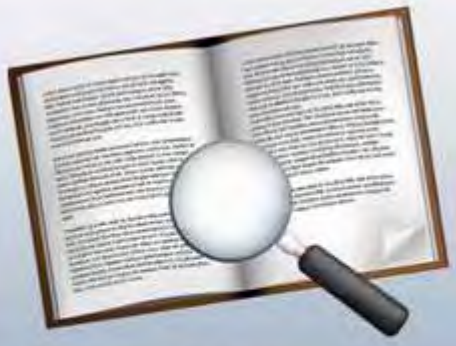
Volume 5, Issue 3, March 2013

THE indian arbitrator

THE INDIAN ARBITRATOR

NEWS MAGAZINE OF THE INDIAN INSTITUTE OF ARBITRATION & MEDIATION



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EDITOR'S NOTE

This is March. Perhaps you should march forward and move now and you won't have to explain why you didn't move later. Often we sit, moan and groan when if we had only moved when we had the chance we would not have to sit explaining the situation. Let us take the cue and start moving in transforming Alternative Dispute Resolution to Appropriate Dispute Resolution or Primary Dispute Resolution. Let us not forget that no other dispute resolution method considers the emotional element of a dispute. So go ahead - MOVE!

March: to go forward; advance; proceed

PUBLISHER: Indian Institute of Arbitration & Mediation, G-254, Panampilly Nagar, Cochin 682 036, India

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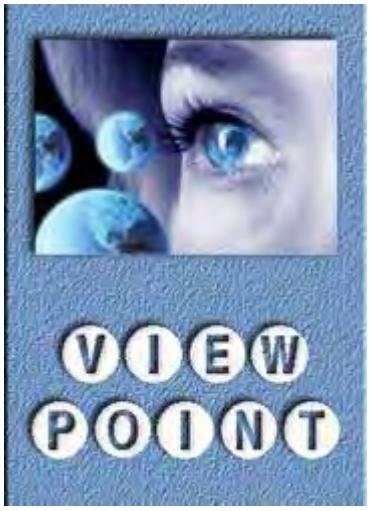
BENEFITS OF MEDIATION TO THE BUSINESS COMMUNITY

ISHITA DAS



In the wake of the globalization, the complexities of modern commercial transactions have necessitated effective redressal mechanisms for speedy settlement of commercial disputes. This has been made possible through the use of measures such as arbitration, conciliation and mediation which do away with the long-drawn process of justice delivery mechanism adopted by the courts. 'Mediation' has been widely adopted all across the globe as a preferred method of settling disputes for the evident advantages that it accrues to the parties in conflict. This article highlight the significance of mediation in the contemporary scenario.

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BACKGROUND OF 'MEDIATION' AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM

'Mediation' is a structured negotiation process in which the disputing parties engage the assistance of a neutral third party, the 'Mediator', who uses certain negotiation procedures and techniques to help the parties in conflict, without imposing any obligatory settlement but rather enabling the parties to understand each other's views and interests in light of the issues of conflict, with the creation of an atmosphere that facilitates the discussion between the conflicting parties to reach a satisfactory and viable solution.

Article 1 (3) of the UNCITRAL Model Law on International Commercial Conciliation, 2002 (hereinafter "UNCITRAL Model Law") provides that "for the purposes of this Law, 'conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship." It also provides that the conciliator does not have the authority to impose upon the parties a solution to the dispute, meaning that the parties are free to decide whether they want to accept the solution so provided by the conciliator or not. Alternatively, they may try to find another viable solution.

The UNCITRAL Model Law has been enacted with a view to assist the States in enhancing their legislation, governing the use of modern conciliation or mediation techniques, and in formulating such legislation where none currently exists.[1]

(Footnotes)

[1] G.A. Res. 57/18, U.N. GAOR, 57th Sess., Supp. No. 17, U.N. Doc.A/57 v. 19, 2002)

The terms 'conciliation' and 'mediation' are often used interchangeably. The countries including United State of America[2] and Canada[3] have enacted legislations for mediation based on the UNCITRAL Model Law[4]. However, in UK, it is believed that "conciliation is a process in which the Conciliator plays a 'proactive role to bring about a settlement' and mediation is 'a more passive process'".[5] However, this view does not hold true for UK in entirety as according to the Advisory, Conciliation and Arbitration Service, UK, 'mediation' involves a process in which the neutral mediator takes a more pro-active role than a conciliator for the resolution of the dispute, which the parties are free to accept or reject[6], which brings out the contradictory stand of UK in distinguishing between 'conciliation' and 'mediation'. However, in 2008, the European Union, adopted the Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matter, where 'mediation' has been defined as a "structured process, however named or referred to", clarifying that mediation maybe called differently.

The UNCITRAL Working Group clearly contemplated that the UNCITRAL Model Law could apply to both domestic commercial mediations and international mediations[7].

Mediation is being increasingly recognized as an effective method of resolving disputes for the array of benefits that it bestows upon the conflicting parties.

(Footnotes)

[2] The legislation, *Uniform Mediation Act*, *adopted in 2001 (amended in 2003) by the National Conference of Commissioners on Uniform State Laws,* enacts uniform legislation influenced by the UNCITRAL Model Law and the principles on which it is based.

[3] The legislation, *Uniform [International] Commercial Mediation Act, adopted in 2005 by the Uniform Law Conference of Canada*, enacts uniform legislation influenced by the UNCITRAL Model Law and the principles on which it is based.

[4] For the complete list of the States which have enacted legislations based on the UNCITRAL Model Law see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html (last visited Mar. 2, 2012).

[5] Brown, The Handbook of the City Disputes Panel, UK 127 (1997).

[6] *See* Advisory, Conciliation, and Arbitration Service, The ACAS Role in Conciliation, Arbitration and Mediation (1989).

[7] Art. 1(1) of the UNCITRAL Model Law provides express drafting instructions for States wishing to adopt the Model Law as applying to domestic as well as international mediations.

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HOW CAN MEDIATION BENEFIT THE BUSINESS COMMUNITY?

The advantages of mediation to the business community are multi-fold:

Firstly, 'mediation' is an alternative dispute resolution mechanism to settle disputes *swiftly and inexpensively*. Mediation, in comparison to other methods of dispute resolution, provides quick settlement of dispute between the parties, whereas completion of arbitration procedures may require several weeks and litigation might take several years for reaching finality in the proceedings.

As the duration for the conclusion of mediation is generally lesser, the costs incurred in the process are reflective of the same. Litigation often ends up in draining the pockets of the parties in conflict by the time the Judge determines the outcome of the case brought before the Court.

Secondly, the 'Mediator' appointed for the mediation proceeding, encourages each of the conflicting parties to reach a *mutually acceptable* solution. In mediation, no party stands to lose as they reach a settlement, considering the interests of both the parties harmoniously.

Thirdly, the parties have a *high involvement* in the process of negotiation and they can even control the outcome of the dispute in mediation, engaging in an informal discussion to settle their dispute.

Fourthly, the Mediator can propose *creative solutions* to resolve the conflict and help the parties to identify the underlying difficulties in the dispute, promoting exchange of information between the parties and helping them to come up with a solution that can meet their needs.

Fifthly, the decision of the Mediator is not *obligatory* on any of the parties and they have the freedom to decide whether or not they want to adopt the Mediator's declaration. This does not impose any burden on the parties and therefore, it is a hassle-free mechanism to deal with the dispute.

Sixthly, *confidentiality* in guaranteed in mediation as unless the parties agree otherwise, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Seventhly, when the conflicting parties deliberate on the issues for consideration, *privacy* is maintained.

Eighthly, mediation helps to *bridge the cultural gap* between the disputing parties as often there is a cultural divide between the parties when they are from different regions or countries. The Mediator coordinates their differences to help them understand each other's views and reach a practically viable solution.

Lastly and *most importantly*, mediation as an alternative dispute resolution mechanism allows the parties in conflict to sustain *cordial relations* for future business transactions. When parties choose the Court as the forum for dispute settlement, by the time the process of litigation concludes, there is a strain in the relationship of the conflicting parties. In mediation, the Mediator helps the parties to resolve the conflict by reaching a settlement that satisfies their interests and priorities in the best possible manner, rooting out the cause of discontentment between the parties, thereby creating a fertile ground for sowing more seeds of business initiatives which would ultimately bear fruit for both the parties.

ANALYSIS OF A FICTITIOUS SITUATION TO UNDERSTAND THE EFFICACY OF MEDIATION

Let us take an imaginary fact situation to appreciate the significance and advantages of mediation:

Amore, a young man from a humble background , after completion of his graduate program in civil engineering, started the business of engineering, procurement and construction activities under the name of Amore Business Ltd. (hereinafter "ABL"). ABL was incorporated in 2001 and in a span of five years had evolved into a prominent part of the energy, petrochemicals and civil infrastructure sectors. Amore was a part of the Board of Directors (hereinafter "BOD") of the company. Later, in 2006, his younger brother, Bose, also a civil engineer, joined him in the business and was appointed as the Head of the Technology Department. Amore held 55% of the share-holding of ABL's shares, while Bose held 15% of the shares and the remaining 30% vested with the public at large.

In 2006, Amore was elevated to the position of Chairman of the BOD, assuming greater control over the company.

Amore was known as a workaholic in his company whose persistent endeavour was to push the goodwill of the company to greater heights. He stayed well beyond the working hours, preparing plans for the future benefit of the company. Bose, as the Technology Department Head, generated lots of innovative ideas to improve upon the existing technology, as a result of which, the company's profits doubled within the next five years.

WIFE'S DIARY:

Tonight, I thought my husband was acting weird. We had made plans to meet at a nice restaurant for dinner. I was shopping with my friends all day long, so I thought he was upset at the fact that I was a bit late, but he made no comment on it. Conversation wasn't flowing, so I suggested that we go somewhere quiet so we could talk. He agreed, but he didn't say much.

I asked him what was wrong; He said, "Nothing." I asked him if it was my fault that he was upset. He said he wasn't upset, that it had nothing to do with me, and not to worry about it. On the way home, I told him that I loved him. He smiled slightly, and kept driving.

I can't explain his behavior I don't know why he didn't say, "I love you, too." When we got home, I felt as if I had lost him completely, as if he wanted nothing to do with me anymore. He just sat there quietly and watched TV. He continued to seem distant and absent. Finally, with silence all around us, I decided to go to bed. About 15 minutes later, he came to bed. But I still felt that he was distracted and his thoughts were somewhere else. He fell asleep — I cried. I don't know what to do. I'm almost sure that his thoughts are with someone else. My life is a disaster.

HUSBAND'S DIARY:

Boat wouldn't start, can't figure it out.

In 2011, the company issued further shares to expand its capital base. Bose, meanwhile, was appointed as a member of the BOD in the company. However, Bose wanted more money and was dissatisfied with the current status of the company. He entered into a contract with Xykes Construction Ltd. (hereinafter "XCL"), a loyal customer of ABL, whereby he delivered machinery worth US $ 150,000 at US $ 200,000.

Soon, the company, XCL discovered the scam that Bose, on behalf of ABL had pulled, and asked for the reimbursement of the money. However, Bose refused to pay back the dues, resulting which a meeting was arranged amongst the Board of Directors and Bose was removed as a member of the BOD for breach of fiduciary duty. Amore was really unhappy with the current scheme of things and withdrew from the office for several days. He was ashamed of his brother's actions and could not stand the criticism of his colleagues.

In the latter part of 2011, XCL threatened to file a lawsuit against ABL for failure to reimburse the dues. The newspapers were rife with rumours of differences between the two brothers in ABL, following which the share price of ABL in the stock market fell rapidly. Knowing that the reputation of ABL was at stake, Amore tried to dissuade XCL from filing a lawsuit against ABL. He proposed the alternative of settling the dispute through mediation to prevent further damage to the company's repute. He also did not want a collapse in the ABL-XCL business relationship, which would be the probable consequence of litigation, where both the parties would be pitted against each other. Furthermore, resolution with the help of mediation would be quick, fair and would give both the parties a workable solution.

So both the parties, ABL and XCL entered into an Agreement to Mediate and discussed what each of them wanted from the mediation process. Finally, when the mediation concluded, XCL got its reimbursement, along with a proposal for merger with ABL.

Soon, the newspapers published stories of their proposed merger, which sky-rocketed the share price of ABL. Therefore, ABL not only resolved the dispute with XCL but also used this process as a means to strengthen its ties with its loyal business partner.

CONCLUSION

Mediation is a dynamic process which is carving a remarkably prominent space for itself as a process of dispute resolution. Other methods like litigation and arbitration lack the inherent benefits of mediation which makes it such an attractive mode for settlement of disputes. Mediation not only provides the solutions to the parties but also helps them to appreciate each other's views, thereby widening the scope for further alternative solutions, which would be beneficial for both the parties. Therefore, it allows both the parties to play an active role in reaching a decision, unlike the courts in the case of litigation. As the parties are so involved in the process of mediation, the outcome of the same tends to be more satisfactory than the consequences which ensue from litigation.

EMERGING ISSUES AND CHALLENGES IN ENFORCEMENT OF FOREIGN AWARDS - I

AMIT YADAV

Section 36 of the Act states that an arbitral award is enforceable by a civil court of competent jurisdiction in the same manner as the court executes its own decrees. The public policy exception to enforcement is an acknowledgement of the right of the State and its courts to exercise ultimate control over the arbitral process. Public policy is a subjective term, which has to be determined keeping in mind the social, economic and political status of the country and also the facts and circumstances of the case on hand. The issues related to public policy; judicial intervention, distrust etc. have made it difficult to enforce foreign awards not only in India but in different countries of the world. This article is published in two parts.

AUTHOR: AMIT YADAV IS A LAW STUDENT FROM JAIPUR, INDIA

INTRODUCTION:

The first serious effort in this direction was made under the auspices of the League of Nations. These efforts resulted in the Protocol on Arbitration Clauses, which was ratified by 30 States on 24th September 1923. This Protocol also provided a procedure for conducting arbitration and a mechanism for execution of the same. Article 2 of the Protocol gave the parties the freedom to choose the constitution of the Arbitral Tribunal and the freedom to conduct the arbitration in a country of their choice. However, the Protocol's major shortcoming was present in Article 3. Due to the construction of this Article, only domestic awards could be enforced by the Courts of the member States. India was a party to the Protocol and the Geneva Convention, subject to the reservation of limiting India's obligations in respect thereof to contracts which were considered as commercial under the laws of India. For implementing and giving effect to the Protocol and the Geneva Convention, the Arbitration (Protocol and Convention) Act, 1937 was enacted. Also, In order to give effect to the New York Convention, the Indian Parliament passed the Foreign Awards (Recognition and Enforcement) Act, 1926. However, this Act was repealed by the Arbitration and Conciliation Act, 1996.

ESSENTIAL CONSIDERATION FOR THE ENFORCEMENT OF FOREIGN AWARDS:

Section 36 of the Act states that an arbitral award is enforceable by a civil court of competent jurisdiction in the same manner as the court executes its own decrees. In other words, all arbitral awards are enforceable by a court as though they are decrees passed by the court itself. Further, Sections 52 and 60 state that the provisions of Part 2 are not exhaustive for the enforcement of awards made under the two Conventions – the parties can take recourse to any mechanism afforded by the law to enforce

arbitral awards. Extending the same logic to the non-Convention awards, the author submits that non-Convention awards passed during an international arbitration are enforceable.

An interesting aspect of Section 36 is that it gives the status of decree to arbitral awards. Some commentators refer to this as a "deemed decree", although the author submits that this would be a misnomer. According to Section 36, a court of competent jurisdiction will enforce an arbitral award, as though the award was a decree that had been passed by it. Therefore, as far as enforcement of an arbitral award is concerned, there is no difference between the award and a decree of the court.

CONDITIONS FOR ENFORCEMENT UNDER THE INDIAN LAW:

The grounds mentioned in section 48 are exhaustive. Enforcement may be refused only if the objector can prove one of the grounds given in sub section (1) or if the Court finds existence of a ground listed in sub-section (2). As a general rule of interpretation the grounds under section 48 for refusal are to be construed narrowly.

The Courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, and some deep-rooted tradition of the common weal.

The grounds listed in sub-section (1) of section 48 of the 1996 Act for refusal of enforcement of the award are to be proved by the party against whom it is invoked (hereinafter also 'the respondent'). The burden of proof to the show existence of the grounds for refusal is on the respondent. These grounds can be invoked only by an application of the respondent.

ISSUES AND CHALLENGES:

A. Public Policy

The public policy exception to enforcement is an acknowledgement of the right of the State and its courts to exercise ultimate control over the arbitral process. There is a tension, however, which the legislature and the courts must resolve between: on the one hand, not wishing to lend the State's authority to enforcement of awards which contravene domestic laws and values; and, on the other hand, the desire to respect the finality of foreign awards. In seeking to resolve this tension, some legislatures and courts have decided that a narrower concept of public policy should apply to foreign awards than is applied to domestic awards.

As is always the case when the term is used, there was some doubt as to the scope of "public policy" used in Section 48. What considerations must weigh on the court's mind before it can declare that an award is not enforceable because it is contrary to public policy? This question was considered in *Renusagar Power Co. v. General Electric Co*[1]. The court held that mere contravention of law would not attract bar of public policy, but the award must be contrary to (i) fundamental policy of Indian law, or (ii) the interests of India, or (iii) justice or morality. In this regard, the dictum of the Supreme Court in Central Inland *Water Transport Co. Ltd. v. Brojo Nath Ganguly*[2] is noteworthy:

"Public policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time."

(Footnotes)

[1] AIR 1986 Del 8.

[2] AIR 1986 SC 1571

The above paragraph from this judgment makes it clear that public policy is a subjective term, which has to be determined keeping in mind the social, economic and political status of the country and also the facts and circumstances of the case on hand. As an aid to interpretation of the term 'public policy', the Explanation to Section 48 states that an award obtained by fraud or corruption is also contrary to public policy.

B. Problem relating to setting aside the Awards:

The grounds for setting aside an award rendered in India (in a domestic or international arbitration) are provided for under Section 34 of the Act. These are materially the same as in Article 34 of the Model Law for challenging an enforcement application. An award can be set aside if:

a) A party was under some incapacity; or
b) The arbitration agreement was not valid under the governing law; or
c) A party was not given proper notice of the appointment of the arbitrator or on the arbitral proceedings; or
d) The award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions; or
e) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
f) The subject matter of the dispute is not capable of settlement by arbitration; or
g) The arbitral award is in conflict with the public policy of India.

A challenge to an award is to be made within three months from the date of receipt of the same. The courts may, however, condone a delay of maximum 30 days on evidence of sufficient cause. Subject to any challenge to an award, the same is final and binding on the parties and enforceable as a decree of the Court.

A CUP OF COFFEE

An interesting fact of physics:

If you yelled for 8 years, 7 months and 6 days, you would have produced enough sound energy to heat one cup of coffee.

Hardly seems worth it, does it?

It is a supposed fact of physics but also a corollary of spirit.

Most fussing, yelling, and cursing causes far more harm than good and usually isn't worth the effort. All of the good it does over the years probably isn't worth a cup of hot coffee.

The next time you are inclined to huff and puff and blow off steam by raising your voice with five minutes of yelling at something or someone, remember with another 8 years, 7 months, 5 days, 23 hours and 55 minutes of yelling, you could have a cup of hot java.

Is the hot cup of coffee worth stirring up with anger? Coffee doesn't hear you. People do. And it only takes one second of yelling to heat them up.

Keep your cool, coffee is not the only thing that's ground up.

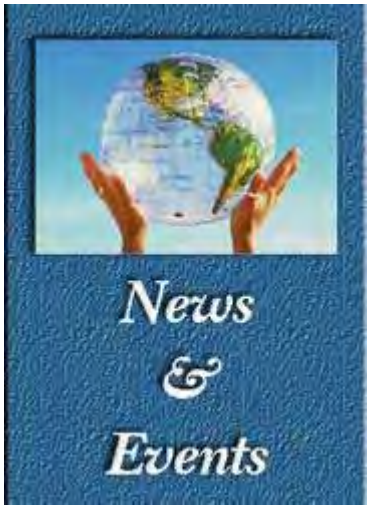
Considerable controversy has been generated as to whether an award is liable to be challenged under Section 34 on merits. The earlier view, as expounded by the Supreme Court in *Renu Sagar Power Co. Ltd. v. General Electric Co.*[3] was that an award could be set side if it is contrary to the public policy of India or the interests of India or to justice or morality – but not on the grounds that it is based on an error of law or fact. The Supreme Court in that case was faced with the issue to determine the scope of public policy in relation to proceedings for enforcement of a foreign award under the Foreign Awards (Recognition and Enforcement) Act, 1961. The Court also held that in proceedings for enforcement of a foreign award the scope of enquiry before the court in which the award is sought to be enforced would not entitle a party to the said proceedings to impeach the award on merits. However, in a later Supreme Court of India decision in *Oil and Natural Gas Corporation vs. Saw Pipes*[4] the Court added an additional ground of "patent illegality", thereby considerably widening the scope of judicial review on the merits of the decision. In Saw Pipes case the court accepted that the scheme of Section 34 which dealt with setting aside the domestic arbitral award and Section 48 which dealt with enforcement of foreign award were not identical. The court also accepted that in foreign arbitration, the award would be subject to being set aside or suspended by the competent authority under the relevant law of that country whereas in domestic arbitration the only recourse is to Section 34. The Supreme Court observed: "*But in a case where the judgment and decree is challenged before the Appellate Court or the Court exercising revision jurisdiction, the jurisdiction of such Court would be wider*". Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the arbitral tribunal could be set aside.

Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality'."

The court in Saw Pipes case although adopted the wider meaning to the term 'public policy' but limited its application to domestic awards alone. The Saw Pipes case has generated some controversy, and it remains to be seen if it will stand the test of time.

(Footnotes)
[3] (1994) Supp (1) SCC 644
[4] (2003) 5 SCC 705

NEWS & EVENTS



INTERNATIONAL SEMINAR & BUSINESS SUMMIT 17 | 18 MAY, 2013 - INDIA

The India International ADR Association is conducting an International Seminar and Business Summit, titled "*Fostering Global Business – Making Deals; Resolving Disputes*" on May 17|18, 2013 at Kochi, India. The segment of International Seminar will have sessions by reputed international and national speakers on topics covering international law and business, like, "Tailoring Dispute Resolution Strategies", "Creating Value in Deals and Disputes", "Successful Investments", "Choices for Troubled Businesses", "Transfer Pricing", "Merger and Acquisitions", etc. The Business Summit will bring together commercial entities who are potential stake-holders in India's international trade. The event focuses on bringing together representatives of government, businesses and the legal profession, from across the world, to network with each other, recognizing it as an essential tool for success in today's business climate. IIAM is the Knowledge Partner for the International Seminar. For more details see; www.adrassociation.org/conference

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With the increase in the volume of transnational trade, investment and business between India and countries in the Asia Pacific and other region and consequential rise in the volume of business disputes, dispute resolutions and enforcement, the Indian Institute of Arbitration & Mediation (IIAM) is intending to provide international mediation and arbitration service for business groups from India doing trade, business or investment abroad or multinational business groups doing trade, business or investment in India, by creating a panel of professional mediators and arbitrators representing various countries with respective language and cultural background. IIAM International Mediation Services include deal mediations for making efficient business deals and dispute management systems or dispute mediations for amicable and effective dispute resolutions.

With ASEAN extending the free trade pact to include services and investment and the recent inclusion of China and Hong Kong in the list of countries under the New York Convention, it is expected that the use of mediation and arbitration will increase in transnational business.

For more details and empanelment contact dir@arbitrationindia.com

SUPREME COURT OF INDIA ISSUES GUIDELINES FOR SPOUSAL MEDIATION

In an attempt to curb prolonged litigation in marital disputes and to find ways for an amicable settlement in divorce and dowry harassment cases, the Supreme Court of India laid down guidelines. The Supreme Court directed the criminal courts dealing with matrimonial disputes to refer all the cases to pre-litigation mediation, saying that many families would be saved of hardships if some of the cases get settled. A bench of Justices Aftab Alam and Ranjana Prakash Desai said, even though the offence punishable under Section 498-A (cruelty) of the Indian Penal Code (IPC) is a non-compoundable offence, this court had always adopted a positive approach and encouraged settlement of matrimonial disputes and discouraged their escalation. However, it has to be ensured that the rigour and efficacy of the dowry harassment provision under IPC doesn't get diluted.

HIGH COURT OF SINGAPORE HOLDS INSTITUTIONAL ARBITRATION CLAUSE INVALID

The Singapore High Court considered whether an arbitration clause which stipulated that disputes were to be settled by arbitration under the ICC Rules in Singapore administered by a non-existent institution was inoperable. The Court ruled that the arbitration clause in question was workable provided that an arbitral institution in Singapore agreed to conduct the arbitration. The judgment in this case appears to be in line with a previous judgment of the Singapore Court of Appeal which upheld an arbitration clause that provided for the Singapore International Arbitration Centre to administer an arbitration under the ICC Rules.

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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.

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"Between stimulus and response there is a space.
In that space is our power to choose our response.
In our response lies our growth and our freedom."
~ Viktor E. Frankl ~