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MEDIATION- A PANACEA OR AN UNAVAILING PRACTICE: WITH SPECIAL REFERENCE TO COMMERCIAL DISPUTES

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ABSTRACT

Disputes are an integral and inevitable part of the society but the failure to address their pendency can be pernicious. Traditionally, the predominant mode of dispute resolution in India has been litigation, which has been losing its sheen for quite some time now due the cost, time, complications and hardships involved in it. This assumes specific importance in disputes that concern commercial matters in the light of the bearing they have- both at micro and macro level. The adverse impact of inefficiencies in dealing with commercial disputes is much more than it meets the eye. It hampers the deliverance of justice and also portrays India as a country plagued by an inefficient system and an unfriendly business environment.

The idea of mediation, as an alternative to litigation is being mooted for long now. It has received recognition from the courts of law as well as the legislature to some extent and the benefits it entails are praise-worthy and seem promising.

In this background, this paper seeks to study the present dispute resolution scenario surrounding commercial disputes. Further, various facets of mediation including its relation to happiness have been studied and its recognition under the Indian law has been highlighted. Thereafter, the advantages and limitations of the use of mediation in such cases have been elaborated upon. Lastly, some data from the Commercial Courts of Delhi has been analyzed and suggestions mooted.

Keywords: Mediation, Commercial, Litigation, Happiness, Alternate Dispute Resolution, Business

Commerce is considered to be the backbone of the country and its smooth functioning at domestic as well as international level is important for any country to survive and flourish. It has no more remained a simple scenario comprising of buying and selling but involves various complex activities as well. At the same time, disputes have also become an integral and inevitable part of the society and no society is virtually dispute-free. Having said that, it is also a fact that the failure to address their pendency can be pernicious and in this regard, it is also important that the approach taken to resolve disputes is efficacious in nature. It must be noted that the Right to Speedy Trial is a fundamental right recognized under Article 21 of the Constitution of India[1]. Apart therefrom, it is also common knowledge that members of a society wherein disputes are resolved efficaciously are more happy and productive.

In 2019, India jumped 14 places to reach the 63rd spot in World Bank's Ease of Doing Business Survey, 2020[2]. While the credit of

[1]P.Ramachandra Rao v. State of Karnataka, (2002) 4 SCC 578 (India).
[2]World Bank Group. (2020). *Doing Business 2020: Comparing Business Regulation in 190 Economies* https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-

overall improvement goes to indicators like ease of starting a business, dealing with building permits, trading across borders and resolving insolvency, the parameter concerning ease of enforcing contracts i.e. the time and cost it takes in a particular country to resolve a commercial dispute and the quality of judicial processes did not witness any major improvement and still ranked at 163. It is noteworthy that the head of enforcing contracts takes into account *inter alia* availability of specialized commercial courts and alternative dispute resolution. As per the survey, it takes about 1,445 days on average to settle a commercial dispute, which is, needless to say, unacceptable.

THE PRESENT SCENARIO

Litigation is the predominant mode of dispute resolution being followed in India. Courts dispense justice following the adversarial system where the Judge acts as an umpire. Currently, there is a pendency of around 95 lakh civil cases in India out of which around 2 lakh cases exist in the capital city of New Delhi alone. Further, 8,634 commercial cases are also pending before 21 commercial courts there.[3] It is important to mention that those disputes of commercial nature whose value is less than INR 3,00,000 still continue to feature under 'civil disputes' head.

Under the present scenario, primarily two acts deal with resolution of commercial disputes, *viz*. the Code of Civil Procedure, 1908 ("CPC") and the Commercial Courts Act, 2015 ("CCA"). Whereas those commercial disputes whose value is less than INR 3,00,000 are dealt by the former, those exceeding that threshold are dealt by the latter. The idea of CCA was being mulled over since 2003[4] and it was finally in 2015 that it was brought with the objective of establishing a system that provides expeditious and fair disposal[5] of commercial disputes involving novel features like case management hearings, summary judgment, stricter timelines and pre-litigation mediation.

Concerning the commercial disputes under the CCA, the legislature has made an attempt to define them under Section 2(c) of the act, and the said definition is quite vast and exhaustive in nature. However, it cannot be said that their cannot be any dispute that can be labeled as "commercial" outside the said definition. In this regard, it can be noted that if all "*that all suits that in common parlance may be stated to be of commercial nature cannot be brought within the ambit of Commercial Courts Act and that if the same is done and the doors of the commercial courts and the commercial division of the High Court are opened too wide, the purpose of enactment of the Commercial Courts Act, as the specialised courts would be defeated with such courts being inundated, making expeditious disposal impossible"*[6]

The Hon'ble High Court of Delhi in a matter[7] held that "*parliament has consciously given the precise definition as to what a commercial dispute "means". It is not an inclusive definition and the specific matters which qualify as relating to "commercial disputes" have been specifically set out in clauses (i) to (xxii)".* Cases such as those involving friendly loan[8], sale deed[9] and cancellation of a Power of Attorney, even if with

2020-Comparing-Business-Regulation-in-190-Economies.pdf

[3]*National Judicial Data Grid*. (2020). NJDG National Judicial Data Grid (District and Taluka Courts of India. Retrieved September 16, 2020, from https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard

[4]LAW COMMISSION OF INDIA. (2003). *REPORT ON PROPOSALS FOR CONSTITUTION OF HI-TECH FAST TRACK COMMERCIAL DIVISION IN HIGH COURTS* (NO. 188).

[5] Ambalal Sarabhai Enterprises Ltd v. K.S. Infraspace LLP &Anr., MANU/SC/0003/2020 (India).

[6]Sanjeev Kumar Arora v. Satish Mohan Agarwal, MANU/DE/1086/2017(India).

[7] Havells India Limited v. The Advertising Standards Council of India (2016) 155 DRJ 435 (India).

[8]*Rita Agarwal v. Uday Medicare Pvt Ltd*&Ors., CS (Comm.) 786 of 2017 (D.H.C. Apr. 23, 2018).

[9] *Sumer Singh &Anr. v. Om Prakash Gupta &Ors*., FAO(OS) 171 of 2016 (D.H.C. Jan. 17, 2017).

respect to an immoveable property[10] used exclusively in trade or commerce and as part of a transaction of sale of such property have been excluded.[11] However, corporate guarantees have been held[12] to be covered under the said definition

The Court, in *Jagmohan Behl v. State Bank of Indore*[13] went on to hold that "*harmonious reading of the explanation with sub-clause (vii) to clause (c) would include all disputes arising out of agreements relating to immoveable property when used exclusively for trade and commerce, be it an action for recovery of immoveable property or realization of money given in the form of security or any other relief pertaining to immoveable property."*

No matter how impressive the provisions might look, the present system has fallen short of providing an efficient dispute resolution system. Delay due to adjournments, uncertainty due to constant challenges in appeals, high costs, rigidity and various other factors have reduced its desirability and efficacy. Voltaire once said *"I was never ruined but twice: once when I lost a lawsuit, and once when I won one."*. The so called winner of a lawsuit actually loses on a lot of fronts and even with the introduction of the CCA, things have not changed much[14].

The traditional method of litigation that necessarily involves an element of coercion has not lived up to the expectations in the modern society and has several inherent limitations. It is noteworthy that it has not proved to be very potent in stopping future disputes from cropping up. The need of the hour is to adopt a resolution scenario that has a collaborative approach.[15]

High pendency of cases can also be attributed to the insufficient strength of judges. A survey[16] shows that the judge to population ratio in subordinate courts is 1 : 75102 i.e. 1 judge per 75102 litigants. At the High Court level, the situation is much worse with 1 judge over 2,24,364 litigants. The Hon'ble Supreme Court of India has recently[17] pointed out that vacancy at both high court and subordinate court shall be filled up expeditiously.

The tardy disposal rate generally as well as specifically qua commercial disputes is a worrisome thing. It is important thatearly and efficacious resolution is adopted because the consequences of any delay therein are undesirable. These not only include a jump in the cost involved in the litigation but also bring disrepute and distrust to the judicial system. Another notable drawback of the same is that till the time the stage of recoding of evidence is reached, witnesses do not remember things exactly as were at the time of the dispute and this faded memory has the potency of deteriorating the quality of justice. At the international level, it reflects very poorly and the country appears to be plagued with an inefficient legal system and an unfriendly business environment, thus discouraging investment[18]. It has its own economic ramifications at the domestic level too where commercial establishments are major employers and tax contributors. They also have influence on the society in as much as they build and maintain social capital. Certainty is a *sine*

[10] Vasu Healthcare Private Limited v. Gujarat Akruti TCG Biotech Limited and Ors, MANU/GJ/1130/2017(India); Also see Ambalal Sarabhai Enterprises Limited v. K.S. Infraspace LLP and Others, (2020) SC 1859(India).

[11]Hindpal Singh Jabbal v. Jasbir Singh, (2016) SCC OnLine Del 4901(India).

[12]*Punj Llyod Ltd. v. M/S. Hadia Abdul Latif Jameel Co. Ltd. &Anr,* FAO(OS) 211 of 2018 (D.H.C. Oct. 15, 2018).

[13] FAO(OS) 166 of 2016 (D.H.C. Sep. 22, 2017).

[14]VIDHI Centre For Legal Policy. (2019). *Commercial Courts Act, 2015: An Empirical Impact Evaluation.* https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf.

[15]Raghunathan and Meenu (2002). Conflict Resolution, *Resolution of protracted conflicts: a human needs approach to Northern Ireland and Tibet* (pp. 7–34). Jawaharlal Nehru University.

[16]Mahadik, D. (2018). *Analysis of Causes for Pendency in High Courts and Subordinate Courts in Maharashtra*. Administrative Staff College of India. https://doj.gov.in/sites/default/files/ASCI%20Final%20Report%20Page%20641%20to%20822.pdf

[17]*M/S Plr Projects Pvt. Ltd. v. Mahanadi Coalfields Limited,* Tr. Pet.(Civil) 2419 of 2019 (S.C. Dec. 6, 2019)

[18]Mahadik D., (2018)

qua non for commercial prosperity and if disputes are pending uncertainly, it will be baneful for not only the investors, businessmen and directly affected parties but also for the society at large. Thus, commercial cases should be dealt expeditiously in the interests of the country[19].

As far as the forum to resolve such disputes it concerned, by their nature, they are suitable for being resolved outside the formal setup of courts of law mostly; doing so will not tantamount to giving such disputes a special privilege because it is in the light of the fact that the traditional courts have more important and suitable things to decide[20].

The system of resolution that operates outside the strict contours of court is called Alternative Dispute Resolution ("ADR"). It included methods like Arbitration, Mediation, Lok Adalat, Early Neutral Evaluation and Conciliation. It also includes hybrid procedures like the Med-Arb, whereby the third party initially acts the mediator but if the parties are not able to come to terms, it ascribes itself the role of an arbitrator.[21] The present paper focuses on mediation particularly. The introduction of such methods will reduce the burden on courts and make justice more accessible. By making mediation the default method of resolution of disputes and applying it at early stages of any dispute, one can take a step towards building a better life for himself, his organization and those around him

MEDIATION: THE WAY FORWARD

Mediation is a type of ADR mechanism that involves resolution of dispute by neutral and unbiased third party called a mediator, who does not give a binding decision but helps the parties reach an amicable solution. It is not the function of the mediator to opine on the merits of the case but he acts as a catalyst, helping the parties explore and understand their positions, and motivate them to settle the dispute. The mediator basically creates a conducive environment for the parties and brings them to dialogue. The initiation of mediation can be due to contractual stipulations, mandatory pre-litigation protocols or voluntary decision of the parties[22]. He plays a dual role in as much as he acts a party proper while he tries to understand the position of a party in single sessions and that of an opponent when he articulates the other side of the dispute[23]. Mediators control the flow of information between the parties and create value[24].

Mediation is not something new, and we can trace the same taking place even in ancient India. In the pre British era, mediation gained popularity amongst the businessmen when the *Mahajans* used to resolve disputes between merchants through mediation. Even in our panchayat system, the dispute resolution process somewhat resembles mediation where the *panchas* attempted to bring consensus between the disputants. Today, we find existence of mediation clauses in various acts such as Industrial Dispute Act, Consumer Protection Act, Companies Act and the Commercial Courts Act. As per the provisions of the Code of Civil

[19]*Glenmark Pharmaceuticals Private Limited v. Merck Sharp & Dohme Corporation*, SLP (C) No. 9220 of 2015 (S.C. May15, 2015).

[20]Pagone G.T. (2009, November 12)*The Role of The Modern Commercial Court* [Paper Presentation]. Supreme Court Commercial Law Conference, Australia. http://138.25.65.17/au/journals/VicJSchol/2009/17.pdf

[21]Henderson, D. A. (1995). Avoiding Litigation with the Mini-Trial: The Corporate Bottom Line As Dispute Resolution Technique. *South Carolina Law Review*, *46*(2), 240–241. https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=3331&context=sclr

[22]Gardner, N. (2014). Mediation and its relevance to intellectual property disputes. *Journal of Intellectual Property Law & Practice*, *9*(7), 565–574. https://doi.org/10.1093/jiplp/jpu063

[23]Girolamo, D. D. (2019). The Mediation Process: Challenges to Neutrality and the Delivery of Procedural Justice. *Oxford Journal of Legal Studies*, *39*(4), 834–855. https://doi.org/10.1093/ojls/gqz011

[24]Brown, J. G., & Ayres, I. (1994). Economic Rationales For Mediation. *Virginia Law Review*, *80*(2), 323–402. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/763/Economic_Rationales_for_Mediation.pdf?sequence=2&isAllowed=y

Procedure, 1908, the court has the power to refer any dispute for mediation under Section 89 and Order X (Rule 1A). Further, any mediation agreement entered into by the parties after they were referred to mediation by the court is covered by the provisions of Order XXIII, Rule 3.

The Hon'ble Supreme Court of India has also time and again emphasized on the need of using mediation as a tool to resolve disputes. In the case of *M.R. Krishna Murthi v. The New India Assurance Co. Ltd. and Ors.*[25], the Court asked the State to "*consider the feasibility of enacting Indian Mediation Act to take care of various aspects of mediation in general.".* Hon'ble Mr. Justice S.A. Bobde, Chief Justice of India (as he was then) had also remarked that "*mediation is one of the best possible solutions for lasting peace*[26] *and that the problem lies in the fact that the notion of 'alternative' is taken literally, as a result in numerous instances litigation is seen as the default mode, with parties turning to ADR only as a secondary option. This mindset needs to change*[27]*"* Further, in *Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. Pvt. Ltd. and Others*[28],the Court expressly observed that all cases relating to trade, commerce and contracts, including those arising out of contracts were suitable for resolution through ADR. In a matter[29], the Court refusing to go into the correctness of the views of the experts, appointed a commercial mediator for resolving the dispute.

Taking example of Australia, it can be seen that mediation of commercial dispute costs 1/20th of the cost of litigating[30]. A study done by Cornell university amongst Fortune 100 Corporations showed that around 87% of them have used mediation for resolution of disputes[31]. Additionally, in Italy, of the parties that agreed to mediate disputes majority was satisfied[32]. In China, civil and economic disputes are being successfully mediated by People's Mediation Committees[33]. It is the most widely used dispute resolution method of resolving disputes arising the pandemic as well. In China, mediation is invariable used in commercial disputes. The courts there have resolved majority of cases concerning commercial dispute due to the pandemic through mediation only[34]. In Singapore also, it has been suggested that where the pandemic led to difficulty in contract performance, mediation should be encouraged for re-negotiation.

As far as commercial mediation in the form of pre-litigation protocol is concerned, it is noticed that the said system is being practiced in various countries including Turkey, United

[25] MANU/SC/0321/2019 (India).

[26] Mediation, not litigation, is the best way out: Justice SA Bobde. (2019, August 13). *DNA India*. https://www.dnaindia.com/ahmedabad/report-mediation-not-litigation-is-the-best-way-out-justice-sa-bobde-2781347

[27]Bobde S.A. (2020, February 08) *Speech of Hon'ble Mr. Justice S.A.Bobde, Chief Justice of India on the occasion of 3rd edition of International Conference on Arbitration in the Era of Globalisationorganised by Indian Council of Arbitration & Federation of Indian Chambers of Commerce and Industry* [Speech Transcript]. Bar & Bench. https://images.assettype.com/barandbench/2020-02/dc7d22ad-d516-4ed8-9f7a-6181460b0db9/Speech_of_HCJI_FICCI__Feb_2020.pdf

[28](2010) 8 S.C.C 24 (India).

[29]Rasila Bhupendra Shah and Anr. v. Indian Charge Chrome Limited and Anr., MANU/SCOR/33597/2018 (India).

[30]Feehily, R. (2019). Commercial Mediation and the Costs Conundrum. *Vindobona Journal*, *23*(1). https://www.academia.edu/39017027/Commercial_Mediation_and_the_Costs_Conundrum

[31]Feehily, R. (2019).

[32]Herbert W.A., Palo G.D. *et. al.* (2011). International Legal Developments in Review: 2010. *International Law*, 45.

[33]Di, X., & Wu, Y. (2009). The Developing Trend of the People's Mediation in China. *Sociological Focus*, *42*(3), 228–245. https://doi.org/10.1080/00380237.2009.10571354

[34] Liu, Q. (2020). COVID-19 in Civil or Commercial Disputes: First Responses from Chinese Courts. *The Chinese Journal of Comparative Law*, *8*(2), 485–501. https://doi.org/10.1093/cjcl/cxaa023

Kingdom, United States of America[35], Australia, Greece, Hong Kong and Canada. Enactment of such protocols is recognition of the fact that early mediation can be helpful in commercial cases.[36] India also introduced this concept under Section 12(A) of the CCA, and as per the said provision, all commercial cases which involve subject-matter of a value above INR 3,00,000 have to mandatorily attempt pre-litigation mediation. However, if it is a non-starter or if an urgent relief is sought, then the said condition can be skipped. It follows that no such protocol exists for commercial disputes whose value is less than INR 3,00,000. Regarding pre-litigation protocols, the Hon'ble Chief Justice of India has opined that *"the pre-institution mediation and settlement as mentioned in the Commercial Courts Act would pave the way for many more institutions to emphasize on the need of pre-litigation mediations considering its very many benefits"*[37].

In 2021, the Parliament of India introduced the Mediation Bill with a view to provide legislative backing to mediation, formalize the practice and remove inconsistencies between various legislations. It promotes and facilitates institutional mediation as well. The ambit of said bill is quite wide and it not only seeks to assist in enforcement of mediation settlements but also includes provisions for encouragement of community mediation and online mediation in order to resolve both- commercial and non-commercial disputes efficaciously. [38]

Advantages of mediation

The process of mediation makes the parties create their own personal system of order and obligations for resolution of their disputes.[39] It helps them toconvert monolog into dialogue and rhetoric into valuable statements. This way, parties are better able to appreciate not only the risk, consequences and position of the other side but also the weaknesses[40] in their own case. BATNA, WATNA and SWOT analysis are some extremely useful tools for this purpose. As a consequence thereof, the parties might easily feel dissuaded from shying away from settlement. When the parties know about each other's position, they are able to make better and realistic offers and reach a commercial settlement rather than a mere litigation outcome.

Mediation leads to speedy settlement and saves time as compared to litigation. The cost and time saved in fighting a dispute can be better utilized on the business activities and thus, it would lead to a reduced opportunity cost.

It involves both long term and short term benefits. While the former relates to satisfaction straight away after mediation, the latter concerns itself with improved relations and absence of new problems. [41] Further, the parties preserve their relationship which can be said to be a win-win situation. Even if the parties are unable to settle their matter then and there, past mediation acts as the starting point and having confronted with the realities, induces a greater desire to reach a settlement.[42]Whenever the parties are able to reach an amicable settlement, they experience happiness, which has the potency of keeping relationships healthy and intact.[43]

[35]Cornell Institute On Conflict Resolution, Lipsky, D. B., &Seeber, R. L. (1998). *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*. Cornell University. https://ecommons.cornell.edu/handle/1813/76218

[36]Andrews, N. (2003). *English Civil Procedure: Fundamentals of the New Civil Justice System* (1st ed.). Oxford University Press.

[37]Bobde S.A. (2020, February 08)

[38]The Mediation Bill, No. XLIII of 2021, R.S. (2021).

[39] Girolamo, D. D. (2019).

[40] Gardner, N. (2014).

[41]Pruitt, D. G., Peirce, R. S., McGillicuddy, N. B., Welton, G. L., &Castrianno, L. M. (1993). Long-term success in mediation. *Law and Human Behaviour*, *17*(3), 313–330. https://doi.org/10.1007/BF01044511

[42]Vitoria, M. (2006). Mediation of Intellectual Property disputes. *Journal of Intellectual Property Law & Practice*, *1*(6), 398–405. https://doi.org/10.1093/jiplp/jpl039

[43]Smilovitz, J. (2008). *Emotions in Mediation: Disputant Perception of the Mediator* (V. Duthoit& E. Huijgh, Eds.). Netherlands Institute of International Relations "Clingendael."

The process used is flexible in nature and business orientated creative solution can be curated. Due to its flexible and sort of informal dispute resolution setup, the parties are at ease when they interact with each other. Various studies have pointed out that if a party approaches conflict with pleasant mood, it is highly likely that conflicts will be resolved through collaboration. Presence of positive mood during mediation sessions will help to achieve cooperation, a long lasting settlement and an agreement that is favorable-for-all.[44]

Mediation can amalgamate various commercial practices. It is suitable for many, if not most commercial disputes[45] and since the parties are themselves in the process of decision making, they consider it a fair procedure and are more likely to honor the settlement.[46]Due to greater degree of involvement in the process, the parties experience higher degree of satisfaction. [47] It also leads to a surge in their perception of justice and fairness; and as per the Utilitarian Theory propounded by the philosopher J. Bentham, justice brings greatest happiness. [48]

In contrast when a third party has more control over the dispute resolution process, the parties experience lack of satisfaction. For that matter, several studies have pointed out that "adversarial mindset among lawyers" contributes towards their dissatisfaction[49]. There is a direct relationship between usage of alternative dispute resolution mechanisms and positive psychology and it has been observed in various studies that unhappy people tend to get associated with destructive conflicts as compared to happy people[50].

Since the parties discuss things openly, it is quite possible that they discover the otherwise hidden causes of conflict between them and find a better solution.[51] From the point of view of lawyers, those who fetch expeditious and economical results gain their reputation as problem solvers and profit in the long run. Many small businesses which do not retain lawyers due to the drawbacks of litigation also become their potential clients.[52] In any event, as opposed to processes that are of adversarial nature, businessmen are more likely to prefer technics which build bridges between the parties.[53]

Another advantage of settlement through mediation is that the parties are entitled to a refund of entire court fees.[54]

The hallmark of mediation is party autonomy. It provides the parties the right of self-determination and power to choose their own procedure and avoids coercion.[55]Mediators,

https://www.clingendael.org/sites/default/files/2016-02/20080100_cdsp_diplomacy_smilovitz.pdf

[44]Lyubomirsky, S., King, L., & Diener, E. (2005). The benefits of frequent positive affect: does happiness lead to success?. Psychological bulletin, 131(6), 803–855. https://doi.org/10.1037/0033-2909.131.6.803

[45] Hager, M., & Pritchard, R. (2004). Deal Mediation: How ADR Techniques can help achieve Durable Agreements in the Global Markets. *Transnational Dispute Management*. https://www.transnational-dispute-management.com/article.asp?key=33

[46] Gardner, N. (2014).

[47]Kressel, K., & Pruitt, D. G. (1989). *Mediation Research: The Process and Effectiveness of Third-Party Intervention (JOSSEY BASS SOCIAL AND BEHAVIORAL SCIENCE SERIES)* (1st ed.). Jossey-Bass.

[48]Feinberg, G. (2011). The Professional Model of Law vs. The Business Model of Law: A Critical View of Opposing Trends in the United States of America and the People's Republic of China. *Asian Criminology*, *6*, 89–113. https://doi.org/10.1007/s11417-010-9097-0

[49] Pearlstein, A. (2012). Pursuit of Happiness and Resolution of Conflict: An Agenda for the Future of ADR. *Pepperdine Dispute Resolution Law Journal*, *12*(2), 215–266.

[50]Pearlstein, A. (2012).

[51] Protecting Confidentiality in Mediation. (1984). *Harvard Law Review*, *98*(2), 441–459. https://doi.org/10.2307/1340844

[52]EHRMAN, K. A. (1989). WHY BUSINESS LAWYERS SHOULD USE MEDIATION. *ABA Journal*, *75*(6), 73–74. http://www.jstor.org/stable/20760535

[53]Clements, K. (1997). Peace Building and Conflict Transformation. *Peace and Conflict Studies*, *4*(1), 441–459. https://doi.org/10.46743/1082-7307/1997.1179

[54]Nutan Batra v. Buniyaad Associates, MANU/DE/4607/2018 (India).

[55]Anderson, D. Q. (2015). Litigating over Mediation: How should the Courts enforce

who are also called peace makers, need to indulge actively in order to decipher and address the disproportionality between the power of parties, strive to achieve equality, when necessary to promote true self determination. [56]

Since the commercial dispute involve various internal financial elements and possible trade secrets, it is prudent that they are kept away from public view and settled by a procedure which is confidential in nature. Mediation is confidential in nature and the statements made by the parties cannot even be used in the trial, if it fails. The success of mediation depends upon the ability of the mediator to ensure confidentiality.[57]

If the mediation is done online, it eliminates the requirement of travelling and with the use of video conference technology, it is as good as face to face inter-personal meetings. If the mediation is conducted online settlement can be drawn online and can be digitally signed. In commercial disputes, online mediation has specific benefits in the form of making it easier for the actual decision making persons to appear in the process, thereby saving both time and money. Since geography is no more a barrier, the parties can bring experts from around the world.[58]

Disadvantages of mediation

By nature, some disputes are not suitable for mediation such as those involving urgent reliefs or wherein allegations of fraud, misrepresentation etc. have been leveled[59].

Since mediation is mostly voluntary in nature a party which is confident about its strength of the case would not be concerned about the success of mediation and at times, even try to fail the same. Another drawback arising out of the voluntary character is compelling the attendance of the parties. Glaring example of this can be seen by perusal of the data relating to pre-institution mediation being done under the provisions of CCA. It is observed that within a period of 1.5 years, it received a total of 7357 applications for the said mediation. Shockingly 5836 applications out of the said total were non-starters and only 105 were sent for mediations. Out of said 105, 35.28% i.e. 36 applications fructified into settlement.

Stimulating interest-based bargaining is difficult in commercial disputes.[60] Another hindrance in mediating successfully is the adversarial mindset of the parties. Further, the stage at which mediation has undertaken also has a direct bearing on its success i.e. to say that if it is commenced too late, the chances of its success is very less.

There are no procedural safeguards of the courts and consequently and second-class justice is offered[61]. The possibility of weaker party being compelled to accept less than what they are entitled to cannot be ignored. In the words of Kressel and Pruitt, mediation is often too brief to alter the climate. Presence and assistance of mediator does not make the parties certainly adoring of each other.[62]

It is also believed that commercial matters settled by mediation lead to hindrance in development of law and precedent in this area. Unless the settlement is recorded in writing and

Mediated Settlement Agreements? *Singapore Journal of Legal Studies*, 105–134. https://ink.library.smu.edu.sg/sol_research/1752

[56]Gunning I.R. (2004). Know Justice, Know Peace: Further Reflections on Justice, Equality, and Impartiality in Settlement Oriented and Transformative Mediations, 5 *Cardozo Journal of Conflict Resolution*, 87-88.

[57]Lyubomirsky, S. *et al.* (2005).

[58]Leiber, N. (2020, July 10). Mediation Can Help Small Businesses Solve Conflicts and Protect Relationships. *Bloomberg Quint*. https://www.bloombergquint.com/businesswee k/small-business-consider-hiring-a-mediator-when-conflicts-arise

[59]Varkey Construction Co. Pvt. Ltd. and Others, (2010) 8 S.C.C 24 (India).

[60]Golann, D. (2009). Nearing the Finish Line: Dealing with Impasse in Commercial Mediation. *American Bar Association.* http://www2.hawaii.edu/~barkai/HO/Impasse%20Golann.pdf

[61]Feehily, R. (2019).

[62] Wall, J. A., & Lynn, A. (1993). Mediation: A Current Review. *The Journal of Conflict Resolution*, *37*(1), 160–194. http://www.jstor.org/stable/174500

signed, it has no binding nature at all. It has been noticed in certain cases that parties backout at the last moment thereby wasting the time spent in conducting mediation.

Lastly, as far as online mediation is concerned, the lack of technological skills, safety of data and confidentiality are a few reasons that some people do not wish to resort to it.[63]

SUGGESTIONS

After perusal of the data of pre-institution mediation and other disadvantages related to mediation, it is suggested that considering majority of applications ending as non-starters, some amendment with regard to the attendance of parties for mediation should be brought. *Secondly*, if any party unreasonable declines to participate in mediation cost should be imposed on it. A provision to this effect already exists under the amended Section 35, CPC which can be used for this purpose. The Hon'ble High Court of Delhi has also held that the court must adopt a pro-active approach in imposing cost in commercial disputes.[64]*Thirdly*, there is a need to teach mediation in Law Schools and attempt to develop a mindset where it is not considered inferior to litigation.

Apart therefrom, the counsels- when representing a party or performing the duty of mediator, should make use of psychology and disciplines dealing with emotions to perform their role in a better fashion and ultimately achieve their goal.[65] It is seen that traditional mediation can be improved by incorporating two processes *viz*. appreciative enquiry and solution focused discussion in as much as they help in generating positive emotions and helping the parties to focus on future[66].

CONCLUSION

Commercial activities play a pivotal role in making any economy grow and flourish. They have a bearing both domestically as well as internationally and it is thus important that any disputes that concern them are dealt with at war footing, in a very efficacious manner. This has become need of the hour due to the exacerbation that took place because of the COVID-19 pandemic. The statistics from World Bank's Ease of Business Survey and National Judicial Grid are sufficient to exhibit that there is a pressing need to address the issues associated with speedy and effective settlement of commercial disputes. As mentioned before, the present system of resolution including the new Commercial Courts Act has failed to live up to its expectations. Making its way, as a saviour, is the concept of mediation, which, if used at the right time and in the right manner can prove to be a blessing and help in resolving the most complex commercial disputes easily. It has also been observed that if the resolution process is efficacious, it brings about a better sense of justice and happiness amongst the parties, which has its own advantages in terms of honouring the settlement, keeping relations intact and ensuring better certainty. It is a solution oriented process and the advantages associated with it are potent enough to outweigh its disadvantages. Having said that, mediation still cannot be called panacea of all ills related to commercial disputes in the light of the fact that there exists many commercial disputes and circumstances attached to them that are not suitable for resolution by mediation. Still, it is re-iterated that mediation is not just an unavailing practice but a potent tool which can bring a massive improvement in dispute resolution scenario concerning commercial disputes.

[63]Ho¨Rnle, J. (2003). Online Dispute Resolution: The Emperor's New Clothes? *International Review of Law, Computers & Technology*, *17*(1), 27–37. https://doi.org/10.1080/1360086032000063093

[64]*Dolby International Ab &Anr. v. Das Telecom Private Limited &Ors.,* CS(COMM) No. 1426 of 2016 (D.H.C. Mar. 6, 2018).

[65]Chackes, K., &Kirn, K. L. (2021). Understanding and Using Psychology in Mediation. *St. Louis Bar Journal*, *67*(4).

[66]McClellan, J. F. (2007). Marrying Positive Psychology to Mediation: Using Appreciative Inquiry and Solution-Focused Counseling to Improve the Process. *Dispute Resolution Journal*, *62*(4), 28–35.