporates. Let us make a sincere attempt to move forward in the list.*


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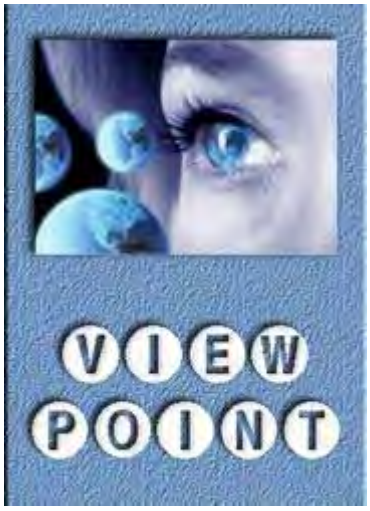
# WHETHER ORDER BY THE CHIEF JUSTICE APPOINTING AN ARBITRATOR ADMINISTRATIVE OR JUDICIAL?

ABHINAV KUMAR & PRASHANT PRANJAL




*The validity of Section 11(6) of the Indian Arbitration and Conciliation Act defining "Appointment of arbitrators" has been challenged time and again before the Courts. The primary question that required consideration in all these challenges has been that whether an order by the Chief Justice appointing an arbitrator is an administrative order or a judicial one? The decision in the case of SBP & Co v Patel Engineering has resolved the dispute but the present article seeks to look at three different cases which are outstanding examples of lack of uniformity on the part of the Indian judiciary in dealing with the issue.*

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**CASE I: KONKAN RAILWAY V MEHUL CONSTRUCTION CO[1] [3 JUDGE BENCH, SUPREME COURT – 2000]**

**Points in Judgment:**

**Use of 'Chief Justice' instead of 'Court'**: Section 11 of the Act had vested the right in the Chief Justice of the Supreme Court in International Commercial Arbitrations, and the Chief Justice of the High Court in domestic arbitrations to be the authority to perform the function of appointment of an arbitrator, whereas under the Model Law the same power had been vested in 'Court'. This shows that the nature of the order was intended to be administrative.

**Contentious order not to be decided by 'Chief Justice:** Supreme court was of the view that when the matter is placed before Chief Justice or his nominee under Section 11(6) of the Act it is imperative for the Chief Justice to bear in mind that the legislative intent is that the arbitral process should continue without delay and to minimize supervisory role of Courts. Therefore, all contentious issues should be raised before the Arbitral Tribunal itself, especially since the power to decide jurisdictional issues had been given to the Tribunal under Section 16 of the Act.

**Party could adopt dilatory tactics:** The court was further of the view that if the function of the Chief Justice was held to be judicial or quasi-judicial, then a party

**(Footnotes)**

[1] Konkan Railway Corporation v Mehul Construction Co. 2000 (7) SCC 201

could adopt dilatory tactics by approaching a Court of Law against the appointment of an arbitrator, instead of resolving the matter before the Tribunal itself. Therefore, the order passed by the Chief Justice is purely administrative in nature.

**Problems with the Judgment:**

If the order of the Chief Justice is an administrative order, then it could be challenged before the High Court under Article 226 of the Constitution of India, from which appeal would lie to the Division Bench, with further appeal to the Supreme Court under Article 136 of the Constitution. This would defeat the purpose of expeditious disposal of arbitral matters, and would further delay the proceedings. Due to these problems, the matter was referred to a Constitutional Bench.

**CASE II: KONKAN RAILWAY V RANI CONSTRUCTION[2] [5 JUDGE BENCH, SUPREME COURT – 2002]**

In this case, a clause in the Scheme introduced by the Chief Justice to deal with applications under Section 11 was called into question. The clause provided that notice should be given to the other party before the Chief Justice makes the appointment of the arbitrator.

**Points in Judgment:**

**No need of Notice:** The Court held that nothing under Section 11 required the Chief Justice to give a notice or opportunity of hearing to the other party. It does not contemplate a response from the other party. Therefore, the scheme framed by the Chief Justice being against the Act was bad in law. The other party needs to be given notice of the request under Section 11 only to assist the Chief Justice in the appointment of the arbitrator.

**Function of Chief Justice:** According to apex court the function of the Chief Justice was only to fill the gap left by the parties or arbitrators and to appoint an arbitrator so that the arbitral process could commence. Therefore, the order could not be said to be an adjudicatory order.

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**(Footnotes)**

[2] Konkan Railway v Rani Construction. 2002 (2) SCC 388

**Arbitral Tribunal Jurisdiction:** Supreme Court was of the view that even after the Chief Justice has appointed an arbitrator that he believes is impartial and independent, a party who has justifiable doubts as to the impartiality of the arbitrator may challenge the arbitrator before the arbitral Tribunal. The arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, but extends to the root of its jurisdiction also. Therefore, if the Tribunal has been wrongly constituted by reason of the fact that the Chief Justice appointed an arbitrator before the 30 days required under Section 11 had passed, the Tribunal can hold that it has no jurisdiction. Thus, Section 11 does not contain any element of adjudication, and the function of the Chief Justice is purely administrative in nature.

**Problems with the Judgment:**

If the Tribunal has the authority to enquire to the impartiality of the arbitrator appointed by the Chief Justice, or can declare that it was wrongly constituted as the Chief Justice had mistakenly appointed an arbitrator before 30 days had passed, then this would mean that the order of the highest judicial authority in the country could be questioned by the Tribunal. This should not be encouraged. Even if the order of the Chief Justice was purely administrative, notice and opportunity of hearing ought to be provided to the other party to ensure fair process. Due to these problems, the matter was referred to a seven judge bench of the Supreme Court.

**CASE III: SBP & CO V PATEL ENGINEERING[3] [7 JUDGE BENCH, SUPREME COURT – 2006]**

**Points in Judgement (Majority Decision):**

**Finality of Decision:** Supreme Court elaborated on Section 11(7) of Arbitration and Conciliation Act 1996 which provides that the decision of the Chief Justice shall be final in nature[4]. Apex court was of the view that once a statute gives an authority the power to adjudicate and makes its decision final, then the decision cannot be said to be a purely administrative decision.

**Relationship between Section 11 and Section 16:** Next the apex court went on analysing the relationship between Sections 11 and 16 of Arbitration and Conciliation Act, 1996. Section 16 deals with the Competence of Arbitral Tribunal to rule on its own jurisdiction. Apex Court was of the view that Section 16, which gives the Tribunal the competence to rule on its own jurisdiction, has full play only if the Tribunal is constituted without intervention under Section 11(6)[5] . Once the Chief Justice decides that the arbitration agreement is existing and valid, it cannot be called into question before the Arbitral Tribunal.

**Use of 'Chief Justice' instead of 'Court':** Supreme Court further analysed the word 'Chief Justice' used in Section 11 of the Act and held that just because the Act uses 'Chief Justice' instead of 'Court' does not mean that the order is not intended to be judicial. Supreme Court was of the view that the legislature might have avoided using the word 'Court' because they did not want applications under Section 11 to go to the District Court, but instead wished it to be decided by the highest judicial authority in the State or country. This is in order to give sanctity to the judicial process. Moreover, by not using the word 'Court', the normal procedure of the Court which is complicated and tedious can be avoided.

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**(Footnotes)**

[3] SBP & Co. v Patel Engineering. (2005) 8 SCC 618

[4] Section 7, Arbitration & Conciliation Act 1996 – A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

[5] Section 11 (6) Where, under an appointment procedure agreed upon by the parties, -
a. a party fails to act as required under that procedure; or
b. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
c. a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

**Persona designata:** Supreme Court held that the power conferred under Section 11(6) on the Chief Justice was not as *persona designata*. Supreme Court was of the view that *persona designata* is a person chosen to act in his private capacity, and not his capacity as a Judge. Obviously, on ceasing to be a Chief Justice, the person cannot exercise power under Section 11 of the Act.

**Comparison with Section 8:** Supreme Court further compared Sections 8 and 11 of Act and was of the opinion that it is settled that under Section 8, the judicial authority can decide jurisdictional issues before sending the matter to arbitration.[6] Thus, if the Chief Justice is not given the power to decide these issues before appointing an arbitrator under Section 11, it would lead to an anomalous situation where the judicial authority under Section 8 can decide, but not the Chief Justice under Section 11.

**Delegation of the Power:** The Chief Justice cannot delegate his power under Section 11 to a non-judicial body as judicial powers can only be exercised by judicial authorities. The Chief Justice can thus only delegate the power under Section 11 to another Judge of the same Court. However, the help of non-judicial persons can be taken in to point out a suitable person as an arbitrator or to get necessary information regarding suitable arbitrators. The preliminary or jurisdictional objections can only be decided by the Chief Justice or a Judge of the same Court.

**Remedy against order of Chief Justice:** If the order under Section 11 is passed by the Chief Justice of a High Court, the only remedy available is to approach the Supreme Court under Article 136. However, if the order is passed by the Chief Justice of the Supreme Court, then no remedy is available to the parties against such orders.

**Policy Considerations:** Supreme Court held that allowing the Chief Justice to decide on preliminary objections under Section 11 will leave the Arbitral Tribunal free to decide the dispute on merits, unhampered by technical objections. It would be more conducive to minimizing judicial intervention than allowing the objections to be taken before the Tribunal after appointment of the arbitrators, only to have the Award challenged under Section 34.

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**(Footnotes)**

[6] Power to refer parties to arbitration where there is an arbitration agreement.


## PERSPECTIVE

A man went out for a walk.

He came to a river and saw a woman on the opposite bank.

“Yoo-hoo,” he shouted, “how can I get to the other side?”

The woman looked up the river then down the river then shouted back,

“You’re already on the other side.”

Life and truth is often a matter of perspective and viewpoint.

**Administrative/Judicial Order:** Supreme Court was of opinion that if the order decides rights and liabilities of the parties, it cannot be administrative in nature. Moreover, if the matter involves discretion of the deciding authority and this discretion is to be exercised on merely subjective and NOT objective grounds, then the order will be administrative. The essence of a judicial proceeding is a lis between the parties that is to be adjudicated on. Since the Chief Justice has to decide on the existence and the validity of the arbitration agreement before appointing an arbitrator under Section 11, he can adjudicate contentious issues. His decision will vitally affect the rights and liabilities of the parties. (The right of the parties that is being affected is its contractual right to go to arbitration) Thus, it is clear that the Chief Justice is not performing a pure administrative function, but a judicial one.

**Requirement of Notice:** Supreme Court, on the issue of requirement of notice was of the view that it is fundamental procedural rule that the right of no person can be affected without being heard. Therefore, the Chief Justice has to give a notice to the other party, and provide both parties the opportunity of being heard before making his decision.

**Issues to be decided by the Chief Justice**: Supreme Court while analysing the power of Chief Justice under Section 11 of the Act held that the Chief Justice is competent to decide on following issues; (a) his own jurisdiction, i.e., whether the party has approached the right court, (b) existence and validity of the arbitration agreement and whether the person approaching him is a party to the agreement, (c) whether the claim is dead or barred, and (d) whether the conditions for appointing an arbitrator under Section 11(6) have been satisfied by the appellant.

**Conclusive Remarks:** Konkan II was overruled. The function performed by the Chief Justice under Section 11 is judicial in nature.

**Points in Judgement (Minority Decision):**

**Prima Facie Consideration:** The Chief Justice under Section 11 does have to look into the existence of an arbitration agreement, default of one party to appoint an arbitrator, and the qualifications required by the arbitrator. However, the satisfaction required is merely of a prima facie nature and does not amount to deciding a lis or contentious issues between the parties.

**Finality of the decision of Chief Justice**: Apex court held that Section 11(7) provides for finality of order of Chief Justice. However, finality of the order has nothing to do with nature of the function being performed by the Chief Justice. Finality does not mean judicial review is not possible.

**Delegation of power:** The Legislature has consciously allowed delegation of the power by the Chief Justice to ‘any person or institution’ since the function is administrative in character and is required to be performed only on prima facie satisfaction. Moreover, the Legislature would have been aware that a quasi-judicial or judicial function cannot be delegated. If the function was quasi-judicial in nature, the Legislature would not have allowed for delegation to ‘any person or institution’.

**Kompetenz-Kompetenz:** Supreme Court held that the principle of competence-competence, in Section 16 is not meant to leave the question of jurisdiction in the arbitrator’s hands alone. However, it is a rule of chronological priority as it is meant to allow the arbitrators to be the first Judges of their own jurisdiction. In other words, it is to allow them to come to a decision on their own jurisdiction prior to any Court, thereby limiting the role of the Courts to the review of the Award. Therefore, the Chief Justice should not be given the authority to rule on the jurisdiction of the arbitral Tribunal, but merely to make a prima facie decision as to the existence of an arbitration agreement. The power of the Tribunal to rule on its own jurisdiction cannot be taken away by the Court. The Court cannot interpret Section 11 in a way that would make Section 16 redundant.

**Appeals on Administrative Orders:** It is true that three appeals would be possible from an administrative order of the Chief Justice – to the High Court under Article 226 of the Constitution, from which appeal would lie to the Division Bench, with further appeal to the Supreme Court under Article 136 of the Constitution. However, the High Court while exercising its jurisdiction under Article 226 has to keep in mind the legislative intent of expeditious disposal of proceedings and exercise its power with utmost caution and circumspection.

**Requirement of Notice:** As the function of the Chief Justice is administrative in nature, there is no duty to act judicially. However, when an administrative action is likely to affect the rights of the parties, there is still a duty to act fairly. Basic procedural fairness requires notice to the opposite party.

**Conclusive Remarks:** Therefore the minority judgment upheld Konkan II to the extent that it held that the function of the Chief Justice was a pure administrative one. However, notice was still required to be given by the Chief Justice and hence, the part of the judgment that held that the Chief Justice's scheme was bad in law was overruled.



## 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-254, Panampilly Nagar, Cochin - 682 036 or editor@arbitrationindia.com.

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# OBSERVED PRACTICE MATTERS

TONY WHATLING

*Observed practice is a process whereby the Professional Practice Consultant or other designated colleague, directly or indirectly observes the practice of the mediator. The most obvious benefit for the mediator is the immediacy and focus of the feedback. With hindsight mediators can usually identify what they might have done differently. In this article the author explains why observed practice is important in family mediation and explores some common objections to the process and suggests ideas on how to manage its practice.*

AUTHOR: TONY WHATLING IS A MEDIATION CONSULTANT AND TRAINER IN THE UNITED KINGDOM

"**O**h would some power the gift to give us! To see ourselves as others see us, It would from many a blunder free us. [Robert Burns].

Observed practice is not new, indeed for many professionals who, perhaps like Burns wish for the power to see themselves as others see them, it has become regular practice. Nevertheless it remains a contentious issue for some who continue to argue the case against its implementation.

In this paper I explain why I think observed practice is important in family mediation, explore some common objections to the process and suggest ideas on how to manage its practice. By 'observed practice' I am referring to a process whereby the Professional Practice Consultant [PPC], or other designated colleague, directly or indirectly observes the practice of the mediator.

There are a number of options for how this can be done. For example, the PPC can sit in the room yet take no active part in the session; s/he can join in the process as a co-worker; audio/video tapes can be made of the session, or it can be observed through a one-way screen. From my direct experience of all of these options, I have no doubt that the former, to borrow the words of Tina Turner, is - *'…. simply the best - Better than all the rest'*. As the lyrics claim, it is both simple to do and the most effective process for meeting the responsibilities of PPC and professional development needs of the mediator.

The first of the above options gives the observer scope for total concentration on what is happening between all the participants in the room. Whilst on the face of it the co-worker option seems more natural, it is a poor substitute for

'the best'. For continuity an observer would need to be involved in all appointments through to completion, thereby increasing cost and time commitment. Making detailed notes about the mediator practice would is not feasible and objectivity of observation more difficult. It is not possible to make an impartial assessment of the mediator since the co-working observer would also be making interventions. Talking to mediator colleagues around the country, co-worker observation would appear to be the most favored option in use at present. How sad it is that it tends to be identified in a negative context, i.e. as 'the simplest way to get round the LSC requirement' for observed practice.

Audio or video-taping is an attractive option, particularly since it can be reviewed repeatedly, for example to see who said what? When? How? and for key learning points to be analysed. However good quality expensive equipment is required if all participants are to be heard or seen clearly on the tape. Anyone who has strained to listen to or watch poor quality audio/video tape material will know how frustrating it is. My main concern about the audio/visual option is the need for explicit policy and practice on such issues as client consent, how tapes are stored securely, who has access to them, why and when they are saved or deleted etc. In a worst-case scenario it is feasible that tapes could be requested as evidence in litigation. For example concerning allegations of poor mediation practice resulting in power imbalance, or advice giving etc. resulting in claims of financial loss by a client. The one-way screen is a familiar option within therapeutic settings but I wonder how comfortable clients feel about this 'big-brother' scenario. What then are some of the objections raised by those who seek to avoid independent observation of practice? My own experience of such objections dates back some 30 years when firstly as a social work Practice Teacher and subsequently a college Tutor we addressed the need for greater objectivity in competence assessment of students. The objections have changed little over the years and the following are current examples I have heard of late: 'It would change the dynamics of the session'; 'it would have implications for client confidentiality'; 'it would increase cost'; 'the client would resent the invasion of their privacy'; 'my office is not big enough'; 'I was appointed to my post with a job specification that required me to be able to work without supervision'; I would have to travel to the mediator's office so that would increase costs.


The room was full of pregnant women and their partners, and the Lamaze class was in full swing.

The instructor was teaching the women how to breathe properly, along with informing the men how to give the necessary assurances at this stage of the plan.

The teacher then announced, "Ladies, exercise is good for you. Walking is especially beneficial. And, gentlemen, it wouldn't hurt you to take the time to go walking with your partner!"

The room really got quiet.

Finally, a man in the middle of the group raised his hand.

"Yes?" replied the teacher.

"Is it all right if she carries a golf bag while we walk?"

Objections often focus on problems created for the client and are usually accompanied by the disclaimer, 'not that it is a problem for me as a mediator of course'! Whilst there will be elements of fact and truth in the above objections, I have never been in any doubt whatsoever that it is more of a problem for the practitioner than for the client. Yes the dynamics may be affected, but why assume that it will be for the worst? Issues of confidentiality should be considered but most clients understand the nature of confidentiality being within the context of the provider organisation. I have noticed that arguments for principles of client confidentiality do appear to vary more or less, according to the vested interests of those involved in the debate. For example I recall similarly strong objections raised a few years ago, by those who sought to resist having to submit client case evidence for LSC competence assessment! It is more time consuming than retrospective face-to-face PPC. However the current LSC minimum requirement is for twice a year and some face-to-face consultation would be happening anyway. All such objections need to be weighed against the very real benefits for professionals and ultimately for their clients. Mediators are good problem solvers, so issues of office space etc. are resolvable, assuming of course that the 'spirit is willing'.

Those mediators, who at one time resisted the very notion of submitting to any form of consultation, let alone observed practice, tend to hold negative personal constructs about the meaning of 'supervision'. Such constructs tend to be based on life experiences of critical negative feedback on performance, often dating back to childhood experience with parents, teachers and significant adults in authority. Supervision is often associated with professional pass/fail assessments, for example in teaching practice or of legal trainees. Such constructs also tend to assume that competence once 'proven' and 'licensed' will remain a permanent state from then on. What is needed is for those who hold such constructs to experience the benefits, both for clients and the ongoing professional development of the practitioner. Within the services that I visit as a PPC, mediators now complain if the gap between live observation sessions is too great. Not only is that a great compliment but it is what I would define as evidence of their professional maturity!

After the first few minutes the mediator is usually so caught up with the clients content, process and need for full attention that they usually forget I am there. Clients too, when I thank them for letting me sit in frequently say that they had forgotten I was in the room. Experience over many years in social work, counseling and family therapy has convinced me that observed practice is not a problem for the client. Client comments suggest some reassurance that the organisation is sufficiently conscientious to ensure practice is regularly audited and an interest in constantly improving performance.

How then is it best done? Clients are often asked by telephone before the day, but if not they are seen individually by the mediator who gives an explanation along the lines of - 'as you probably appreciate, we are always interested in developing our practice and the service has a practice consultant who is here today'. 'Would you have any objection to them sitting in on the session'? If you feel at all uncomfortable about it it's fine to say no'. Actual words will vary according to the mediator but the more it sounds a matter of routine the better. It is very rare for a client to decline. When it has happened it is associated with early limited trust in mediation, high conflict or emotional distress in one of the parties. Many professionals will have had experience of getting permission for trainees to sit-in and clients appear to regard it as normal practice across a wide range of professional contexts.

As with all mediation sessions, seating and room layout are obviously important. My own preference is to be out of the direct line of vision of clients, otherwise they tend to make eye contact. Office space can be a problem but I aim to sit as far away as possible from the participants. For example it may be possible to sit in an adjoining room with the door open and still see the mediator(s). As far as possible it is important to be a truly silent observer, for example rustling of paper or coughing can be distracting. Equally I have discovered that my non-verbal responses need to be 'switched off' during the observation since a frown or raised eyebrows can be very disconcerting for the mediator.

The following is a copy of an observation record form I have evolved and that readers are welcome to copy or adapt.

RECORD OF OBSERVED PRACTICE

Mediator(s): Service:
Observer: Date:

Core Skills Observed:

| | |
|---|---|
| Engaging | Clarification |
| Appropriate Language | Power Balancing |
| Child Focus | Managing Conflict |
| Future Focus | Reality Testing |
| Mutualising | Solo Mediating |
| Normalising | Co-working |
| Positive re-frame | Active Listening |
| Acknowledging positions | Open questioning |
| Summarising | |

| Effective Interventions - (what worked) | What could be done differently |
|---|---|
| | |
| | |
| | |

The reverse of the page and continuation sheets omit the 'Core Skills Box'. The latter can either be used to score the use of skills or simply serve as a reminder of skills to look for. The wording of the columns symbolises how I see my role as PPC and observer. Given that mediation is arguably more art than science, practice is rarely 'right' or 'wrong', only more or less effective. I am primarily concerned with what is effective and what could possibly be further developed or done more of or less of. As standards of training have risen over the years, it is rare to encounter elements of seriously 'poor practice'. Where it happened it tended to be based on misunderstandings

taken from training, or involved the practice of mediation in the style of another professional background, e.g. giving legal advice or inappropriate opinions/instructions on parenting. I did observe a recently trained mediator who did not carry out adequate domestic abuse screening with a male client, despite had disclosure from the spouse of a long history of abuse. In another instance incorrect legal information was given about consent orders, thus illustrating a need for some specific training on the legal divorce process. Once such practice is observed it is not difficult to bring about change. In the words of Rabbi Lionel Blue, (Radio 4 'Thought for the day'), - 'Our successes make us skilful, our mistakes makes us wise'. Such examples would almost certainly never come to light without direct observation, so as Burns so eloquently put it, 'It would from many a blunder free us! It should be acknowledged of course that mediation is inevitably easier to do as an observer than when sitting in the mediator chair!

I never record real client names on this record, and rarely make comments on what clients do or say, unless it is clearly related to cause or effect of the mediator's competence. When observing co-mediators I use one sheet but record initials when referring to individual interventions. It can also be useful sometimes to record the time of particular interventions, perhaps in context with movement through the stages. The record is left with the mediator(s) and a copy stored at the service in their individual supervision file. I would not normally take any part in the session but there is an understanding that should the mediator want to consult with me s/he will propose a short tea break, e.g. 'to give everyone time to think about what has been said so far'. This does not happen often but when it has it is a useful opportunity to explore alternative strategies and options. The observer may be able to provide a more objective and 'detached' perspective on how to manage the rest of the session. A de-briefing based on the notes usually follows immediately after the session.

What then are the benefits for the mediator? Perhaps the most obvious benefit is the immediacy and focus of the feedback, compared for example to meeting some weeks later, when the mediator attempts to recall the details. It is not unusual for mediators to express doubts about their practice and most tend to be more self critical than is justified. Working through the list of interventions recorded as effective can be reassuring and affirming. With hindsight mediators can usually identify what they might have done differently, before consulting the right hand column of my list. In general mediators tend not to name particular interventions or techniques used to 'make things happen'. In part this may be to do with working at a largely intuitive level and our cultural taboo on self-praise! Mediators also tend not to describe what they do in the 'technical' language of mediation, for example 'mutualising', 'normalising', 'positive reframing' etc. As observer I can record all such competencies directly, often with the result that the mediator is reassured to learn just how skillful they had been. The value of this independent observed record of practice as subsequent evidence for assessment for UKC/LSC recognition and accreditation is an obvious major bonus.

Faced as they are with such high levels of distress, anger and apparently insurmountable problems, I am frequently aware of the high level of practice competence delivered by my mediator colleagues. If only critics of mediation could witness that and see the beneficial reactions of parents as, in the space of an hour or two, they reconnect with their former parental competence and responsibility. It is an experience that is probably unique to direct observation and for me is always associated with a deep sense of privilege at having the opportunity to witness it at first hand.

For mediators facing their first exposure to observed practice, the hardest part is often setting the date for it to happen. From then on it quickly becomes less of a 'gremlin' and certainly requires less effort than the energy required in generating objections to getting on with it. However experienced the mediator there is always the need for new ideas and further development. It would be sad indeed if the only reason professional mediators carried out observed practice was to satisfy the minimal requirements of the LSE.

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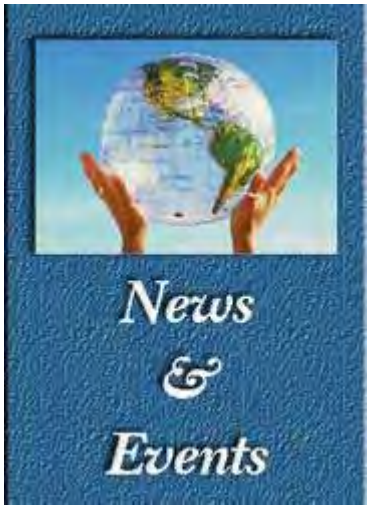
# NEWS & EVENTS




## 1000 TRADITIONAL RULERS TRAINED ON ADR IN NIGERIA

About 1000 traditional rulers have been trained on Alternative Dispute Resolution under the Justice Sector and Law Reform Commission in Jigawa. The monarchs were trained on ADR and it is expected that since ADR was important to justice system, it would go a long way to eliminate hatred and enmity arising from litigations among the people in the society.

## 24 INDIAN JUDGES TAKE PART IN WORKSHOP ON ADR

About 24 Judges from Himachal Pradesh attended a six-day-long workshop to learn how to encourage mediation as the use of alternative dispute resolution to solve the long-pending cases to speed up justice system in the state in future.

## INDIA THIRD WORST IN RESOLVING COMMERCIAL DISPUTES: WORLD BANK

As per the report released by the World Bank and International Finance Corporation, it takes nearly four years on an average to resolve a commercial dispute in India, making the country the world's third worst place on this front. The report ranks countries on the basis of 10 factors including enforcing contracts that looks at how efficiently commercial disputes are resolved through courts. Providing details about ease of doing business in India, a separate report said that it takes 1420 days for resolving commercial disputes in the country, placing it at 186$^{th}$ spot in terms of enforcing contract, among 189 economies.

## MALAYSIA BECOMING MORE ARBITRATION FRIENDLY

The Malaysian Parliament passed amendments to the Legal Profession Act 1976 in September 2013, introducing an exception to the "fly-in fly-out" prohibition which allows a foreign lawyer advising on non-Malaysian law to enter Malaysia for up to 60 days in a calendar year, subject to immigration approval. With these amendments, both foreign Arbitrators and foreign lawyers are now allowed to enter into Malaysia to participate in arbitral proceedings and are exempted from the "fly-in fly-out" prohibition. They will not be subject to the restriction of 60 days nor require immigration approval to enter into Malaysia to conduct arbitral proceedings.

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institution for dispute resolution & management

## MEDIATION TRAINING PROGRAM

IIAM will be conducting a commercial Mediation Training Program at Kochi, India from 18-22 November 2013. The program is designed for 5 days – 40 hours. The training program combines the theory of ADR through highly interactive, skill-based courses in negotiation and mediation. The program will enhance the understanding and ability to negotiate and resolve conflicts, as well as provide a solid foundation in ADR processes and to serve as ADR practitioners and neutrals. Through discussion, simulations, exercises and role-plays, the program will focus on the structure and goals of the mediation process and the skills and techniques mediators use to aid parties in overcoming barriers to dispute resolution. The training also gives emphasis on the code and ethical standards of mediation. As per IIAM Mediator Accreditation System, based on the International Mediation Institute, The Hague (IMI) standards, a candidate having successfully completed Mediation Training Program will be categorized as Grade B Mediator and eligible for empanelment with IIAM.

## CERTIFICATE IN ARBITRATION LAW (CAL)

IIAM will be conducting a Certificate Program in Arbitration Law at Kochi, India during January 2014. The program is designed for 2 days – 15 hours. The program offers the participants to know the underlying theory of arbitration law and practice, with emphasis of the Indian law, drafting of arbitration clauses and agreements, procedure of arbitration, important case laws and institutional arbitration methods. The program will provide a solid foundation in the ADR process of arbitration and to serve as an arbitrator or arbitration counsel.

## CERTIFICATE IN DISPUTE MANAGEMENT (CDM)

CDM is an ongoing 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 mail to training@arbitrationindia.com

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There are three kinds of people in the world,
The wills, the won'ts, and the can'ts.
The wills accomplish everything; the won'ts oppose everything, the can'ts fail in everything