BRAND. Broad Research in Accounting, Negotiation, and Distribution ISSN 2067-8177,
Volume 6, Issues 1 & 2, 2015

Mediation: The Wise Advocacy

Towseef Ahmad
University of Kashmir, Srinagar, India
towseefahmad7@gmail.com

Abstract

Adversarial litigation is not the only means of resolving disputes and settling of claims. There are various options. Alternative means of dispute resolution can save money and time, and can help to anchor and resolve the dispute while exploring valuable good offices, amicable approaches and facilitation. Mediation, as used in law, is a process of managing negotiation by a neutral third party in the form of Alternative Dispute Resolution (ADR), as a convenient way of resolving disputes between two or more parties with speediation processes. On the sidelines typically, a neutral third party, the mediator assists the parties to negotiate a settlement. The term "mediation" broadly refers to any instance in which a neutral third party helps others to reach an amicable and mutually acceptable agreement. More specifically, mediation has a structure, timetable and dynamic approaches that "ordinary" negotiations usually lack. The process helps the parties to flourish the healthy ideas which are different and distinct from the legal rights in a Court of law. It is well known in International Law also and disputants can submit their disputes to mediation in a variety of matters such as commercial, legal, diplomatic, workplace, community and family matters, which assumes a great significance and it is bricolaged within the framework of this article.

Keywords: Adversarial, Litigation, Mediation, Negotiation and Amicable.

1. Introduction

Mediation is a special form of negotiation in which a neutral third party plays an active and dynamic role. With some active facework constructs and some jazz it has two characteristics. The individualist construct is represented by one which is linked to the idea of self-orientation. (Waterman, A.S., 1984). The collectivist construct on the other hand, is described as a cluster of a wide variety of beliefs and behaviours (Hui & Triadis, 1986), (Sebastian).

Mediation may come about by different methods like a private arrangement between the parties, peer negotiation, as a result of a legislative directive, or as a consequence of Court orders or tribunal initiative (Azarov, 2012). As Court dockets fill, and more and more demand is placed on a mediator, it is important for a mediator to analyze a case quickly though reasonably. As the demands on a mediator change, mediators must change their expectations too and be prepared and willing to adopt and consider new options and roles (Dey, Mankoff, Abowd & Carter). This active role is to help the parties to give them a chance of reconciliation and mitigate the acts of whinging the conflict to achieve a naturally desired and acceptable settlement.

Mediation, as a form of alternative dispute resolution (ADR), or amicable dispute resolution (also ADR), is a legal technique for the resolution of disputes generally outside the courts, where the parties to a dispute refer it to a neutral third party intervention. It is non-binding. It is a settlement technique in which a third party reviews the case and persuades a decision to help the parties in conflict to achieve a naturally acceptable settlement. It is a form of settlement negotiation facilitated by a neutral third party and non-binding mediatory processes and dispute-resolution skills by experts.

2. An Aware Mediator

Mediator should be aware and alert well-wisher to know the merits of the case at hand. He must involve the parties at dispute actively and assist them to resolve the matter at stake amicably

and in a friendly atmosphere. A characteristic of an aware, sensor-rich environment is that it senses and reacts to context, information sensed about the environment's mobile occupants and their activities, by providing context-needed services that facilitate the occupants in their everyday actions (Belak & Deshpande). A mediator seeks to help parties to develop a shared understanding of the conflict and to work towards building a practical solution to the problems. Mediation serves to identify the disputed issues and to generate options that help disputants to neutralise the bitter experiences and reach a mutually-satisfactory solution.

It offers relatively flexible processes; and any settlement reached should have the agreement of all the parties for the outcome of strengthening their relationships and removing their differences and enlarging the scope of protection of their interests. Mediation is not meditation, although a considerable body of evidence in the scientific literature, as well as reputed media publications, are supportive of the hypothesis that meditation will enhance workplace mediation programs (Manocha). The theoretical explanation for the effects of relaxation techniques is that the release of catecholamines and other hormones are reduced and parasympathetic activity is increased (Encina, 2002).

A mediator may use inclusive caucusing to deal with strained relationships. In the same vein the central element of the pre-caucusing stage aims to assess the potential benefits and harms of bringing stakeholders together, before any damage to the strained relationships protracts (Moore, 1987), (Wolski).

As law students know, this contrasts with adversarial litigation, which normally settles the dispute in favour of the party with the strongest legal brief. Mediation is different from counselling, therapy or adversarial advocacy. It is a wise advocacy. The mediator does not take sides or push for any one monotonous or redundant solution. Mediators maintain a neutral role. Mediation does not replace the need for legal advice or counselling if your "interests" in a situation are sincerely your concern.

This legal technique is a way of resolving disputes between two or more parties with concrete effects and bold confidence. Typically, a third party, the mediator, assists the parties to negotiate and reach a pragmatic solution. The disputants can submit their disputes to mediation in a variety of matters, such as commercial, legal, diplomatic, workplace, community and family matters (Sinha, B. S.).

3. National Significance of Mediation

3.1.Court-Referred Mediation in India

It is interesting to note that it took even some developed countries like USA, twenty years to effectively integrate its mediation system with its Court system. India too has started the process to develop its mediation system and should hopefully have an effective mediation mechanism in place by 2020. Keeping the study of a leading weekly magazine in mind, every judge will have an average load of about 2 thousand cases during his or her career. Is it a cause of despair? The answer is affirmative. However, with the correct implementation of ADR expertise and trainning, especially mediation, this backlog of cases can be cleared within a reasonable time. It applies to cases pending in Courts and which the Court would refer to mediation under section 89 of the Code of Civil Procedure, 1908 (Concept and Process of Mediation).

A Mini-trial differs from mediation and that is usually conducted after formal *litigation* has already been undertaken. The outcome of the mini-trial is generally confidential and advisory only, and the parties may proceed to trial if settlement negotiations fail.

3.2.The Potential for Private Mediation in India

The parties look up to the best mediators. There should be no let-up. The selection of the mediators is therefore necessary. In private mediation qualified mediators offer their services on a private, voluntary and fee-for-service basis to members of the public, to members of the particular

workplace environment and also to the governmental sector to resolve disputes through mediation. Private mediation is used in connection with disputes pending in Courts and pre-litigation disputes.

As already said, typically, a neutral third party, the mediator, assists the parties to negotiate a settlement amicably and the disputants can submit their disputes to mediation in a variety of matters (Azarov, 2009).

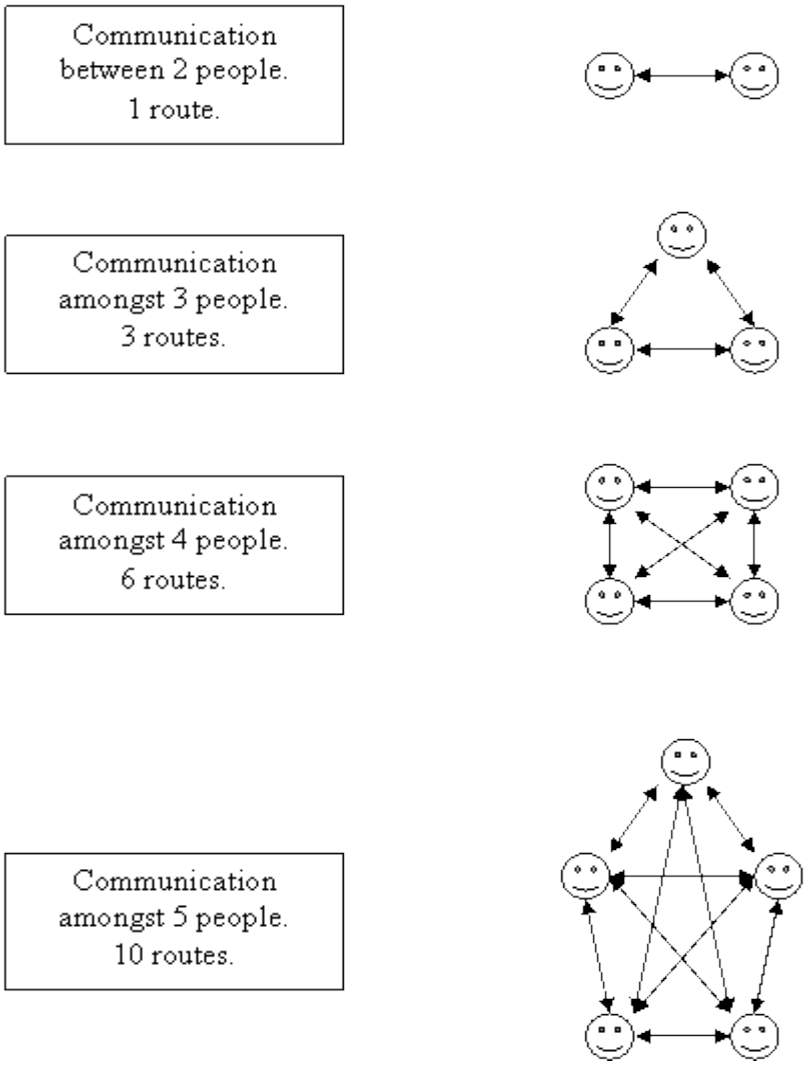

Figure 1. Source: Azarov, A. Multi-Party Facilitation-Improvisation: How to 'Do The Jazz' in Multi-party Facilitations. Available from URL: http://www.mediate.com/articles/

It can be seen in the representational image on mediation that as the number of people in a negotiation increases linearly (say, 2, 3, 4, 5 and so on), the number of possible routes of interaction increases exponentially (i.e. 1, 3, 6, 10 and so on) in this transcript (Singh, 2007).

United States	1. American Arbitration Association (AAA) 2. Center for Public Resources (CPR) 3. Endispute Inc. 4. Judicial Arbitration and Mediation Services (JAMS)

	5. Indicate Inc. 6. Society of Professional in Dispute Resolution (SPIDR)
United Kingdom	1. British Academy of Experts (BAE) 2. Centre for Dispute Resolution (CEDR) 3. Chartered Institute of Arbitrators (CIArb) 4. Construction Disputes Resolution Group (CDRG) 5. Institution of Civil Engineers (ICE) 6. IDR Europe Ltd.
Australia	1. Australian Commercial Disputes Centre (ACDC) 2. Institute of Arbitrators 3. Lawyers Engaged in Alternative Dispute Resolution (LEADR)

Figure 2. Organisations Established to Promote and /or Provide ADR Services. Source: Adapted from Lau, Kin-ho, Lewis. The role of alternative dispute resolution methods in the construction industry and the application of these methods in Hong Kong. Available from URL: http://hdl.handle.net/10722/37025

4. International Significance of Mediation

The use of the term "mediation" is well known in International Law (Beber, 2012). A mediator has to reduce the gulf between the conflicting parties by his goodwill. Mediation is the most frequently utilized technique and most common form of peaceful recourse to third-party intervention in international conflicts (Bondy & Mulcahy, 2009).

Figure 3.Mediation

It prompts an amicable dialogue by active intermediate postures and actively rebooted gestures. It cannot be parroted mechanically. Moreover, if mediation has to be fruitful, both parties in a dispute must realize that there is either something to gain from, engaging in it or something to lose from not attempting it, at all.

5. Conclusion

The objective of the mediation is to enable the parties to reach a mutually agreed and acceptable settlement of their festering problems or strained relationships. The wise mediator and his advocacy is independent and neutral, as it should be. The mediator's role is not to adjudicate the dispute. *Prepare for Mediation and forget Litigation.*

References

Azarov, A. (2009). Multi-Party Facilitation-Improvisation: How to 'Do The Jazz' in Multi-party Facilitations. Retrieved from: http://www.mediate.com/articles/

Azarov, A. (2012). Speediation: The Challenges of Resolving a Dispute in an Hour. Sydney, Retrieved from: http://www.mediate.com/articles/

Beber, B. (2012). International Mediation, Selection Effects, and the Question of Bias, *Conflict Management and Peace Science, volume 29(4), pp. 397-398*, DOI: 10.1177/0738894212449091.

Belak, T., & Deshpande, B. P., Meditation Enhances Mediation: A Six Sigma Perspective. Retrieved from: http://www.mediate.com/pdf/

Bondy, V. & Mulcahy, L. (2009). Mediation and Judicial Review: An empirical research study. The Nuffield Foundation, (pp. 19) London, The Public Law Project. Retrieved from: http://www.nuffieldfoundation.org/sites/

Concept and Process of Mediation. Mediation and Conciliation Project Committee. Supreme Court of India, New Delhi. Retrieved from: http://www.mediationbhc.gov.in/

Dey, A., Mankoff, J., Abowd, G., & Carter, S. Distributed mediation of ambiguous context in aware environments, 1-10. Retrieved from: http://www.cs.gmu.edu/~jpsousa/classes/

Encina, B. G. (2002). Contributions of Caucusing and Pre-Caucusing to Mediation. *Group Facilitation: A Research and Applications*, Number 4, pp. 6.

Hui, H. & Triadis, H. C. (1986). Journal of Cross-Cultural Psychology, *Individualism-collectivism: A study of crosscultural researchers*, Hong Kong, Sage

Manocha, R., Why meditation?, *Australia Family Physician, volume 29, pp. 1135-1138*. Retrieved from: http://www.ncbi.nlm.nih.gov/

Sebastian, J. (1997). A Study of Conflict Management. The Intercultural Mediation Project: In an Intercultural Context, Berlin, in *Berghof Occasional Paper No. 15*, Berghof Research Center for Constructive Conflict Management. Retrieved from: http://www.berghof-foundation.org/

Singh, A. (2007). Law of Arbitration and Conciliation. Including Alternative Dispute Resolution Systems, Lucknow, Eastern Book Company.

Sinha, B. S., Courts and Alternatives. Retrieved from: http://delhimediationcentre.gov.in/articles.htm/

Wolski, B., On Mediation, Legal Representatives and Advocates. *UNSW Law Journal Volume 38(1), 5-6*. Retrieved from: http://www.unswlawjournal.unsw.edu.au/issue/volume-38-no-1