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BROADCAST

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A short chat with Nakul Sachdeva and his thoughts on evolution of ADR in India and insights for young law students.

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EXPERT'S VOICE

Mr. Nakul Sachdeva
(Partner at L&L Partners | Forbes India: Top 100 Individual Lawyer)

Since joining L&L In the last 2 years, Mr. Sachdeva has ably advised and represented NHPC in numerous Arbitration related matters including substantive Arbitration Proceedings, Section 34 Petitions, Section 37 Petitions. As on date NHPC Limited is the largest organisation for hydropower development in India, with capabilities to undertake all the activities from conceptualization to commissioning in relation to setting up of hydro projects. NHPC has a project known as Parbati Hydroelectric Project (Stage-II) which is a run-of-the-river scheme proposed to harness hydro potential of the lower reaches of the river Parbati.

Mr. Sachdeva and his team have been advising and appearing for NHPC in all Arbitration Proceedings relating to the said Project. NHPC has another project known as Subansiri Lower HE Project. The said project is the biggest hydroelectric project undertaken in India so far and is a run of river scheme on river Subansiri. The Project is located near North Lakhimpur on the border of Arunachal Pradesh and Assam.

Mr. Sachdeva and his team have been advising and appearing for NHPC in the Arbitration Proceedings relating to the said project as well. In addition to the above, Mr. Sachdeva [on behalf of the firm] also assisted and advised NHPC in conducting a study of numerous Arbitral Awards against NHPC and provided suggestion/recommendations with regard to how Arbitral Proceedings are to be conducted in an efficient manner.

1) What are your views on ADR being termed as Privatized Justice, and do you think that moving ahead, ADR could make Judiciary obsolete, in terms of civil and criminal cases?

A dispute is basically 'lis inter partes' and the justice dispensation system in India has found an alternative to adversarial litigation in the form of ADR Mechanism.

ADR is indeed a privatized mode of justice for the reason that it can be initiated at the behest of the parties and is conducted in a manner flexible and convenient to the parties. The Parties can choose the prevalent law that the ADR proceedings shall be governed by or even write their own rules for facilitating the proceedings. ADR facilitates parties to deal with the underlying issues in dispute in a more timely and cost-effective manner with increased efficacy. In addition, these processes have the advantage of providing parties with the opportunity to reduce hostility, regain a sense of control, gain acceptance of the outcome, resolve conflict in a peaceful manner, and achieve a greater sense of justice in each individual case. The resolution of disputes takes place usually in private and is more viable, economic, and efficient.

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The technique of ADR is an effort to design a workable and fair alternative to our traditional judicial system. It is a fast-track system of dispensing justice.
It may be considered to be an alternate or a parallel judicial system, however it in no way can be construed to make Judiciary obsolete for the primary reason that the option of ADR mechanism is only available to resolve civil disputes and not while prosecuting criminal cases and even then, all the appellate powers arising out of an ADR procedure rests with the Judiciary. Therefore, in the construct available today in the Indian scenario, it is tough to imagine ADR playing a role that extensive so as to make the Judicial system obsolete or in a way take over the dispute resolution system in India.

2) India is moving forward to integrating ADR into its' justice system, but still lagging behind western countries in some arenas. What do you think are the root problems which are preventing widespread of ADR?

First and foremost, it is important to highlight that ADR has been introduced in the Indian justice system in as early as the British Rule wherein in the year 1899 the Indian Arbitration Act, 1899 was enacted to give effect to alternate dispute mechanism in India.
Then in 1908, CPC was brought into force and Section 89 read with second schedule gave wide powers to the civil courts of the country to refer the disputes to an ADR mechanism.
Thereafter, in 1937 the Geneva Convention was signed and adopted by India and a parallel legislation was introduced in the form of the Arbitration (Protocol and Convention) Act, 1937 followed by the enactment of the Arbitration Act, 1940. Thereafter, in 1958, the world came up with a convention i.e. the New York Convention, after which the Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted.
In 1985, United Nations Commission on International Trade Law (UNCITRAL) presented a comprehensive model for arbitration and conciliation, based on which, the Arbitration and Conciliation Act, 1996 was enacted, repealing the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 as well as the Foreign Awards (Recognition and Enforcement) Act, 1961. The enactment of the Arbitration and Conciliation Act, 1996 was also the first time that a comprehensive legislation was made on Conciliation in India, and it recognizes the value of conciliation as a method of private dispute resolution process in which a neutral person helps parties to reach a negotiated settlement.

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Apart from arbitration and conciliation, India has finally introduced the Mediation Bill 2021 which facilitates and promotes mediation in India, particularly institutional mediation for the resolution of disputes. It also aims to encourage community mediation and make online mediation an acceptable and cost-effective process. It proposes to bring a codified law on mediation and provide for enforcement of settlement agreements resulting from mediation.

Unfortunately, despite the fact that the Indian legal system encourages dispute settlements through ADR mechanisms, our masses have not yet embraced it whole-heartedly. The foremost reason for ADR's unpopularity in India is owed to the government's and Bar's failure in making it reach the masses. In comparison to the western world, it is seen that the success of ADR in the United States of America is due to the strong initiative taken by the Bar. In most of the developed countries, the Bar is divided into litigating lawyers and non-litigating lawyers, where the non-litigating lawyers are usually involved in representing clients in the ADR proceedings. In India there is a lack of proper understanding of ADR mechanisms by the lawyers, who are generally devoid of any training in administering the ADR techniques.

. The lack of an institutional framework in India has also stood as a major obstacle in the popularization of ADR. There is no strict qualification criterion for the appointment of an arbitrator, conciliator, mediator or negotiator. This factor results in the possibility of passing unreasonable awards or bad mediation or negotiation, resulting in further enhancement of conflicts.

Also, there are instances of ADR mechanisms being very expensive, sometimes much more than the ordinary court proceedings. While the ordinary court proceedings may be facilitated by free legal aid, the ADR would often involve the payment to the arbitrators, conciliators, mediators or negotiators for hiring their services. This factor compels the poor Indian masses to avoid resorting to the ADR process. The speedy disposal of cases through ADR also requires institutions specifically dedicated to the same administering it however, in India, we do not have a separate skilled group of lawyers/ administrators/ persons who are devoted only to the resolution of disputes through ADR. The people who administer ADR in India are busy advocates, having cases in courts almost every day which negates the otherwise advantage of ADR's speedy proceedings by making it quite lengthy and time-consuming.

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3) As discussed about the problems above, what kind of solutions would you like to suggest or recommend, to counter the problems?

A few suggestions could be that parallel ADR institutions must be developed in all parts of the country and even at remote levels in the same manner the Courts of law have been established.
Each and every court in the country ought to have Arbitration and Mediation Centres, which measure would ensure that the disputes capable of being resolved out of court be first taken up by the ADR forum.
The establishment, empowerment and legal recognition of ADR bodies in the country would be of no use unless the people are made aware and are as keen to choose ADR over the Courts. The knowledge of ADR options ought be given to the weaker-poor sections of society and people should be taught the advantages of out-of-court settlements.
Till the time, ADR successfully emerges as parallel mechanism to legal system, measures must be taken by courts and the legal fraternity to make the masses aware of ADR mechanisms and to encourage the use of ADR mechanisms for resolution of disputes.
Arbitral institutions may be encouraged to form their own fora of young arbitration practitioners and students which provide training in arbitration, mediation and conciliation procedure and practice, and also and provide opportunities for networking with experienced arbitration practitioners.
Diploma courses and specialised LL.M. programmes in arbitration law and practice could also be provided by premier law schools and universities in India specifically in ADR. The Government and the legal community may provide funding and establish research chairs for promoting research and studies on developments in arbitration law in these law schools and universities.

4) Do you think that India being more ADR friendly, would invite foreign investments and prove to be good for overall economy, considering the increase in competition for domestic businesses?

India's economic liberalisation brought with it a need to provide potential foreign investors with an enhanced form of investment protection that did not rely solely on municipal laws and the domestic judicial system.

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Presently, India lacks institutions that can reach the level of some reputed nations institutions such as the International Court of Arbitration (ICC), London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), etc. Most of the times it has been seen that many companies making commercial transactions or contracts with India prefer approaching foreign international arbitration centres.

India needs to widen its platform for institutional arbitration because these entities have modern rules that encourage them to grant parties more leeway. They are preferable because they have tools such as a review of the draught arbitral award and other potential flaws. These have a well-organized administrative committee and a professional panel of arbitrators with international experience. SIAC and HKIAC have been greatly aided by their respective governments, which offered adequate financial and infrastructural support as well as playing an important role in international promotion; in a similar manner the Indian Government must try to maintain an adequate standard of arbitration institutions.

The advantage of designating an institution that is responsible to handle arbitration disputes is that it ensures that:

(a) there are no administrative delays; and

(b) there is certainty among the parties as to the body that is to be approached in case they inter se have grievances/ disputes.

5) How would you like to describe your experience in ADR, so far? And would you like to share some interesting case or moments with our readers?

I have been extensively involved in arbitrations and mediations in my career over a wide spectrum of sectors, however lately, a substantial part of my arbitration practice involves handling and representing Public Sector Undertakings in complex and high-stake commercial arbitrations and disputes arising out of EPC Contracts. EPC stands for Engineering, Procurement, and Construction and it is a contracting agreement pertaining to the terms of design, engineering, procurement and construction of a construction project.

Representing PSUs in such high-stake arbitration comes with a whole another level of responsibility since public money is involved in the such disputes and such PSUs have high expectations from their counsels to ensure that they are represented to their best interests.

EXPERT'S VOICE

6) What advice would you like to give to our young student readers' who are looking for a career in ADR or a law firm?

In India, ADR has huge scope and is a great career option. In case, one is interested to choose ADR as a career option, one should do more internships with lawyers practicing in their field of Arbitration and Mediation. Apply for internships at the Arbitration, Mediation and Conciliation Centres. The more one gets the opportunity to practically observe the practice of ADR the more one learns.

As a student be well versed with the Arbitration Act, Code of Civil Procedure, Contract Act, and Commercial Courts Act. These are the basic subjects that will help one in Arbitration.

After one graduates from law college, they must join an Arbitration firm or an Arbitration Centre or become an assistant to an Arbitrator. Working with them will give one a practical experience about the Arbitration Proceedings and of course they will learn how orders are passed. Eventually it all boils down to the involvement and the time one spends in practice. The more one practices in a certain area of law, the better one gets at it.

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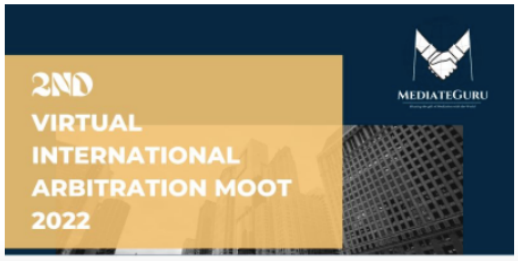
We at #MediateGuru are honoured to have L&L Partners as our collaborating partners for our 2nd #International #Arbitration #Moot 2022, which is all set to take place in October 2022.

We would like to convey our sincerest thanks and gratitude to Mr. Nakul Sachdeva sir and Ms. Amrita Tonk for helping and guiding us.

You can check out more details on www.mediateguru.com/iam



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2) Launch of Arbitration Moot Problem – 1st June 2022
3) Registration Closes: 6th October 2022
4) Last date to seek clarification – 6th October 2022
5) Last date to submit Memorials – 9th October 2022
6) Training session for 2nd IAM – 12th October 2022
7) Preliminary Round 1 – 13th October 2022
8) Preliminary Round 2 – 14th October 2022
9) Semi Final – 15th October 2022
10) Final – 16th October 2022

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Bryan Clark • 1st
Professor of Law and Civil Justice at the University of Newcastle
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Really excited to host this event and work with the MediateGuru team aga

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ALTERNATIVE APPROACHES TO CRIMINAL JUSTICE SYSTEM

by - Sana Quayyum

The need for alternative approaches to Criminal Justice System (CJS) is backed by humanitarian and equitable principles which the present populace needs. CJS is predominantly understood to have 4 major approaches viz. Retributive, Deterrent, Preventive and Reformative approaches. Albeit we have adopted a Utilitarian approach which comprises of some aspects of every approach, as to say utilise best of each, making the CJS cumbersome. It becomes difficult for the judiciary in maintaining the concepts of proportionality, consistency and fairness in sentencing. This disparity in sentencing has resulted in curtailing the accomplishment of goals of sentencing.

In context to India, Section 53 of the Indian Penal Code, 1860 lays down the kinds of punishments generally imposed for offences, imprisonment being most extensively used. Being part of a colonial framework, the governance of the criminal offences and their respective punishments is governed by the philosophy of instilling fear and exercising control over the people.

In the era of barbaric public rituals, the use of imprisonment became the most humane and preferred approach to punish offenders. Some might argue that imprisonment is the only punishment that can incorporate all the objectives of punishment, namely incapacitation, retribution, deterrence, rehabilitation, and correction. The disagreement on the relative weightage could be thatthis form of punishment needs does not uphold the importance of reintegration and rehabilitation as the primary purpose of punishment which indeed is vital for defendinghumanity. The Supreme Court of India had highlighted various key issues related to the prison system, including overcrowding, delay in the trial, torture and ill-treatment, neglect of health and hygiene, insubstantial food and inadequate clothing, prison vices, deficiency in communication, streamlining of jail visits and management of open-air prisons which results in the violation of the human rights of prisoners. Administrators of the CJS need to be aware that there are certain rights and freedoms which fundamental to human existence, which cannot be denied or forfeited regardless of the person being a prisoner or criminal.

The overall use of imprisonment is rising throughout the world, with little evidence that its increasing use is improving public safety.

There are now more than nine million prisoners worldwide and that number is growing.[1] The reality is that the growing numbers of prisoners are leading to often severe overcrowding in prisons. This is resulting in prison conditions that breach beliefs of United Nations and other standards which require that all prisoners be treated with therespect due to their inherent dignity and value as human beings. There are several important reasons for the primary focus to be upon alternatives that reduce the number of people in prison and for imprisonment to be used only as a last resort. Since the mid-1950s, the United Nations has developed and promoted standards and norms to encourage the development of CJSs that meet fundamental human rights standards. These standards and norms represent a collective vision of how to structurea CJS. Alternatives to imprisonment may not be cruel, inhuman, or degrading but may violate human rights standards and norms if used inappropriately or improperly. Moreover, no matter what the motivation for the imposition of a particular alternative may be, it should be recognized that the offender receiving it will experience it as punitive. The existing international framework for considering alternatives to imprisonment is restricted primarily to the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules), adopted in 1986. These Rules provide for alternate, non-custodial measures as the basis for a reductionist criminal justice policy. In addition, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters become additional tools for matters related to alternatives to incarceration.

According to these international frameworks, alternatives to imprisonment include decriminalisation and diversion become methods that could be adopted to reduce imprisonment. Here decriminalisation can be apprehended as changing of law so that an act that was considered as a crime no longer continues to be a criminal act. Such decriminalisations can be explored in considerations to general exceptions related to infancy, insanity, and inevitable accidents. Decriminalisation can also be applied to those offenses that are against morality, an example could be adultery. Diversion, on the other hand, concerns with the use of other methods than processing the CJS and empowering police and prosecutors to avail the discretion on which cases needs to be considered and which needs to be ignored, for which again clear guidelines must be developed. The use of mediation and alternative dispute resolution mechanisms are also methods that could make diversion a reality. The Tokyo Rules list a wide range of dispositions which constitute Verbal sanctions; Conditional discharge; Status penalties; Economic sanctions and monetary penalties, such as fines and day-fines; Suspended or deferred sentence; Probation and judicial supervision; a community service order; Referral to an attendance centre; House arrest etc.

The world has indeed recognised the significance of alternative approaches to CJS. Thecurrent mechanism in India has only explored a very limited demesne while a few countries have reached the level of shutting down its prisons. A gradual decrease in theprison population also means budgetary allocation into other developmental activities. And the first step to catch up is to know which direction o move in. Alternative approaches to CJS can safeguard the eminent Human Rights and also save a lot of Tax-payers money by reducing the number of prisons and entailing to a better rehabilitated populace and reduced Recidivism.

AROUND THE GLOBE

Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1)

Decision rejecting the parties' applications for annulment of the Award and annulling the Decision on Supplemental Decisions and Rectification issued on December 17, 1992.

Cemex Asia Holdings Ltd v. Republic of Indonesia (ICSID Case No. ARB/04/3)

Settlement agreed by the parties and settlement recorded at their request in the form of an award (Award embodying the parties'settlement agreement rendered on February 23, 2007, pursuant to Arbitration Rule 43(2)).

KT Asia Investment Group B.V. v. Republic of Kazakhstan (ICSID Case No. ARB/09/8)

The ad hoc Committee issues a procedural order for the discontinuance of the proceeding for lack of payment of the required advances, pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e).

Singapore: Court of Appeal sets aside arbitral award for breach of natural justice [CAJ v. CAI]

The Court of Appeal in CAJ v. CAI has upheld an earlier High Court decision to set aside part of an arbitral award, in circumstances where the party was deprived of its fundamental right to be heard- i.e., the right to present its case, and the right to respond to the case against it. While cases of arbitral awards being set aside are uncommon, this case shows that the Singapore court will intervene when there are meritorious challenges.

Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania (ICSID Case No.ARB/11/24)

The ad hoc Committee issues an order for the discontinuance of the proceeding for lack of payment of the required advances,pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e).

Churchill Mining Plc and Planet Mining Pty Ltd, formerly ARB/12/14 v. Republic of Indonesia (ICSID Case No. ARB/12/14 and 12/40)

The ad hoc Committee issues its decision on annulment

Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste (ICSID Case No. ARB/15/2)

The Tribunal renders its award.

Cube Infrastructure Fund SICAV and others v. Kingdom of Spain (ICSID Case No. ARB/15/20)

The ad hoc Committee issues its decision on annulment.

Tantalum International Ltd. and Emerge Gaming Ltd. v. Arab Republic of Egypt (ICSID Case No.ARB/18/22)

The Tribunal issues a procedural order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1).

MEDIATION AND NEGOTIATION IN BANKING SECTOR

By – Rithik Aggarwal

Dealings concerning bank liabilities are coordinated in the irksome circle of the client's commitment. An institutional advance chief, a bank, routinely weakens the borrower who feels that they are not an identical assistant in dealings and anticipates their adverse result. The obliged individual often dodges a standoff with the bank's referees and falls apart what is happening. In transit to understanding, the go-betweens need tovanquish both the client's financial difficulties and their psychological limits.

KINDS OF NEGOTIATIONS IN THE BANK DEBTS SECTOR

Courses of action concerning bank commitments are driven on an irksome plane that incorporates the client's commitment. An institutional credit chief - a bank, every so often hinders an obliged individual, who feels a conflicting associate in dealings, accepting their unfavourable result. Generally, obligated people avoid a confrontation with bank arbiters, as needs are even compound things. They don't comprehend that bank labourer or co-agents - called commitment mediators or commitment finders – an attempt at spreading out a quick contact essentially to show up at a plan concerning commitment repayment. While going to plan, arbiters ought to beat either money related difficulties on a piece of clients, or their psychological limits

The place of courses of action is to sort out the conditions, in which an unprecedentedcommitment occurred and to fix an ideal repayment plan, acceptable for the bank anddoable for the client. Since clients consistently stay inert - they escape from their commitment - the middle person's task is to make the client aware of the need to defy the difficulties. To this end, they most often endeavour the going with exercises:

- making the client aware of legitimate results – from a psychological point of view,
- making the client aware of financial outcomes,
- making client aware of social results,
- making the client aware of blood-related results,
- intriguing to validity.

There are by and large relentless reports of intense, uncivil Laboure sways to deal with descending on account holders. Regardless of the way that banks underline their labourers should follow the Ethical Code, at the same time they put absurd pressure on their results.

Accordingly, borrowers, desire to be treated with concession, which doesn't recommend that a considerate talk is persistently adequately convincing.

To make real progress, arbitrators use various kinds of the game plan. In light of a fundamental examination of the composing with respect to the matter, five kinds of game plans were singled out

- from the spot of a 'controller',
- from the spot of a 'strong hand',
- from the spot of 'I close the case',
- from the spot of 'I will deal with things here,
- from the spot of 'I can't muster the energy to care.

The kind of dealings coordinated with a client from the spot of a 'controller' powers an incredibly formal course of the talk. The middle person drives an inquisitive evaluation figuring out the reasons essential the late obligations. The individual demands that the clients address their negligence shown towards their moneylender and powers plans. Clearly, the mediator ponders the situation and capacities of the client, regardless, such sort of trades widely limits the possible penchant on piece of the obligated individual to make claims.

Other demeanour shown by a commitment authority could lead, for example, to the situation where obligation holders will absolutely isolate themselves from their commitment.

Dealings from the spot of a 'steady hand' motivate the quality of understanding while simultaneously making game arrangements. Go between comprehending the client and showing the will to give help. The individual looks for the best method for easing the discussion. Tragically, various clients don't agree to the strategies made during such assembling, since they are calmed someplace close to how their case is managed by an all-around organised arbitrator. 'I close the case' incorporates the way to deal with wrangling with a weight of a period of pressure, which is - a way - constrained by genuine fundamental deadlines, for instance, a deadline for conveying legal action to get a solicitation for a portion.

Client needs to some degree quickly state whether they acknowledge a pledge to repay their liabilities and embrace introductory stages as repayments proportionally fast. Such strain and the apparition of a time span elapsing for amiable reimbursements regularly convince obliged people well and they began to deal with their money-related issues, undertaking unequivocal exercises. A similar kind of trade is 'I will deal with things here.There is no time for a summary of complaints. It is the last deadline to deal with thingsand for clear decisions of both the arbiter and client. Trades with the 'I wouldn't fret' winning mindset are as often as possible a convincing technique to show up at the client. A borrower is convinced that a commitment authority will ask or descend on them to get a portion towards their commitment and - as opposed to focusing in whilegoing to beat money related issues - they are inventive in the way to outfit an arbitratorwith an insightful and interesting reaction. They feel the specialists of their situation, which is most frequently grievous for them. Authority's separation makes it doable for an obligated individual to fathom that it is their business, the predetermination of their financial situation that is at this point being referred to and they can help themselves the best. Such a mediator's attitude could rouse the client to change their disposition from inert to a dynamic one. The kind of trade depends upon numerous components, similar to the mediator's tendencies, kind of client, conditions and genuine conditions for a given commitment. There may moreover happen explicit differentiation in the interpretation of the referred to sorts of game plans by various middle people. Before long, the doubts are basically something practically the same and the guideline point isto choose a simultaneousness with the client, in light of which they repay their commitments without the need to endeavour more fanatic and exorbitant legitimate measures.

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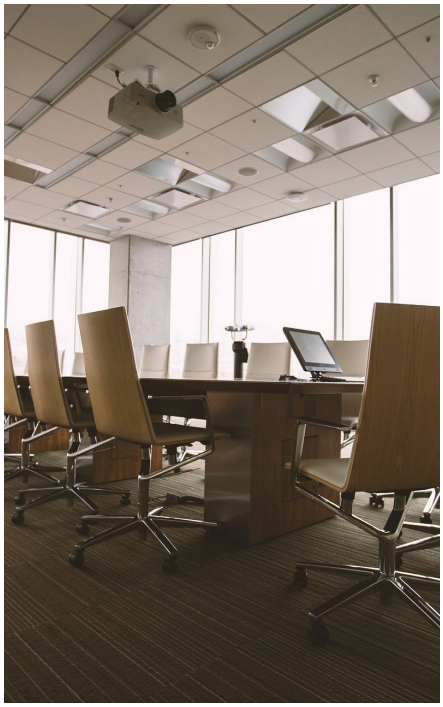

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Disputes are rife in all walks of life. In the era of increasing legal disputes due to high population within which there are different demographics, not all people can afford the high cost of going to court to seek justice or wait for years to get justice. Here we come to assist you. We intend to bridge the gap between the classes in a community and mediators, and provide a linkage between the same with an aim to provide social awareness.

Apart from this, we organize various landmarks events such as conferences, webinars, competitions including Mediation and Arbitration Competitions.

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