



Madhyastham

End litigation; Embrace mediation

In times of global distress

In times of difficulties, we huddle. The assumption is by sharing, by holding hands together, by staying in embrace, we feel strong to cope with any unhappy eventuality. Now, we are doing something strange in the situation of the global pandemic Covid-19. By social distancing, we enhance safety; we show by aloofness that we care.

There are lots of good things reported. There are no accidents. The rivers are clean. The atmosphere is clean and more breathable, even as we stay indoors. There are less crimes.

There are no filings of cases not only because the Supreme Court has given a reprieve through extending the period of limitation from the commencement of the national lockdown period but also perhaps because, you suddenly feel that we are part of the same planet where the fears, suffering, the concerns for life are the same. Who should we be fighting against? Why should it not be possible to close the chapter on recriminations and build trust and camaraderie?

In the physical world where social contacts could become dangerous, the virtual

world till recently worried us about some viruses infesting our systems but not anymore. The internet world is now perceived as the safest. It entertains us; it helps us stay in contact with the most distant people in the world at the click of a button. It is so easy to abjure isolation and build bridges.



Global spread of covid-19



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Don't be Ostrich like

If you have a serious misgiving with someone you were close one time, if you were in a relationship that has soured, if you have an unresolved conflict, you either confront head on, bring

it to a fulmination that yields to an uneasy quiet or perhaps escalate it to another level. Or, you take help through an external agency to intercede and find an avenue for resolution.

In no way, running away from the situation will give an enduring result. If you have tried everything about ending a conflict, was an attempt through online mediation ever in your reckoning? Come, let's explore together!!



Online Dispute Resolution (ODR)

We have understood, even if we were not a tech geek, more about internet capabilities than ever before when social distancing became the new norm. Probably you have ordered your vegetable online. You paid your salaries to your staff through online transfers. You settled your debt online. You paid your corporation bills online.

For persons who are already working in the IT industry, all this is *jujubi* but if you are an ordinary person averse to longtime hogging on computers, it is perhaps most propitious that you recognise this

medium as a conversation enabler, a communication enhancer!

If you are in a company and you have long term dispute with your supplier or your own employees, it is essential to know that ODR is a great option, when you do not need to stir outside but seek resolution through the online process. There are different types of software that enable you to resolve, establish contact with a neutral, narrate your story and carry conversation through her with the person whom you are in conflict with.

Surf the internet. You will land in several options. It is first best to know the capabilities of ODR process and to judge, if it is the right tool.



Enforceability concerns of ODR

ODR can do just what the best negotiation tactic face to face could deliver. If you are engaged in a one on one dialogue through internet or you act through a neutral and secure an agreement, what more is there to bargain for? The action to follow that is contemplated through the agreement should take place immediately and the conflict situation ought to wither.

Make the involvement of another dependable person or a supervisory body as a part of the settlement and in case of failure of compliance, seek the intercession

of that person or body whose gentle nudge shall do wonders.

Where element of trust is at its nadir, a settlement, if it is brought as a conciliated effort through a conciliator will partake the character of 'award' and capable of being enforced as if it were a decree under Arbitration and Conciliation Act.

"I sometimes wish that people would put a little more emphasis upon the observance of the law than they do upon its enforcement." – Calvin Coolidge

Test your experience with some ODR model

The first players in the field were some of the big online retailers that most of us are very familiar with now: eBay and Paypal.

Have you had an issue with some purchase wrongly made or you were not satisfied with what was purchased and you wanted the product returned? Gone are the days when the 'purchaser beware' principle operated to thwart any

attempt to resile for a bargain and seek for return of goods. Breach of condition or warranty in the retail world is seldom required to be proved. All that you need to declare now for return is that you are not

satisfied.

Register your grievance in the online portal of your retailer and presto, you have the solution resolved. With any leading aggregator, you complain about some excess billing through the mobile app. There is someone at the other end who takes you seriously and gives a solution immediately.

"The goal is to maximize the number of successful transactions, and resolving disputes is essential to increasing that volume."

Being a litigation lawyer to mediation advocate

When is a lawyer most sought after in a litigation scenario? Her knowledge in law and abilities to effectively communicate to win an argument are surely the most important qualities. Follow closely the qualities of a lawyer when she is preparing for the case. She tries to find what the weak points of the opponent are. The stoutest form of defense is never to explain what the other side points out as your client's weakness. It is, on the other hand, a more vociferous response of what the weakness of the other side is; making mountain

of a mole hill and go on counter offensive. An adversarial posturing is the most desirable trait in a conventional court room litigation. It is your justice versus the other side's injustice and seeking to align a judge's point of view to justice as close as to yours.

In mediation also, knowing the strength and weakness of both sides are a desirable virtue. It is essential to acknowledge that in every situation, there are two points of view. We try to seek answers why the other side behaves or says the way she does.

Ask **what** the problem is, you have learnt to **hear** the other side. Ask **why**, you have known the **reason** for the behavior. Ask **how**, you will **find** the way to resolve.



New approaches for a legal professional

If your work is only in courts, you are not yet a busy professional. In courts, inevitably, you languish for a longer period in the corridor or in the court itself waiting for your turn to arrive than the time that you actually spend arguing the case. Busy law firms are again not necessarily professionals engaged in litigation. Many young persons trained in law are looking for 9 to 5 company culture of work and do

not find it attractive to spend the time in courts.

When do you really get to know where and how you want to spend your time as a person involved in

“Everything is negotiable. Whether negotiation is easy is another thing”

- Carrie Fisher

conflict resolution? If you believe, you are the problem solver, if you recognise that you will not cede the authority to decide to someone else, if you want quicker results, you have arrived! You are seeing your role differently. Learn the new skills of negotiation, to discuss, to collaborate, to know that there is the other side that is equally meritorious.

Before you arrive at the mediation session

A typical mediation session is when you arrive to know that the persons in conflict are not yet at peace with each other. Each of the disputants surely believe that there is justice only on one side. The other is unreasonable.

If you are a mediator, get to know the parties any which way, by engaging in a short phone call, reading their mediation briefs,

learning to elicit if they have any apprehensions about safety, dousing their anxieties and doubts about the process.

If you are a lawyer assisting one party, be prepared to believe that there are several points of view and you have heard only one side. Have you gathered all facts? You are not yet ready, if you are advising the party, ‘let us hear what

the other side says and let us then strategise how we will respond’. Anticipate what the expectations of the other side could be.

If you are a party yourself, it is just not another day; not like the previous encounters. Today is special. Your own sense of fairness is at the anvil. Look for just outcomes. You are never a loser by giving.

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*End litigation; Embrace
mediation.*

We're on the Web!

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Madhyastham is a one stop portal for dispute resolution and blunting conflicts. Its director- founder is a senior advocate and was judge at Punjab and Haryana High Court and after his retirement in 2016, served as a Chairman of Railway Claims Tribunal at the principal Bench at New Delhi till 2019.

He was awarded Weinstein Fellowship in 2017 that lent him opportunities to shadow mediation sessions at San Francisco and New York conducted by world renowned mediators and gave him occasions to learn about developing systems to suit the needs of individuals, small and large business houses for inter-corporate and intra-corporate disputes at Stanford and San Francisco.

Author of several books on law, he brings his knowledge in diverse fields to best use to understand and help parties resolve conflicts of varying complexities.

FAQs

Is there a law on mediation?

There is none, as a stand-alone legislation. There are however over 30 central legislation which make references to mediation as a prime model for conflict resolution before litigative approaches.

How is conciliation different from mediation?

Conciliation is a form of mediation and has statutory provisions in the Arbitration and Conciliation Act that elevate settlements drawn up at conciliation to the status of awards that could be enforced as decrees of courts.

Is mediation necessary because our courts are over-worked and there is huge volume of pendency of unresolved disputes?

Court will never become irrelevant. There are several varieties of litigation that could be addressed only by courts, more particularly matters of criminal nature and dealing with heinous crimes and matters of interpretation of statutes. Mediation is necessary for its own intrinsic merit of empowering parties to be the judges of their own cause and find their own solutions themselves or with the help of a third party neutral.

Can matters already in courts be mediated upon?

That was how the popularity of mediation arrived in India, of cases in courts assigned to mediators by courts in what was popularly called as court annexed mediation

