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Why Mediation Matters?

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Abstract

The advantages of mediation have often been understated. This is largely due to the disbelief in the rightfulness of settlement of disputes without a judge and the greed of procuring more money through hefty damages as opposed to minor settlements, and the inability to compromise due to resentment or lack of ability to communicate. While there may be instances that may go on to prove litigation and other forms of alternate dispute mechanisms as to be advantageous; the benefits that accrue from mediation stand out due to the low levels of risk involved in the process and the fact that it is can result in a win-win situation. Unlike litigation, or other forms of alternate dispute mechanisms, mediation involves the role of a mediator, or a neutral third party who merely assists to maximise mutual gain of the parties, and therefore, more often than not mediation ends up in making the entire process of settling disputes amicable for both parties. This paper highlights the impact of mediation and the various overlooked gains it has over other forms of dispute settlement mechanisms. It also looks into the substantive and procedural implications of various steps in the method of mediation ranging from the gamut of deciding and opting for mediation, till how to decide as to how a mediator ought to be selected and conclude a mediation so as to debunk the myth surrounding the forcefulness of mediation and the processes involved therein.

Introduction

A farmer in ancient China had a neighbour who was a hunter, and who owned ferocious and poorly trained hunting dogs. They jumped the fence frequently and chased the farmer's lambs. The farmer asked his neighbour to keep his dogs in check, but this fell on deaf ears. One day the dogs again jumped the fence and

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attacked and severely injured several of the lambs. The farmer had enough, and went to town to consult a judge who listened carefully to the story and said, "I could punish the hunter and instruct him to keep his dogs chained or lock them up. But you would lose a friend and gain an enemy. Which would you rather have, friend or foe for a neighbour?" The farmer replied that he preferred a friend. "Alright, I will offer you a solution that keeps your lambs safe, and which will keep your neighbour a friend." Having heard the judge's solution, the farmer agreed. Once at home, the farmer immediately put the judge's suggestions to the test. He took three of his best lambs and presented them to his neighbour's three small sons, who were very happy and began to play with them. To protect his son's newly acquired playthings, the hunter built a strong kennel for his dogs. Since then, the dogs never again bothered the farmer's lambs. Out of gratitude for the farmer's generosity toward his sons, the hunter often shared the meat he had hunted with the farmer. The farmer also reciprocated by sending the hunter milk and cheese. Within a short time, the neighbours became good friends.

The above story is a typical example of voluntary dispute resolution. Voluntary dispute settlement practices like negotiation or mediation would flourish and constitute an integral part of civilised life. It is said that these processes are voluntarily produced, voluntarily adjudicated, and voluntarily enforced and has proved to be a moral and practical alternative to compulsory dispute settlement processes like litigation or arbitration.

Dispute resolution by litigation or arbitration also has another essential characteristic – someone wins while the other loses. We need to understand that both litigation and arbitration are right-based or position-based processes, where a decision is made by a third party based on your legal rights and evidence. On the contrary mediation is an interest-based process. The mediator, who is a neutral third party, assists the parties to arrive at a resolution on a collaborative method to maximise mutual gain.

"Mediation" is a term known to everyone, but understood differently. In common parlance, mediation is mostly associated with "concessions" or "brokering". Most people think that in mediation, parties have to compromise or "give and take", to arrive at a settlement. For e.g., if 'A' owes Rs. 1,000/- to 'B', a mediator could persuade and convince 'B' to settle at Rs. 750/-, if 'A' pays it today. At any rate, the popular belief is that mediator has to make a break-through by persuading the party to arrive at a figure less than Rs. 1,000/-, proposing a settlement, advising him that if he goes for litigation the outcome may come after many years and it is always better for him to settle it today. I would say that this is a misconception about mediation. Highlighting

the "compromise" factor in mediation gives it a negative impact, as people think it gives out the signal of "weakness". It is precisely because of this misconception most of the people hesitate to give the first offer to mediate.

Mediation is something totally different. It is a voluntary resolution of dispute based on interest and satisfying both parties' needs. Even though the "orange" story is a very popular one and most of you must have heard about it before, I have to depend on the same story to clarify position-based and interest-based dispute resolution:

In a house two children, a boy and a girl were fighting over an orange. There was only one orange left in the fridge. Both of them wanted the orange and they were fighting for it. Ultimately both of them ended up crying. The father, who was busy with his work, intervened and asked them about the issue. Both of them told they want the orange. The father grabbed a knife and cut the orange into two and gave it to both of them. But they continued crying and threw away the pieces they got.

This is position-based resolution. Because both of them were his children and both of them were "legally" entitled to the orange and the equitable division was to give them half. This is exactly how disputes are resolved in litigation. Here you can compare the court to the father. The courts are busy with heavy court dockets and pendency and do not have much time to inquire into the issue in detail.

Now we will look at the same situation. The mother patiently calls both the children who are fighting for the orange. She first manages their emotions and calms them down. She then asks them as to why they require the orange. The son wants to eat the fruit and the daughter wants the peel of the orange for baking a cake. The problem is solved instantly. Even without the intervention of the mother, the children could now resolve their issue. The fruit to the son and the peel to the daughter!

This is interest-based resolution. Rather than looking at positions, the interest behind taking such positions are looked into by the Mediator and he tries to resolve the dispute in the best interest of both parties. Like the mother the mediator has the patience and time to listen to the parties, control their emotions and understand their needs or interests and ultimately a solution would come up with his assistance.

This is business intelligence. Businesses want processes which apart from resolving the dispute, preserve or enhance the business relationship. Conceptually speaking, mediation is a dramatic departure from the standard processes of dispute resolution, because it makes both parties win. Mediation is win-win. Both sides feel they have won and both sides feel good about the outcome.

Even though mediation has now become one of the most preferred modes of dispute resolution among the global business community and international legal practitioners have also shifted up to an expanded use of mediation, mediation is still considered as an anomalous process by the Indian business and lawyers' community. This article is meant to dispel some of the myths about mediation and how it could be sophisticatedly used.

Deciding to opt for Mediation?

In some cases, the decision to use mediation is made in the dispute resolution clause drafted in the contract itself by the parties. Increasingly parties have started using a multistep dispute resolution clause whereby negotiation and then mediation are required to be attempted before arbitration is invoked.

But if the parties are not contractually required to utilize mediation for their dispute, then the decision to attempt mediation becomes purely voluntary. Considering the fact that mediation gives the benefit of party control, attention to party interests rather than positions, confidentiality and preserves relationship, unless there is a significant reason not to employ mediation, it should be the initial dispute resolution process of choice. Probable reasons for not opting mediation could be the need to establish a legal precedent, the need to obtain an immediate court injunction, or unwillingness to engage with an unreliable party.

How to start Mediation?

Mediation can be invoked at any stage of the dispute. But an early use offers a number of advantages – like avoiding substantial costs, more chances of a resolution since it would be less likely that parties have hardened their positions.

Even if the party is aware about the advantage of mediation, the initial stumbling block to start mediation is to decide as to who will suggest mediation. The general myth is that the party suggesting mediation signals a sign of weakness. It would be easier if you have a dispute resolution clause in the contract which stipulates a process of mediation, so that initiating mediation becomes a contractual obligation. But in the absence of such a clause, you can suggest mediation clarifying your intent to mediate. As stated earlier, mediation is not compromise or concession, but another mode of dispute resolution and now it is known to big corporate that opting for mediation is not a sign of weakness, but a policy aspect of the company. Many companies have signed the "Pledge to mediate", showing its commitment to use mediation as the first option to resolve any dispute. This also gives a public declaration that they don't drag their business partners to unnecessary litigation. This helps the party to give the first offer to mediate.

How to select the Mediator?

A number of factors have to be considered in deciding whom to be appointed as the mediator. Parties often think that the mediator have to be a subject-matter expert and should have experience and expertise in the issues involved. We need to understand that mediation is assisted negotiation and the mediator should have the skill and expertise to facilitate the parties to a resolution. The mediator is not a judge or an arbitrator – he does not impose any decision on the parties. So as a general rule, process-expertise and negotiation skills are more important than subject-matter expertise.

Another key rationale for selecting the mediator is the element of confidence in the independent professionalism of the mediator. One of the concerns would be which Code of Conduct binds the mediator, and which disciplinary process applies.

As mediation is practiced behind closed doors in confidential environments, the individual abilities and characteristics of those practicing as mediators are hard, often impossible, for users to assess in advance. So, how do we find such mediators?

We need to search for mediators who are trained and accredited/certified by organizations or empanelled by institutions. A Certified Mediator's profile that includes a Feedback Digest prepared by an independent and trustworthy source as an attestation of competency addresses both competency and suitability aspects and increases the likelihood that all the parties will agree to the selection of such a mediator. I know international organisations that will now only consider appointing IMI Certified mediators, because the thing that they regard as critical is the Feedback Digest embedded in every IMI Certified Mediator's Profile. As IMI Certification gains wider recognition among users, this trend is sure to increase .

You can select accredited and certified mediators from mediation provider organizations , who follow accreditation procedures as per international standards. This gives the confidence for the other party to accept the nomination, even if the same is suggested by one party.

Who should attend Mediation?

The ultimate decision maker should attend for each side. This not only makes sure that the resolution could be made in the mediation without consulting anyone else, but also helps in such person witnessing and experiencing what the mediation session has to offer. Reality testing, option building and interacting directly with the other side are of enormous value and cannot be adequately experienced if the person is not the decision maker.

Mediation has grown beyond the skills of the mediators alone. Mediation would become more successful and credible when the parties' advocates or advisors are knowledgeable and skilled in the mediation process. Trained mediation advocates can bring value addition to the process and can help parties achieve outcomes that may be unattainable in a courtroom or arbitral tribunal. So you need to select your counsel who is trained in mediation advocacy.

How to conclude Mediation?

If a resolution or agreement is reached, the parties or their counsels may agree to have the settlement agreement made. This could be made on the very same day, or if it is a complex matter, this could be made during the next couple of days. In such a case, it would ideal to make a jointly signed memorandum of the key terms of the settlement, so that the parties have clarity of the terms, failing which the entire agreement may disintegrate. If the parties need to make the settlement agreement binding and executable, they can opt to make the settlement agreement under Section 73 of the Arbitration and Conciliation Act, so that it gets the status of an arbitral award.

The ideal ending of mediation is to reach a resolution. But it may not happen in all mediations. But in many cases, there could be partial resolutions in substantive matters or at least some resolution on future procedural aspects. The Counsels should be prepared for that and the client must be advised of that and this should be made use of rather than walking out of the mediation without anything in hand.

As per the rules of some mediation provider organizations, even if the mediation fails or even if the other side does not attend the mediation session, the applicant will get a Mediation Status Report . This will provide a record that the party had initiated a process for amicable resolution of dispute, which was rejected by the other side.

Conclusion

There is no doubt that in recent years mediations have become much more prevalent in civil and commercial matters. Nonetheless, a number of common questions and misperceptions continue to persist. It is always good to understand the mediation process and opt for it when you find that it is the appropriate dispute resolution method for your dispute. After all you have the option of adjudication process which offers the ups and downs of the roller-coaster ride ahead! No wonder it is said that an ounce of Mediation is worth a pound of Arbitration and ton of Litigation!

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