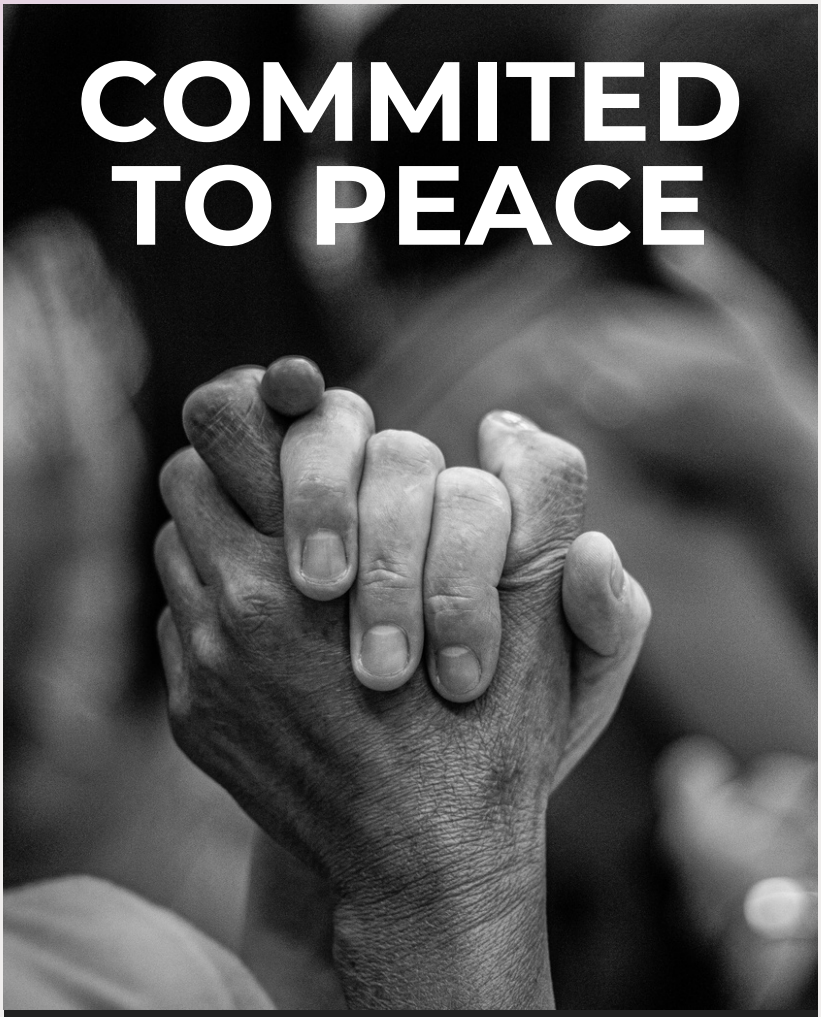
Peacemaker Quarterly

INADR NEWSLETTER

1st edition 2022



The mission of the International Academy of Dispute Resolution is to build, through education, world-wide recognition of the power of dispute resolution processes to peacefully resolve conflicts and promote conciliation and healing.

INADR Directors in Erasmus Project 'DISCOM'

"The Project's focus was on five soft-skills that are crucial in today's world. Our Directors were responsible for the two skills most closely related to the mission and core specialization of INADR".

AGNIESZKA GÓRA AND JACEK CZAJA

The Flower That Blooms in Adversity is the Rarest and Most Beautiful of All

"Being an intern for the InterNational Academy of Dispute Resolution gave me the opportunity to join a group of professionals, each based in a different part of the world, with no barriers as I was used to intend them".

ELVIRA BACCI

INADR NEWSLETTER

Contents

Welcome note

Greetings Everyone,

This will be my last message as President of INADR. My term ends on June 29, 2022, at the conclusion of the Academy's Annual Meeting of the Board of Directors. My successor is Professor Dr. Elena Koltsaki, who will be an excellent President of the Academy for her two-year term.

My term, as President, coincided with the pandemic, which presented numerous challenges for the Academy. During these two years, INADR continued to serve the global community by promoting international law school and undergraduate mediation tournaments and training, virtually, through the Zoom platform. Indeed, I can accurately report that the Academy overcame the challenges the pandemic presented by continuing to deliver world-class international and regionally based mediation tournaments, training and related programs, e.g., the 10th World Mediation Congress (also conducted virtually in June 2021) by connecting to thousands of students, coaches, tournament judges, trainers, speakers and others. Clearly, the pandemic did not deter the Academy from continuing to meet and deliver on its Mission Statement.

Every time I had the opportunity to speak on behalf of the Academy during these past two years, I emphasized its Mission Statement:

"THE MISSION OF THE INTERNATIONAL ACADEMY OF DISPUTE RESOLUTION IS TO BUILD, THROUGH EDUCATION, WORLD-WIDE RECOGNITION OF THE POWER OF DISPUTE RESOLUTION PROCESSES TO PEACEFULLY RESOLVE CONFLICTS AND PROMOTE CONCILIATION AND HEALING."

Our world today, more than ever needs the ideals that mediation promotes, in the peacemaking context, which the Academy emphasizes. On that note, as many of you may already be aware, the Board of Directors for the Academy cancelled the International Law School Mediation Tournament, scheduled for March 2022, due to the invasion of Ukraine and in solidarity with the Ukrainian people. This was the first time in the history of INADR that an international mediation tournament was cancelled; the impetus for doing so was borne out of the Academy's Mission Statement. The Academy has also made a financial donation to Ukrainian relief efforts.

The Academy has used the backdrop of the pandemic to continue to build towards the future and the Academy's impact upon its global audience. This past winter, the Board of Directors amended the Academy's bylaws to include membership status.[1] Accordingly, the Academy is inviting, with no financial charge or obligation, students, professors, coaches, trainers, past and current tournament participants, and others, supportive of its mission, to join as "members" of the Academy. The benefits of membership are many and will include access to newsletters, podcasts on topical issues, continued education about mediation trends and related events, and the opportunity to network, on a global basis, with others. It is our hope that membership in the Academy will eventually include thousands of like-minded supporters of the Academy and enthusiasts for the peaceful resolution of disputes. Please reference the Academy's website to join as a member.

[1] Non-voting membership status.

During these past two years, the Academy has also developed a program for interns and fellows to assist the Academy. The Academy has been enriched by the service of dedicated and outs tanding interns, two of whom later were invited to become fellows of the Academy. The opportunity for internships and fellowships will be expanded in the future, as membership expands, and as the Academy continues to grow and deepen its presence on a worldwide basis.

Another matter of note, which is an important and exciting development for the Academy, was the implementation of the pilot high school mediation tournament program. The Academy is expanding its educational reach to high school students, again, with a global audience in mind. The Board of Directors strongly believes that teaching the ideals of mediation to students can never start too early. Although the program is in its early and continued development stages, I am especially optimistic that it will become, in the future, an integral part of the Academy.

Lastly, I want to comment on, and extend my appreciation to, my colleagues who are members of the Academy's Board of Directors, and especially to those individuals who have served with me on the Executive Committee these past two years. Often, I use the phrase "working Board" to describe the governance and management aspects of the Academy. Throughout my career as a lawyer and educator, I have served on many boards and committees. Never have I served on any committee that has been comprised of so many dedicated, thoughtful and inspired individuals, as those who are members of the Academy's Board of Directors. I have been privileged to serve as President with their collective leadership, wisdom, direction and example.

As the pandemic ends, the Academy will resume in-person and onsite mediation tournaments.
There are plans in the future to expand the range of the Academy into other areas, all of which will be the subject of upcoming newsletters, events and opportunities for the Academy's members. The Academy's future and continued influence on a global scale is excellent.

It has been an honor to have served as President.

Dennis R. Favaro
INADR President

COMMITED TO PEACE

The mission of the International Academy of Dispute Resolution is to build, through education, world-wide recognition of the power of dispute resolution processes to peacefully resolve conflicts and promote conciliation and healing.

Consistent with our mission statement, the Academy endorses all efforts to facilitate peace locally, regionally, and globally.

Our thoughts are with those who seek peace in these troubled times.

24.02.2022

Hands-on but neutral: Walking the Tightrope

Professor Derek P Auchie, LLB (Hons), DipLP, LLM, FCIArb, FHEA,
Chair in Dispute Process Law, Tribunal Judge, Arbitrator and Mediator

The notion of a neutral in a dispute process tends to suggest someone who sits back and listens. Any intervention should be mild, careful and measured, so as not to endanger the neutrality. Neutrals are expected to tiptoe around the parties, carefully stepping through the process, as if walking over hot coals.

I would like to challenge this. The notion of neutrality is a fluid one and a professional neutral should, where needed, be hands on, while maintaining neutrality. Indeed, there are distinct advantages to such an approach.

The best way to develop my thoughts on this is to do so in the context of different neutral process types.

Adjudicatory processes

Where a neutral (or neutral panel) is making a binding decision on a dispute, it is acting as adjudicator. The final decision is what counts.

There is, however, a problem for the parties in such an environment: they don't know in advance what the final decision will be. You may well say 'of course, that is the point'. It is. But, does that mean that the neutral(s) must sit back silently and listen as the case unfolds, and then spring its decision on the parties at the end? I suggest this is neither necessary, nor desirable.

This brings me to the role of the neutral in stating a preliminary view on the outcome or on an issue. I believe that even in an adjudicatory context, this is an important role. The neutral has read the papers, knows the competing arguments, understands what the evidence is likely to be (especially with the increasing use of witness statements) and has, in fact, formed a preliminary view on likely outcome.

A word of warning here: there are cases where the outcome can be a surprise to the decision maker. I have made decisions in around 600 cases following an evidential hearing and I can recall very clearly a case where all three members of the Tribunal had formed a strong preliminary view on the likely outcome, only to be confounded by the oral evidence, which drove us to the opposite conclusion. The party we thought would lose won. This only came out in discussions during deliberations, but it was stark.

Such cases are rare, but they cannot be ignored. I will come back to this case later. For now, I will build my thoughts on stating a preliminary view.

Specialist tribunals and interventions

In the UK, a significant volume of civil judicial business is handled not in the ordinary, general courts, but by specialist tribunals. They consist of two or three members, chaired by someone legally qualified and with one or two 'specialist' members. The specialist members are qualified in a discipline relevant to the business so of the tribunal: for example, doctor, teacher, health professional, employment, property surveyor.

Disputes in the following areas are handled by this means: mental health, education, immigration, employment, tax, property rental and even war pensions. There are others, these are just some examples.

The idea is that the tribunal uses the specialist members as a way to avoid decisions being taken solely by tribunal members who are lawyers and who may (often will) find it difficult to understand technical matters. The legal chair runs the process, decides on legal questions and drafts the reasoned decision. The specialist member leads on technical matters. One interesting by-product is that many specialist members also understand the law, and as someone who has worked on specialist tribunals for 17 years, I am not too proud to admit to my preliminary view on the law having occasionally been challenged (politely of course) and sometimes corrected by a suggestion from a legally interested and experienced specialist member.

This system is an excellent and robust decision-making model. For present purposes, it is relevant since the tribunal is expected to be interventionist – to raise issues and pursue lines of enquiry which may not have been raised by the parties (or may have been raised but not pursued as far as might be seen as desirable).

Inevitably, the provisional views of the tribunal members (who are, remember, still neutrals) comes through. Tribunal questions can indicate lines of interest, challenges, concerns (while not being leading). This contrasts with the approach in the UK public courts, where questions from the judge may only usually be asked for clarification purposes (Jones v National Coal Board [1957] 2 QB 55, applied, for example, in Rea v Rea [2022] EWCA Civ 195, both decisions of the English Court of Appeal in civil cases; see also Tallis v HMA 1982 SCCR 91, applied more recently in G v HMA 2020 SLT 63, both decisions of the Scottish criminal appeal court.).

The specialist tribunal model is hands-on, interventionist and inquisitive (Not 'inquisitorial', as that label applies to Continental judicial systems, which are entirely different in foundation from those in common law jurisdictions). None of this diminishes neutrality. The final decision is taken only after all of the evidence and argument is considered.
But the tribunal may go further.

Specialist tribunals and provisional views

Where a neutral who will be making a decision states a view on a point in dispute prior to the conclusion of the evidence and argument (in other words before deliberation takes place), one may take the view that the neutral has compromised their neutrality. This is wrong, as long as the view being stated is a provisional one.

The appeal courts in the UK have been clear on this, and in doing so have gone quite far along the road in favour of the discretion of the neutral who chooses to act in this way. As long as the view being expressed is a provisional (preliminary) one, and is not expressed in trenchant terms, the appearance of bias will have been avoided.

In one case, the tribunal chair stated that the task facing the unrepresented applicant to succeed in the claim was 'virtually impossible'. This view was based on a reading of the papers, before any evidence was led. The applicant asked the tribunal if it was saying he should give up. The tribunal chair replied: 'If I was advising you, I would say that'. The appeal court held that since this view was explicitly expressed as a preliminary one, it did not display apparent bias.

Another case, Gourlay v Aviva Insurance Ltd [2019] SAC (Civ) 10, was a decision of the Sheriff Appeal Court in Scotland. In this personal injury case in the general courts, not in a specialist tribunal), the judge (sheriff) held a meeting of the lawyers of the parties in chambers. This meeting happened after hearing the evidence of the main witnesses for each side, but where there were still two other witnesses to give evidence, followed by argument. The judge stated that the pursuer (the party making the claim) had 'tailored his evidence to suit the case' and that he had misgivings about the pursuer's credibility compared to the credibility of the other party. The appeal court held that the views did not demonstrate a closed mind on the case and stated:

"Looking at the [judge's] comments objectively, through the eyes of the fair-minded and informed observer, they were intended to be helpful to the parties, providing them with an indication of the sheriff's preliminary views so that the submissions yet to be made could properly focus on the sheriff's concerns and on the possibility of contributory negligence. In such circumstances, the fair-minded and informed observer would not conclude that the [judge] had reached a concluded view." ([2019] SAC (Civ) 10, para 33)

This might seem surprising, but one needs to consider the context in which the neutral is operating. In the case I mention above in which I was involved, all three tribunal members had formed the same provisional view. In the end, we changed our minds. Our provisional view was wrong. We did not express that view during the case, but if we had, it would not have prevented us from forming a different view in our decision. Those who operate as professional neutral decision makers have to be (as one Scottish lawyer, in describing a judge to me, captured in a single word) 'persuadable'. That is the most important quality of any judicial decision maker. This implies the ability (and integrity) to change one's mind, even where a public indication to the contrary is expressed.

I should add that the appeal courts in the cases mentioned above do sound a note of caution: that provisional views should not be expressed too trenchantly, since this might be an indicator of a closed mind. In some UK cases, such a closed mind has been held to have been demonstrated (see, for example, *Ellis v Ministry of Defence* 1985 ICR 257; *Chris Project v Hutt* EATS 0065/05, both in the Employment Appeal Tribunal in England).

Arbitration

Similar comments to those above apply here. The arbitral tribunal is a judicial body and holds subject-matter expertise. It may approach the evidence in a hands-on way, even making provisional comments. The same test of apparent bias applies to arbitral tribunals as applies in the UK courts (The UK test is found in the House of Lords case of Porter v Magill [2001] UKHL 67 at para 103 (Lord Hope of Craighead): 'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'. The test is similar in substance across many jurisdictions, with differences of emphasis).

Mediation

If it is possible for a judge/arbitral tribunal (who will make a binding decision on a dispute) to give a strong steer as to where (on a provisional basis) it sees the case going before proceedings are over, and not to compromise neutrality, the same should (in theory) apply to a mediator.

I accept that ideally an agreement should be reached with the mediator adopting a 'facilitative' role, but where that is not possible, a so-called 'evaluative' mediation approach can be used. In my view, an evaluative approach can take three basic forms:

(a) A subtle evaluative approach, where the mediator asks questions which could indicate that certain issues are important, thereby disclosing a preliminary view;
(b) A more direct evaluative approach, where the mediator expresses a view on the issues in dispute; and
(c) The most direct evaluative approach, where the mediator suggests possible outcomes.

I repeat: none of these approaches should be considered unless and until a 'hands-off' facilitative approach has been tried and has not worked. Approaches (b) and (c) should only be attempted with the express (informed) permission of all parties. Where (b) and (c) are tried, the discussions should usually take place in private with each party, followed by a break, followed by a joint session, where the comments are not repeated, but are instead allowed to (hopefully) influence the resumed discussion.

'If handled carefully, the evaluative element should not deprive the mediator of their neutrality when it comes to the rest of the mediation. The prospects of success may well be higher if such a process is used.'

A word on expertise here. The mediator could use, for example, legal expertise in making evaluative comments about prospects of success should the case need to be adjudicated; comments on strong and weak points for each party might be useful in this context.

But, equally, the expertise used could come from life experience. I see this in employment disputes, where often the issues are not legal at all, but are about communication, personality, perception. The evaluative comments could, then, simply be about explaining how in the random workplace environment, different approaches are needed for different individuals (I consider the randomness of the workplace as part of a short article 'Differences and Randomness: Some thoughts about mediation" published online by Carmichael Lemaire.).

Similar dynamics can appear even in commercial disputes, where although there is a legal dispute, getting to that dispute might involve dealing with the communication/personality/perception problem first. In some cases, that is the main source of disagreement, and once resolved, the legal dispute can be cured with relative ease.

Early Neutral Evaluation (for a discussion of this process, see Blake et al, The Jackson ADR Handbook, 3rd ed (2021) OUP, chapter 22)

This is a non-binding method that involves a skilled neutral (usually a lawyer) being asked to provide an evaluation of prospects of success, and possibly recommendations on settlement.

In its usual form, the evaluation is jointly instructed by the parties, with the evaluation report coming to both parties. However, there is nothing to prevent one party from (secretly) instructing such a report on its own.

The process normally involves the written submission of evidence and argument, but a hearing can be fixed. Oral evidence will not, however, usually be taken.

The purpose of ENE is to get an idea of how the case might eventually be decided by a skilled neutral; after all, such a person (judge/arbitrator) is likely to have to do so if the case does not resolve consensually.

This process is not costly (in comparison to an arbitration or lawsuit), can happen early in the case and is risk-free, since it is non-binding.

In ENE, the statement of an opinion on prospects is what the process is all about. This time, the neutral is offering a concluded view (not a provisional one). The neutral in this process would not, therefore, become the neutral in the final adjudication of the dispute.

Conclusion

We form opinions all the time. Keeping them to ourselves is common, in order to maintain relationships and so as not to offend. But in a resolution process, as a neutral our opinions are valued. What we are thinking as a dispute unfolds can be sobering for the parties. There is nothing wrong with being hands-on as a resolver.

We should be brave and have faith in our ability to stay neutral, whatever we might think along the way. Where telling the parties what we think might help produce a resolution, why not do so?
Not a tightrope after all, just common sense and practicality.

Mediation in India: the Current Jurisprudence, Challenges and Proposed Reforms

Tushar Behl ACIArb, Advocate, New Delhi
Shreshtha Garge, Associate, Ashlar Law, Mumbai

I. Introduction

Determining the strength of a country's judicial system is a multifaceted task that depends on the careful evaluation of several factors including: principled positions chosen by courts, i.e. the reasonings followed by courts in order to solve legal issues, the timely disposition of cases, and adaptability to changing times. The practice of Alternate Dispute Resolution ("ADR") has made strides on a global level in providing an avenue for resolving disputes outside traditional litigation. ADR provides an excellent mechanism for dealing with individual problem(s) and for adapting to the needs of the parties rather than enforcing on them a yardstick of black-and-white, right and wrong. Therefore, it is understandable that many legal professionals vehemently argue for the codification and encouragement of ADR methods in contrast to judicial civil suits.

The implementation of mediation, however, comes with such challenges as practitioners' lack of training with respect to the management of cases (Salem Advocate Bar Association v. Union of India, 2002), potential clients' lack of awareness and trust in the process, and various administrative and legislative issues. At the same time, some forms of ADR, such as arbitration, have seen leaps of development, especially in corporate circles.

Indian courts have defined mediation as a consent-based, non-adjudicative form of dispute resolution wherein a third party, who is neutral to the case, assists parties to a dispute to reach a harmonious solution through negotiation and facilitation (Mediation Training Manual of India, 2018). The neutral third party must be a trained and experienced person who must be able to establish fruitful communication between both parties. For the process to be legally tenable, legal professionals, i.e., Bar-approved lawyers, must conduct the mediation (Mediation Training Manual of India, 2018).

The Indian Judiciary is fabled for its backlogs and inability to dispose of cases within a reasonable timeline (Suresh & Narrain, 2014) , although the Honorable Chief Justice of India has defended the lack of timeliness by clarifying that the statistics do not provide a complete picture since they put cases pending for 10 years and those pending for 10 days in the same category (N.V. Ramana, 2021). Additionally, he also listed other nuanced problems that contribute to the delays such as "luxurious litigation" (Suresh & Narrain, 2014). The term luxurious litigation is used in parlance to mean a situation wherein parties with resources at their disposal attempt to frustrate the judicial process, i.e., make unnecessary filings and extensions on fallacious bases.

In addition, the legal framework borrowed by India from England has undertones of litigation as it was practised during the colonial days. It has created a persistent image that all dispute resolution is a paperwork-laden process that requires elaborate arguments made by people in black-and-white attire in front of a very formal courtroom (Justice N.V. Ramana, 2021). The current reality of the legal environment in India is far from that. The majority of parties who opt for any form of dispute resolution are unable to pay lawyers over a long period of time (since litigated cases take an average of years to conclude if one takes into account appeals).

Apart from the socio-economic reasons which make litigation inaccessible to the vulnerable parts of the population, there is one benefit of mediation that makes it surpass other forms of dispute resolution: mediation completely avoids the winner-takes-all outcome at the end of the resolution. Further, studies have indicated that there is a higher chance of parties complying with a mediation settlement than a court decree (Alfini & McCabe, 2002; Radford, 2000).

II. The law that exists today and the challenges

In light of the benefits of mediation, the Law Commission of India (1988) and Malimath Committee Report (2003) recommended broadening the ambit of the section, which earlier focused solely on arbitration, to all forms of ADR with their distinctive advantages. As a result, statutory amendments were made to the Code of Civil Procedure, 1908 ("CPC") in order to implement various forms of ADR for civil cases under Section 89. That section of CPC was an effort to reduce the load of case files on the courts and provide for a statutory outlet to resolve disputes such that they minimize costs (which in turn, would encourage parties to opt for ADR). Section 89, if read together with Rules 1A, 1B, and 1C of Order X of the First Schedule, provides for an exhaustive mechanism that could very well be used to promote ADR (especially mediation) in India.

Due to changing needs, there needs to be a viable system that is an amalgamation of judicial and non-judicial methods. This would help cater to the unique needs of each case at every stage of a civil dispute. A comparative study would demonstrate that the rate of out-of-court settlements differs greatly among locations. For example, the Bangalore Mediation Centre ("BMC") and the Mediation and Conciliation Centre of the Delhi High Court ("DMC") reported that they settle around 50% of the cases that come to them.

On the other hand, the Allahabad High Court Mediation and Conciliation Centre ("AMC") reported a mere 25% of all cases settled (Vidhi Centre for Legal Policy, 2021).

It is pertinent to note that the method of mediation used by the BMC, DMC, and AMC is court-referred mediation, i.e., if it fails, the dispute may continue to litigation and, if it succeeds, a report is submitted to the Court by the mediator and the case is then disposed of. The Supreme Court of India, in the case of Salem Advocate Bar Association v. Union of India (2002)("Salem Case I"), interpreted § 89 (d) as indicating a need to formulate a common framework for determining which form of proceedings should be used. In accordance with that opinion, the Mediation and Conciliation Project Committee ("MCPC") was formed, headed by Justice Jagannadha Rao, and the Committee's findings were consolidated under the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 (Rao, 2019).

On perusal, these guidelines would seem too broad. Even though their applicability (having been delegated to the discretion of the High Courts) could be moulded according to local needs of dispute resolution, in practicality, it seems to decelerate the promotion of mediation among parties because of the general inertia of the Courts. It is a result of these wide ambits that the development of any mediation system in a state is largely dependent on the interpretation and motivations of each court. For example, only five disputes have been resolved at the Tripura Mediation Centre from 2008 to 2015, while 31,441 disputes have been resolved by Bangalore Mediation Centre from 2011 to 2015 (Narain & Sankaranarayanan, 2018).

Statutes such as the Companies Act, 2013, the Industrial Disputes Act, 1947, and the Arbitration and Conciliation Act, 1996 loosely add provisions for mediation into the bargain. We use the term *loosely* because (a) these provisions do not specifically mention mediation and they resemble conciliation, at best, and (b) even after these proceedings occur, parties may institute suits on the same subject matter. It may be more accurate to say that these statutes make reference to mediation if parties or lawyers wish to opt for it in their cases.

At this juncture, we may ascertain that courts could establish a system of mediation that is either post-litigation (i.e., court-referred or statute-regulated) or pre-litigation (i.e., contract-based or corporate). In this light, the legal position and implementation of post-litigation mediation are much stronger due to >

references in statutes that give it gravitas. On the other hand, pre-litigation mediation is unregulated and derives its implementation from either highly aware parties (or clients) or enthusiastic legal professionals, since it requires a higher degree of self-resolution.

The Supreme Court discussed pre-litigation mediation in the case of K. Srinivas Rao v. D.A. Deepa (2013); however, that judgement is restricted to family matters owing to the facts of the case. Appreciation is due because the Court undertook an additional responsibility to enumerate the importance of mediation in its ratio (or rationale) and emphasised the benefits of pre-litigation mediation as a method to settle the said disputes. The Court connected the problems surrounding an adversarial legal system to the difference in the behaviour of parties under litigation and mediation. The Court explained that if the parties agree, even non-compoundable offences under § 498A of the Indian Penal Code (1860) should be referred to mediation at the onset (Code of Criminal Procedure, 1973).

This brings us to two of the most important aspects (more precisely, hurdles). In the case of *Moti Ram v. Ashok Kumar* (2011), the Supreme Court discussed mediation and observed that a mediator must ensure confidentiality, which means that they may present to a court only the report of the dispute and its solution and not the details of the parties and the proceedings that unraveled. It might be smart for the parties and the mediator to engage in a Confidentiality Agreement; however, this is a rare occurrence in India and most mediations are bound by trust rather than paperwork for confidentiality.

It is understandable that stricter confidentiality is necessary (Irvine, 2012) and may be a huge factor in determining the trust of laymen in the process itself. This is easier said than done. In practicality (as can be inferred from a sea of arbitration cases), if a party questions the professional integrity of a mediator, or if a party chooses to pursue litigation even after a settlement has been proposed/agreed, there is no law that stops them from doing so and presenting confidential knowledge to the court.

A larger problem, faced not just by mediation but by the ADR fraternity as a whole, is the enforcement of settlements. Even though the Supreme Court has consolidated the legal stance on the matter (Afcons Infrastructure Ltd v. Cherian Varkey Construction Co (P) Ltd, 2010), stating that settlements arising out of court-referred mediation are enforceable when they are placed before the Court and the resolution/settlement is recorded, even then (a) it arguably does not apply to pre-litigation cases, and (b) >

the rules differ from state to state. At the same time, Order XXIII Rule 3 of the Code of Civil Procedure, 1908 does provide an outlet for compromise between the parties, which may be argued to include any mediation entered into by them.

III. Suggested reforms

Despite hurdles in the mechanics of implementation of mediation, India does not necessarily present a grim picture with regard to using mediation. With the aid of certain proposed framework changes, mediation has the potential to become a go-to method for parties with difficult economic backgrounds, limited time, or relationships that may be adversely affected by extended litigation.

(1) Improving the Role of the Existing Mechanism

The existing mechanism does not approach mediation with an open mind for reasons that may range from desensitization of judges towards disputes to lawyers earning more through litigation. We therefore believe the encouragement to try mediation must flow hierarchically, i.e.,, judges must foremost be made aware of and be enthusiastic about the avenues and benefits that mediation has to offer. Mediation may substantially reduce their burdens and bring to them parties that do not act as adversaries but rather as collaborators in resolving a problem.

Additionally, there must be an accreditation mechanism for mediators. The benefit of accreditation lies in the organisation and comparative analysis that it displays to the parties, i.e., it helps identify mediators and helps organise their mediation experience in relation to (a) other professionals engaged in mediation, and (b) the subject-matter of mediations. That will help make the process more trustworthy and open to the parties because they will be able to compare and choose mediators. Even though there has been almost a decade worth of developments made in the field of mediation, there is abysmal awareness amongst the public with regard to the same.

Increasing parties' awareness of the mediation process and providing accredited mediators would lead to higher professionalism in the mediation field. Parties would begin to see mediation as a method for completely ending a dispute, rather than as a first step toward resolving the dispute that, if unsuccessful, would still require the dispute to be resolved through litigation. Also, similar to arbitration practitioners today, mediation professionals need to be helped to >

develop expertise in all kinds of cases including, but not limited to, family matters and corporate contract matters. In this regard, a collaborative effort is necessary between the judiciary and legislation (government(s)).

(2) Codification of Rules

The need for codification arises when there is a need for better uniformity. There also exists broad consensus on some of the aspects of mediation that require legislative amendments, such as regular training of mediators, regulation of settlements, accreditation of mediators, and enforcement of settlements. It goes without saying that such a framework must not compromise on the flexibility and applicability of mediation; however, it is high time that it receives equal footing to the other forms of dispute resolution.

(3) Guidelines for the Conduct of Mediators and Judges

Guidelines should be established for categorizing cases based on factors including, but not limited to, subject matter, the gravity of the situation, and the nature of the relationship between the parties to the dispute. This would help identify whether a case would benefit from mediation at the earlier stages of its proceedings. In fact, mediation might even be made compulsory for certain cases. For example, Family Courts in India are required to refer matrimonial disputes in relation to child custody, divorce, maintenance, etc. for mediation as per Section 9 of the Family Courts Act, 1984. This is why all family courts have been directed to take a collaborative approach with the parties wherein, for example, a solution such as judicial separation may be preferred over something as absolute as a divorce. In a similar manner, certain categories of cases, such as cases pertaining to business associations and partnerships, might be referred to mediation as a matter of rule (hereinafter referred to as 'compulsory mediation'). The Guidelines might also provide negative consequences, such as monetary compensation, to be levied on parties who refuse to pursue compulsory mediation. Additionally, the Guidelines might provide that either the parties or the judge should be allowed to refer the dispute to mediation at any stage of the proceedings.

Mediation represents the most rudimentary and amicable method of dispute resolution, and it is astonishing how rarely it is resorted to. It is our implicit >

duty as people of the legal profession to make the practice more accessible to any layman. Clients (so to speak) must be seen as aggrieved parties first and not just as consumers of services. This change in outlook would help put into perspective the unapproachable and tedious nature of an average case in the court where parties are faced with sporadically organized hearings and numerous appeals or revisions. ADR in general, and mediation in particular, provide a congenial outlet that benefits the legal fraternity and aggrieved parties equally.

IV. The way forward

The future for mediation in India, all things considered, appears promising. The Union Law Minister Kiren Rijiju stated, "Prescribing mediation as a mandatory first step for resolution of every allowable dispute will go a long way in promoting mediation. Perhaps, an omnibus law in this regard is needed to fill the vacuum."

Recent developments in the Indian ADR landscape witnessed the introduction of the Draft Mediation Bill On December 20, 2021. The Draft Mediation Bill provides for the institution of pre-litigation mediation in civil and commercial matters and also proposes to bring a codified law on mediation providing for the enforcement of mediated settlement agreements. Although vehemently opposed in the Parliament, the Bill offers great potential and a dynamic shift towards creating a legislative regime of mediation. We are yet to witness if the introduction of mandatory mediation is suitable for all kinds of disputes and how far it caters to every stakeholder in India.

See references

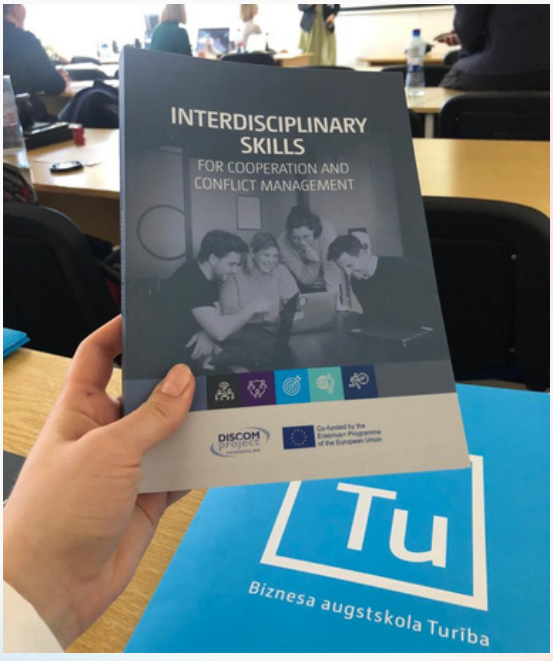
INADR Directors in Erasmus+ Project "Discom"

Agnieszka Góra and Jacek Czaja

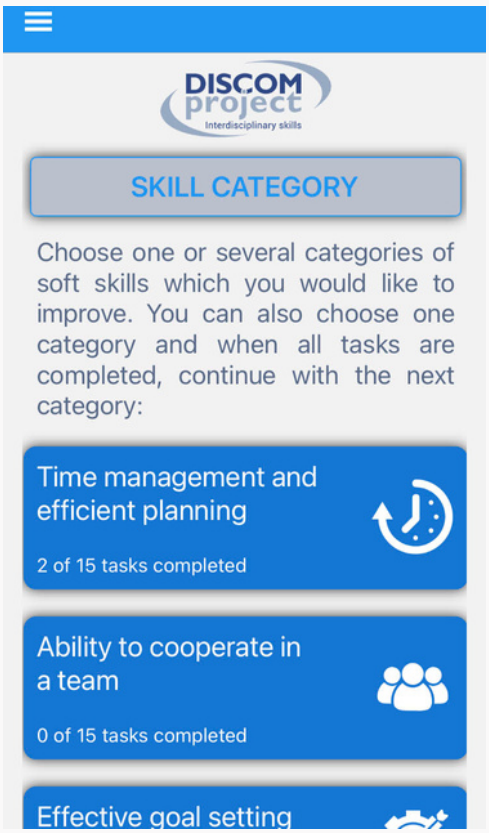
We are happy to share with you that three of INADR's Directors: Director Dr. Agnė Tvaronavičienė (Mykolas Romeris University), INADR's Vice-President International Agnieszka Góra (Jagiellonian University) and Director Jacek Czaja (Jagiellonian University), as representatives of their respective Universities, have been instrumental in developing an interesting and important project on soft skills: DISCOM - «Development of Interdisciplinary skills for cooperation and conflict management» (the Project) co-funded by the Erasmus+ Programme of the European Union.

In short, the Project focuses on the development of the "soft skills" of both students and professionals. The aim of the Project was to implement innovative practices, elaborate interdisciplinary study materials and tools (including a mobile application) for students and teachers of different faculties in the fields of communication, teamwork, cooperation and conflict diagnosis and management.

While the core subject matter of the Project consists of five soft-skills, our Directors were responsible for the two skills most closely related to the mission and core specialization of INADR, that is: Conflict Management (Agnė) and Multicultural Communication (Agnieszka and Jacek).



It is worth mentioning that within the framework of the Project, the participating Universities have created diversified materials openly available online for everyone interested in developing such skills, especially for students, as well as academics to be freely (and without any charge) used and implemented in their courses. All materials can be found on the website http://skills.turiba.lv/ . The mobile app 'Softskills Training' is available on App Store and Google Play.



We congratulate our Directors on their success, as well as we applaud their constant efforts' with 'INADR applauds constant efforts.

The world is becoming smaller and more diversified every day. Conflict and communication are an inherent part of life.

Over the past decades, INADR, through its various events, especially international mediation competitions, trainings and conferences, has provided students from all over the world with a safe space in which they can develop and practice the skills needed to peacefully resolve conflicts and to interact and effectively communicate with people from different cultures and with different opinions.

INADR will continue to engage in a variety of activities consistent with its mission.

Such skills and knowledge are extremely needed in today's world. Now, maybe more than ever.

COMMITED TO PEACE

The Board of Directors of the International Academy of Dispute Resolution has regrettably canceled the upcoming Law School Mediation Tournament scheduled for March 2-5, 2022. Since Ukraine has been invaded by Russia, Ukrainian participants' lives are endangered and we unconditionally condemn this violence.

Our cancellation reflects our solidarity with the Ukrainian people.

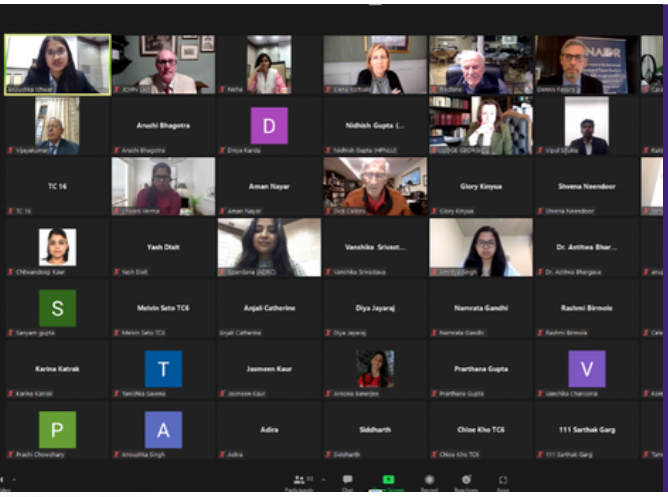
As an organization dedicated to promoting peace and reconciliation, we are actively involved with students all over the world. Consistent with our mission statement, the Academy endorses all efforts to facilitate peace locally, regionally, and globally.

Our current attention must be focused on doing whatever we can to aid and support the Ukrainian students and professionals.

The Ukrainian students, coaches, colleagues, and judges have been an integral part of this organization and we will provide every possible means of assistance until all individuals are able to freely and peaceably participate.

10th NLIU INADR International Mediation Tournament, 2022

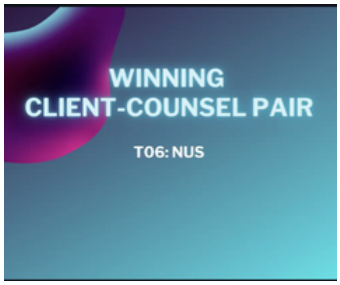
NLIU ADR Cell Co-Convenors, Rayana Mukherjee and Spandana Singh.

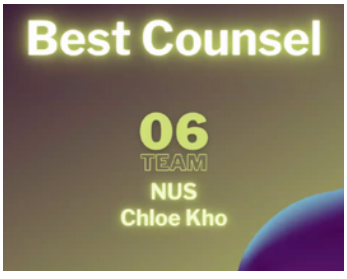


This year the Academy and NLIU ADRC had the privilege to virtually host the 10th edition of their Annual flagship Mediation Tournament from March 24-27, 2022, which witnessed participation by more than 90 students from different parts of the world, and enriching training sessions preceding the competition provided by Prof. John Lag, Mr. H Case Ellis, Mr. Dick Calkins, INADR President Dennis Favaro Adv. Aryan Gupta, Adv. Yash Dixit and Prof. Kavita Pujari Bhatia. The Competition also saw judging from multiple luminaries in the field of Alternative Dispute Resolution from across the globe.

The Competition involved 3 participants from each participating team, viz. the Client, the Counsel and Mediator, with it being mandatory for each participant to play all the three roles over the course of the Competition. The Competition spanned over three preliminary rounds, with each participant playing all the three roles at least once, following which there were two Advanced Rounds (the Semi Final and the Final).

The Winners and Runners-Up in the Mediator Segment were the teams from the West Bengal National University of Juridical Sciences, Kolkata and the National University of Singapore, respectively, and the same for the Client/Attorney Segment were the National University of Singapore and the Government Law College, Mumbai, respectively.





The Arizona High School Mediation Tournament: shaping young peacemakers of tomorrow

Kathie Calkins Keyes and Federica Simonelli

The first in-person High School Mediation Tournament took place in Tucson, Arizona, on April 9, 2022. The tournament was hosted by Empire High School in Vail, Arizona, under coach Jennifer Roberts. As a pilot program under the auspices of the InterNational Academy of Dispute Resolution (INADR), young, bright, hard working students from two schools, Tanque Verde High School and Empire High School, formed 3-person-teams and engaged in mock mediations with much enthusiasm.

As a matter of fact, this is the second pilot program at the high school level conceived by INADR founder Dick Calkins. Principia School in St. Louis hosted two online tournaments in 2021, under coaches Patti Fox and Donald Sterrett. Eight teams participated and many INADR members supported the tournament as scorekeeper, zoom host, judges, and advisors: the event was a great success.

The Academy has a long and successful tradition with the organization of intercollegiate and law school tournaments. In fact, the Academy is renowned worldwide as a not-for-profit, educational organization, devoted to shaping the peacemakers of tomorrow. This is why educating about peaceful dispute resolution to high school students is the newest challenge... And INADR is surely a forerunner in this!

Dick Calkins provided advise, training, and mediation textbooks. Federica Simonelli zoomed into classrooms to provide basic tournament training. The event coordinator, Kathie Calkins Keyes, created short training videos. Kathleen Ruane Leedy, Orlando Blake, four students from the University of Arizona, and many others provided judging and support. Jennifer Castro and John Armendt from the Arizona Bar Foundation supported the planning of the tournament and judge recruitment. Tanque Verde High School coach Jeremy Savoy was instrumental in generating interest for this new endeavor.

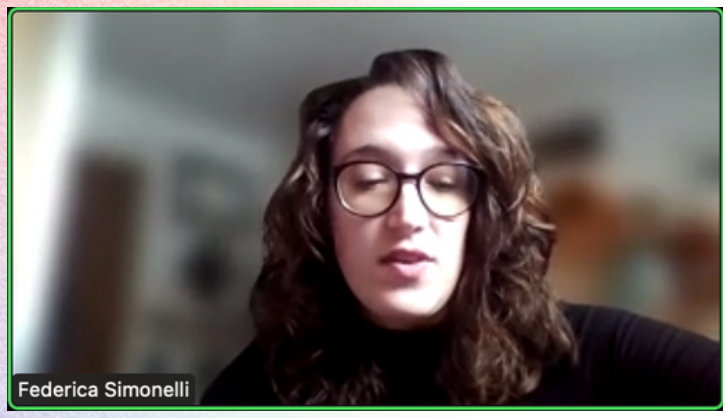
The organizers were honored to have Ukrainian mediator Anna Dushkova deliver a moving keynote address via zoom from Spain (see photo). She encouraged the high school students to train themselves to work for peace, highlighting the importance of mediation in preventing conflicts in today's world.

The organizers decided that such a young group of students would benefit from shifting the emphasis away from a more professional mediating perspective (traditionally left to lawyers with an adversarial background) and towards teaching more basic, essential, and life-changing mediation skills. Students learned how to peacefully resolve their disputes in a healthy and proactive way.

Judges and observers were amazed at the ability of the students to learn the mediation process so quickly and execute these new ideas so effectively. Coached and trained by their high school mock trial teachers, these students showed a natural aptitude for negotiation and peacemaking. The students, who have been introduced to the principles of mediation for only a few hours per week, were absolutely stunning at grasping the theoretical concepts and turning them into practical skills. Having previous experience with mock trial, they were surely acquainted with a competition setting. What was really remarkable was their flexibility when switching from an adversarial mindset to interest-based negotiation!

The competition rooms of the Arizona tournament opened into an outdoor courtyard, allowing students to network while the opposite party was in caucus.

Comments from the participants were extremely positive. One student said, “I think that when we were able to communicate and cooperate with other teams we haven't met before [it] was a really fun experience.” One wrote, “It was really nice being able to represent a client and deal with law but not be in opposition with the other side.” “A definite win from the Arizona Mediation Tournament was the ability to do something different from actual court, to be able to try something different and find out that it's really fun. I was definitely nervous going into this but came out having had so much fun!”



Many seeds have been planted, and interest is sprouting across the world to train high school students in mediation. The participants themselves have goals: “I would like to learn how to make someone feel like I am hearing them better.” Another wrote, “Well, I really enjoyed being a mediator, and I see it as a viable career path for me, so I think any skills relating to becoming a better mediator is great.”

Incorporating mediation and peaceful resolution of disputes at the high school level is essential to shaping the leaders of tomorrow. The Arizona Bar Foundation demonstrated an interest in running this type of educational event as early as 2023. At the moment, the organizers are offering free, weekly, one-hour training via zoom to build interest and skills. Incorporating mediation and peaceful resolution of disputes at the high school level is essential to shaping the leaders of tomorrow.

What impact has the tournament had so far? Students remarked that the tournament was fun, informative, and useful. Within a week of the high school mediation tournament, several reported they were already using mediation skills in real life. One explained, “I helped my siblings be nice to each other by being the mediator in between them.” Another said, “My friend and I that frequently bicker have been better able to bond and get along.”

A final comment from one of the students was, “My favorite moment from the tournament was being a mediator and feeling accomplished that we worked out an agreement.”

This is the start of something special.

MEDIATION TOURNAMENTS

UPCOMING

LAW SCHOOL TOURNAMENTS:

POZNAŃ

LSTC TOURNAMENT
SEPTEMBER 21-25 2022

UNDERGRADUATE TOURNAMENTS:

BRENAU

INVITATIONAL TOURNAMENT
OCTOBER 7-8 2022

MAHARISHI

PEACEMAKER TOURNAMENT
OCTOBER 27-28 2022

INTERNATIONAL

INTERCOLLEGIATE MEDIATION TOURNAMENT
NOVEMBER 10-12 2022

THE DATE OF ILSMT WILL BE ANNOUNCED LATER IN JULY.
JUST CHECK ON US HERE:

The Flower That Blooms in Adversity is the Rarest and Most Beautiful of All

Elvira Bacci, fellow at INADR

My story with INADR began amidst the first wave of the Covid-19 Pandemic back in the end of Winter 2020. That was when the world stopped. During self-isolation I found myself reflecting on my privileged condition and my accomplishments with plenty of time to reflect on what I had accomplished during my life, to acknowledgethe privileges I have, and to wonder how I could build a career focused on "giving back" to the people who have been less lucky than me.

I had just graduated from the Florence University Law School, and many things I had been expecting for years or had taken for granted, were now completely different: I was graduating online, meeting people exclusively through a video-call, finding it impossible to experience live what it meant to go to court and attend a trial. And most of all, because I could not travel due to the travel ban, I thought about the difficulties of meeting new people with diverse backgrounds, and I found it hard to imagine a career not confined to the city where I was physically living.

IThe European Law Students Association advised me to start virtually an internship I had applied to in the past, and I was lucky enough to find a company involved in Online Dispute Resolution and for sure they were not scared as I was about the world moving online!

During this internship I had the pleasure to meet Dr. Elena Koltsaki, who at the time had been selected to become president-elect of the InterNational Academy of Dispute Resolution. I was therefore introduced to and became involved in the activities of the Academy, first as a volunteer (for their first online version of the International Law School Mediation Tournament which was hosted by Mykolas Romeris University in Vilnius) and then, after a selection process, as an intern. Being an intern for the InterNational Academy of Dispute Resolution gave me the opportunity to join a group of professionals, each based in a different part of the world, with no barriers because we always connected electronically on Zoom.

This gave me also the chance to learn about how problems can arise in mediations due to cultural differences, especially differences in communication and emotional styles.

Part of my learning was in attending, along with INADR's Board of Directors, diversity trainings offered by Tatyana Fertelmeyster, founder of Connecting Differences LLC. Ms. Fertelmeyster grew up in Moscow, Russia, and moved to Chicago in 1989 as a refugee from the then Soviet Union. She is the founder of Connecting Differences LLC, a company which provides trainings in leadership, teambuilding, diversity and inclusion. Her trainings helped me understand how different cultures have different communication preferences and styles and how those preferences can create problems in everyday life as well as in the mediation setting. Understanding these general styles can help us think about how people from different cultures might react to each other's different communication styles. Emotion and stress also play a big part in how we react emotionally, which is also largely determined by our culture.

Diversity is a part of our everyday life. To be respectful of others, we need self-awareness about how we act and react in different situations. We learned that the ways we react are mostly influenced by the place where we were born and raised, which is why our culture plays an important role when we interact with people.

I learned that a skilled mediator or negotiator should be able to detect when people sitting at the mediation or negotiation table might need help to overcome issues arising from their cultural differences in communication. Sometimes one's communication style can cause the other person to perceive a lack of respect towards the other person or the other person's culture, even when no disrespect was intended.

As a young mediator, I have noticed that basic mediation training focuses on the process itself and the correct actions a mediator should or shouldn't follow during each phase of the session. Yet, little attention is given to the important role of communication skills and the psychology behind them.

Communication differences stemming from cultural differences can often create a situation where one or both parties feel disrespected. In a group, often those people who are used to interacting from a privileged position might not easily recognize when a situation could be uncomfortable for others who are not so privileged.

I was already aware that we should be careful in our dealings with people from other cultures to express ourselves in a way that they would recognize as respectful, but Tatyana's trainings have helped me even more in understanding the reason why it is important to do so.

Additionally, working in an inclusive organization, I have learned how important it is to create an environment where everyone feels safe in asking others for help in understanding their perspectives and, when addressing delicate topics, to be able to pose questions that will further understanding, such as "How can we navigate this space better together without stepping on each other's toes."

At the mediation tournaments organized by the Academy, competing participants, members of teams coming from several parts of the world were always demonstrating respect towards each other, both verbally and nonverbally. Even if role-playing cases, they were showing empathy and listening carefully in order to be able to paraphrase other's words and show they understood their perspectives.

Thanks to the preparation they endured with their coaches, the trainings offered by INADR during tournaments and their mindset the students I have been able to observe are the perfect example to end the short reflection about the concept of diversity: the way they are able to overcome different communication styles, different approaches to mediation show that if students are taught to develop these skills a better world is possible.

What I always enjoy the most is the willingness they demonstrate to adapt in adapting their behaviors in order to reach an agreement with the other side, which is also respectful for their own team's demands: this demonstrate that we can all learn something from others and most of all understand that diversity is what truly makes us richer.

The internship and fellowship with INADR gave me the opportunity to outgrow my past self and learn not to be scared even by the most unexpected situations. With the recent diplomatic crisis and the many wars affecting the world population, I am most grateful of having the chance to share perspectives with experts in the field of mediation and negotiation. There's no doubt that my life has been changed by the whole experience with the Academy and that my future career will be affected by that. Even at the moment, where I am mostly engaged with pro-bono cases and refugees rights I feel that I am much more attentive, sensitive and respectful of each person's own culture and personal story.

INADR OFFICERS

DENNIS FAVARO
President

ELENA KOLTSAKI
President-elect

SUSAN SLOANE
Secretary

ANTHONY BALDASSAMO
Treasurer

TERESA FRISBIE
Vice President ,USA

KEN FRANK
Vice President of education, USA

AGNIESZKA MAJKA-GORA
Vice President, International

ANA KHURTSIDZE
Vice President of education, International

AT LARGE MEMBERS

JACEK CZAJA

JOHN LAG

AGNĖ TVARONAVIČIENĖ

DEREK P. AUCHIE

S. JAI SIMPSON-JOSEPH

PAST PRESIDENTS

DICK CALKINS

CASE ELLIS

FRED LANE

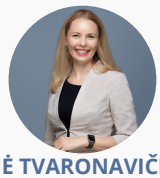
NANCY SCHULTZ

MARY LOU FRANK

INADR PUBLICATION COMITTEE

AGNIESZKA MAJKA-GORA

DENNIS FAVARO



AGNĖ TVARONAVIČIENĖ
CHAIRPERSON

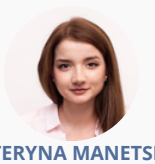
SUSAN SLOANE

DEREK P. AUCHIE

MARY LOU FRANK

INADR FELLOWS AND INTERNS

ELVIRA BACCI



KATERYNA MANETSKA

FREDERICA SIMONELLI

LYDIA VATUTINA

JULIANNA MIELCZAREK

inadrpublications@gmail.com

References

Mediation in India: the Current Jurisprudence, Challenges and Proposed Reforms

Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24. Irvine, C. (2012 January 12). The Three Pillars of Mediation. Kluwer Mediation Blog. Retrieved from: **http://kluwermediationblog.com/2012/01/12/the-three-pillars-of-mediation/**

Ramana, N.V. (2021). Mediation for Everyone: Realizing Mediation's Potential in India. India- Singapore Mediation Summit. Alfini, J.J. & McCabe, C. G. (2002). Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law. Arkansas Law Review, 54(2), 171-206. Retrieved from **https://ssrn.com/abstract=2690503**

Jagannadha Rao, M. (n.d.). Concepts of Conciliation and Mediation and their Differences. Retrieved from: **http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20rao%201.pdf**

K. Srinivas Rao v. D.A. Deepa, (2013) 5 SCC 226. Law Commission of India (1988). 129th Report on Urban Litigation: Mediation as Alternative to Adjudication. Retrieved from: **https://lawcommissionofindia.nic.in/101-169/Report129.pdf**

Radford, M. E. (2000). Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters. Pepperdine Dispute Resolution Law Journal, 1(2), 241 – 253. Retrieved from: **https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1187&context=drlj**

Suresh, M. & Narrain, S. (2014). The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India. Telangana: Orient Blackswan. Mediation and Conciliation Committee (n.d.). Mediation Training Manual of India. Retrieved from: **https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf**

Mediation and Conciliation Project Committee (n.d.). Mediation training manual. Retrieved from: **https://supremecourtofindia.nic.in**

Moti Ram v. Ashok Kumar, (2011) 1 SCC 466. Report of the Malimath Committee on Reforms of the Criminal Justice System (2003). Retrieved from: **https://www.amnesty.org/en/wp-content/uploads/2021/06/asa200252003en.pdf**

Salem Advocate Bar Association v. Union of India, (2002) 1 SCC 49. Ramana, N.V. (2021). The International Virtual Mediation Summer School by Nivaaran: Mediators of Supreme Court of India. The World Bank (n.d.). Ease of Doing Business in India. Retrieved from: **http://www.doingbusiness.org/data/exploreeconomics/india/#enforcing-contracts**

Vidhi Centre for Legal Policy (2021). Strengthening Mediation in India: A Report on Court- Connected Mediations. Retrieved from: **https://doj.gov.in/sites/default/files/Final%20Report%20of%20Vidhi%20Centre%20for%20%20Legal%20Policy.pdf.**