MEDIATION- THE MAGIC MANTRA?

Whether one is having an off day or a lucky day in Court, there is one common denominator to every litigator's court experience and that is the daily discourse on burgeoning caseload given by judges nearly every day. Rare are those times when an overworked (and usually underpaid) judge does not lament in open court about the futility of litigating disputes that usually do not merit wastage of judicial time. While the well meaning judge certainly does not intend to ignore any one's rightful claim, such opinions emanate from the plethora of disputes that could easily be adjudicated out of court and in a shorter amount of time than what litigants usually invest in a regular judicial process.

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It is under these circumstances that more and more people have begun to explore other avenues that are cost-effective and less time consuming than conventional litigation. It is also the opportune time to witness an increased interest in mechanisms of Alternative Dispute Resolution. Post Bhatia-Balco and other relevant decisions enunciating and highlighting the varied facets of commercial arbitration, this field of law may easily be the most recognizable type of ADR. However, slowly yet steadily another limb is making it presence felt due to its efficiency and popularity.

Mediation involves a structured negotiation process in which an independent person, known as a mediator, assists the parties to identify and assess options in order to negotiate an agreement for an amicable resolution of their disputes. Mediation has also shown to address the causes of disputes, reduce the alienation of litigants, and inspire consensual agreements that are complied with and are durable over time and help disputants resume workable relationships.[1] Instead, the parties, with the assistance of the mediator, can reach a solution which is tailored to their real needs and interests.[2] This entire process is achieved without stepping into the confines of a courtroom, which is precisely the reason why mediation is an alluring option as it bodes well for business and commercial transactions. It is widely accepted and known that having less litigation and more out-of-court settlements improves trade and commercial developments. Many countries already have legislations in place that give their courts the leeway to order disputing parties to mediate, when deemed appropriate, and various other countries are now focused on bringing about laws that enable parties to go for mediation even before the court's intervention over the issue.

While the premise of mediation is largely borne out of skills of negotiation and psychology, law and legal process remains an integral part of the concept. The law remains in the foreground and emerges. One would be right in saying that mediation strives and facilities to reach a settlement, especially by maintaining the balance between law and equity, and for the same reason, would be effective in resolution of disputes before they are sent to courts.[3] The purpose of this brief is to highlight the palpable advantages of mediation and why this recent model might be the answer to many of the short and long term problems plaguing the Indian judicial system, with special emphasis on justice delivery mechanisms. "I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a

[1] Pearson, Jessica. "An Evaluation of Alternatives to Court Adjudications"
[2] Aird v. Prime Meridian Ltd, Aird [2006] EWCA Civ 1866; [2007] C.P. Rep. 18; [2007] B.L.R. 105 at [5]
[3] 1 Mauro Rubino-Sammartano, —Domestic, transnational, foreign and international mediations: legal issues", Arbitration 2015, 81(4), 381-388, at [3]

large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromise of hundreds of cases. I lost nothing thereby not even money; certainly not my soul." - MAHATMA GANDHI

Mediation & Arbitration- Two Sides of the same coin

Both mediation and arbitration arise out of the bigger umbrella of ADR but employ diverse techniques in their operation. Where mediation involves third party assistance in getting the disputants to achieve a voluntary settlement, arbitration involves the third party conducting a hearing. Arbitration requires the disputing parties to present their respective position vis-à-vis the dispute and the said stance is bolstered with necessary evidence. After evaluating the evidence and taking note of other relevant factors, the third party (arbitrator) issues a binding award.[4] Arbitration has lately become increasingly popular, both at the domestic and international levels and off late inserting an arbitration clause within contracts and while concluding agreements has become the norm.

However, the flipside to the system of arbitration is that it is not drastically different than the process of litigating in court and before a judge. While a mediator does not have any advisory role as to the content and outcome of the negotiation, an arbitrator, similar to a judge, gives a binding decision.[5]

Efficacy

The real success and reason for its increasing popularity is because of the freedom that mediation accords to disputants. It provides them with opportunities to participate in the process and explain their version of events in a more elaborate fashion. This contributes to the psychological satisfaction of a person who feels that he has contributed to his best efforts in determining the final outcome of the dispute. Numerous lawyers also see that mediation has improved communication between the parties and the attorneys. Furthermore on cases that eventually reached settlement, 90% of the mediated cases had a higher rate of settlement than cases that did not undergo mediation.[6]

Other noticeable advantages include reduced burden on judges docket, relatively lesser legal fee and the most attractive of all is saving of copious amount of time for all parties concerned. In commercial disputes, often a stalemate occurs due to lack of trust in the integrity of the other party, a genuine good faith difference of opinion on the facts underlying the dispute or on the probable outcome of the case. The mediator would assist in bringing parties together and build bridges of diplomacy and effective communication, by funneling out emotional aspects and working on a mutual consensus to the dispute at hand. This also fosters satisfaction among parties as they feel that the issue was resolved with their participation and efforts as opposed to it being thrust on them. The judicial fraternity too has come out in strong support to the cause of mediation since it offers a more efficient and cost effective system for the parties (and the courts

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[4] Elkouri, Elkouri, Goggin, & Volz, 1997
[5] Shah, Sayed Sikander. "Mediation in Marital Discord in Islamic Law: Legislative Foundation and Contemporary Application." Arab Law Quarterly 23.3 (2009): 329-46. Web.
[6] Dorcas Quek, ―Mandatory Mediation: An Oxymoron? Examining the Feasibility Of Implementing a Court-mandated Mediation Program", available at https://www.statecourts.gov.sg/Lawyer/Documents/The%20ADR%20Form.pdf#search=dorcas%20quek .

are not clogged up with cases that could have been resolved otherwise). Courts want faster disposal. Litigants want cost saving and an effective way of resolving the dispute. Lawyers want to ensure that their client's rights are not eroded. Mediation is slowly evolving as a concept that encompasses all these factors under its realm.

Scarce employment of Mediation techniques and consequent pitfalls

Despite its documented advantages, mediation may well be under-utilized in certain jurisdictions. Parties and their attorneys are still accustomed to treating litigation as the default mode of dispute resolution; initiating mediation may also be perceived as a sign of weakness. In many jurisdictions, the rates of voluntary usage of mediation have been low. For instance, in England's Central London County Court system in which mediation occurred only with the parties' consent, only 160 mediations took place out of the 4,500 cases in which mediation was offered.

In contrast, after England introduced changes within the Civil Procedure Rules, which empowered the courts to encourage the use of ADR (with cost sanctions), the number of commercial disputes referred for mediation increased by 141 percent.[7] Where the parties' reticence towards mediation is due to unfamiliarity with or ignorance of the process, court-mandated mediation may be instrumental in helping them overcome their prejudices or lack of understanding. The need to increase awareness and the usage of mediation services is probably the most compelling reason for introducing mandatory mediation.[8]Mediation has also been a way of getting people to appeal to their good side, negotiate disputes with a clear head and to consider and search for creative, forward-looking solutions to problems and develop understanding through possible collaborations.[9]

Court mandated Mediation outside India

a) Mandatory Mediation in Ontario: In 1999, Ontario introduced mandatory mediation for civil, non-family actions, with a provision for the parties to opt-out of filing a motion. The parties in all these cases have to undergo mediation within ninety days after the filing of the first defense. The parties in standard cases may consent to an extension of sixty days, but all other extensions have to be obtained through formal court orders.[10]

b) The U.K. Approach to Court Referral for Mediation: In the United Kingdom, mediation is theoretically a process that is entered into voluntarily. However, the courts have encouraged the use of mediation or ADR for suitable cases under the U.K. Civil Procedure Rules.

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[7] The Lord Chancellor Dep't, —Emerging Findings: An Early Evaluation Of Civil Justice Reforms", para. 4.12 (Mar. 2001), available at http://www.dca.gov.uk/civil/emerge/emerge.htm.
[8] Dorcas Quek, —Mandatory Mediation: An Oxymoron? Examining The Feasibility Of Implementing A Court-Mandated Mediation Program", available at https://www.statecourts.gov.sg/Lawyer/Documents/The%20ADR%20Form.pdf#search=dorcas%20quek
[9] Carrie Menkel-Meadow, "The Case For Mediation: The Things That Mediators Should Be Learning And Doing", Chartered Institute of Arbitrators 8th Symposium on Mediation, October 2015, Arbitration 2016, 82(1), 22-33.
[10] Tsormpatzoglou Stavros, "Compulsory mediation: A contradiction?" Pg. 20, available at https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/289/Stavros%20Tsormpatzoglou_3724_assignsubmission_file_Dissertation%20Tsormpatzoglou%20Stavros.pdf?sequence=1

c) Florida: Florida is the torchbearer among all states in USA with its comprehensive court-connected ADR program. It has been estimated that more than 100,000 cases are diverted from court process to mediation each year.

d) Italy: Italy's mediation law is an example of compulsory mediation. Italy's March 4, 2010, Legislative Decree No. 28, required that by March 2011 all civil disputes arising in the following areas proceed to mediation prior to gaining access to the courts: neighbor disputes, property rights, division of goods, trusts and estates, family-owned businesses, landlord/tenant disputes, loans, leasing of companies, disputes arising out of car and boat accidents, medical malpractice, libel, insurance, banking, and financial contracts.[11]

e) California: California's mandatory mediation law, which first became effective in 1981, requires that all custody and visitation disputes be mediated prior to being considered by the county Superior Court. In 1978, the Los Angeles Conciliation Court, the largest jurisdiction offering public sector mediation services, handled 747 cases with an estimated net savings to the County of Los Angeles of $175,004. The procedure was found to be so satisfactory and cost effective that it was made mandatory in 1981 with the enactment of S.B. 961.[12]

The Indian Perspective

Mediation has been an age-old practice in India, with people approaching Panchayats in villages for resolution of their disputes. A village Panchayat, comprising a group of five elderly men, used to be recognized and accepted as a conciliatory and/or decision-making body who took up grievances of the people of the village and got them to amicably come to a settlement, while continuing to maintain peace and harmony in the society. The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of Industrial disputes." Later, the Code of Civil Procedure was amended in the year 1999 to include Section 89, which explicitly established mediation as a separate ADR method. Section 89 along-with rules 1A, 1B and 1C of Order X of First schedule have been implemented by Section 7 and Section 20 of the CPC Amendment Act and cover the ambit of law related to Alternate Dispute resolution.

Section 89 of the Code of Civil Procedure States that: –

Sub Section (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for- (a) arbitration; (b) conciliation (c) judicial settlement including settlement through Lok Adalat; or (d) mediation.

Sub Section (2) Where a dispute had been referred-

[11] Herbert, William A., De Palo Giuseppe, Baker Ava V., Anthimos Apostolos, Tereshchenko Natalia, and Judin Michael. "International Commercial Mediation." The International Lawyer 45.1 (2011): 111-23. Pg 112. Web.

[12] Pearson, Jessica. "An Evaluation of Alternatives to Court Adjudication." The Justice System Journal 7.3 (1982): 420-44. At pg. 437. Web.

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

In India, Mediation is slowly gaining credence. Even though predominantly India uses court annexed mediation, but in time the practice and acceptance of private and court referred/assigned mediation and online mediation are in the offing. The Supreme Court in ***Afcons Infrastructure Ltd. & Anr v. Cherian Varkey Construction***[13] explained that mediation is a synonym of the term 'conciliation'. The Law Commission has also supported this viewpoint. Mediation, as a tool of the larger ADR jurisprudence, has got judicial recognition in India, as was pointed out by Justice Ranjana Prakash in para 39 of ***K. Srinivas Rao vs. D.A. Deepa***[14], which dealt with resolution of a matrimonial dispute. Prakash, J., had also expressed his views as under: In November 2015, leading English daily, The Indian Express published a newspaper report narrating the details of the Bangalore Mediation Centre in successfully mediating matrimonial and property disputes. The report said that of the total 25,028 cases received for mediation 24,097 cases settled. Of the 24,097 cases settled, 67% were matrimonial and 8,882 pertained to property disputes. The remaining was taken back by the parties as they patched up, or the 60-day period and the 30-day grace period expired.[15]

Delhi's brush with Mediation

The Delhi Government, working with the Delhi High Court, has been making positive strides in the cause of promoting mediation. Mediation centers operating under the aegis of the Government and Delhi High Court are present in all districts to hear all kinds of civil and petty criminal cases, regardless of their status in courts. The mediation centers are managed and supervised by trained mediators and officials. Similarly, the Delhi High Court has a Mediation and Conciliation Center, where thousands of cases are resolved by way of mediation and conciliation, thus resulting in faster disposal of the case and reduction in civil litigation in courts.

[13] (2010) 8 SCC 24
[14] (2013) 5 SCC 226
[15] "3,642 City Couples Sought Mediation", The Indian Express, 15.11.2015, available at http://www.newindianexpress.com/cities/bengaluru/3642-City-Couples-SoughtMediation/2015/11/15/article3128999.ece

Manmohan Singh, J., Delhi High Court, in an interview taken by Dilip K. Das for his book 'Trends in the Judiciary: Interviews with Judges Across the Globe', succinctly expressed his views as follows:

> *"There are several systems that have worked extremely well besides litigation in the courts. Our Delhi High Court Mediation Cell has been very successful. Within the span of a year or say a year and a half, about 100,000 cases were disposed of by mediation. Attorneys acting as mediators work for the best interests of their clients. As a mediator handles the proceedings like a Judge would, the client feels confident that his or her grievances will be resolved in the best possible way. Such a system of mediation has worked very effectively in the Delhi High Court and I have personally witnessed several cases... Also, the procedures for giving speedy justice like the mediation centers have proved to be effective in relieving the case load."*

Section 89 of CPC, 1908- A Necessary Evil

Section 89, as it presently exists, came into its current form on account of the enforcement of the CPC (Amendment) Act, 1999 with effect from 01.07.2002. The rules under Order X provide for when court may direct to take recourse to alternate means to resolve disputes, the duty of parties to appear before such forums and the responsibility of the presiding officer to act in interest of justice and return the suit if better suited for the court. The Law Commission, in its 129th Report advocated the need for amicable settlement of disputes between parties and the Malimath Committee recommended to make it mandatory for courts to refer disputes, after their issues having been framed by courts, for resolution through alternate means rather than litigation/trials.

Section 89 was introduced with a purpose of amicable, peaceful and mutual settlement between parties without intervention of the court. The case/dispute between parties shall go to trial only when there is a failure to reach a resolution. While Section 89 seems promising, there are several irregularities in the provision. Some such irregularities include:

1. In the Afcons' case, the Hon'ble Supreme Court had observed that the Section 89 had been drafted in a haphazard manner and the interpretation of the Section was observed to be "A trial judge's nightmare."

2. The terms "shall formulate the terms of settlement" impose a heavy and unnecessary burden on the courts. The formulation and reformulation of the issues to be dealt with by the courts and specifying the method to be adopted may leave the provision meaningless and out of place at the pre-ADR stage.[16]

3. A mediator's intervention leads to a settlement and such settlement is also authenticated by the mediator, but it is still not regarded as a decree. Notwithstanding, when the same mediator is referred to as a conciliator, the settlement reached through him is regarded as a decree.

4. Converting mandatory requirement into a directory provision also leads to an anomaly. Section 89(1) states that "where it appears to the court that there exists elements of a settlement

[16] Justice R. V. Raveendran, – "Section 89 CPC: Need for an Urgent Relook," (2007) 4 SCC J23.

which may be acceptable to parties". This necessarily means that the Court will refer the matter to ADR only when it finds elements of settlement in the dispute and not otherwise. Such words impute discretion to a provision which was intended by the lawmakers to be obligatory.

Mainstreaming of Mediation: The necessity and imminent challenges

Sir Anthony Clarke MR once said, "The more horses approach the trough the more will drink from it". This statement could not be more relevant in the present times when there are multifarious disputes arising out of numerous spheres of law. As law continues to grow and touch upon different areas, the scope for unique disputes is only widening. In other words, there is an urgent need to educate different stakeholders of the legal community about the significance of mediation.

India has come a long way as far as ADR is concerned and the time is ripe for mediation to be adopted as a legitimate prerequisite to litigation. The intrinsic function of mediation emphasizes the value of mediation as an end in itself. The debate in favor of mediation is not complete or successful without adverting to the following factors:-

a) Rigors of litigation including delay, rigidity of procedure and excessive costs involved costs. Mediation provides a solution to all of the above problems by being faster, more flexible and reducing drastically the expense involved.
b) In today's times, when courts are flooded with cases ranging from petty property disputes to high stake matters involving sky-rocketing expenses, mediation can save the day. There can be no doubts whatsoever that most cases pending in courts presently do not merit the amount of time and resources that are spent towards adjudicating these menial disputes. Such cases, being prioritized towards a settlement under mediation, can and will definitely reduce the burdensome docket.
c) The troubling issue of few judges in ratio to the pending disputes could also be headed towards resolution when certain cases are referred to mediation first.
d) The greed for winning a case and affirming that victory by the top-most Court of the country is the root cause for frivolous litigation. It is sparse knowledge that recourse to mediation can fetch a wider relief that even the Court, in its traditional wisdom of straitjacket adjudication, may not be able to provide.
e) Mediation assists in improving the relationship between both parties and makes them work towards a mutually acceptable solution as opposed to litigation which bears witness to embittered people embroiled in a dispute for years together.
f) Replacing arbitration with mediation poses longstanding advantages. Such substitution shall ensure commercial disputes may get settled by way of mediation in first instance with negotiations between the parties.
g) By mandating mediation, the focus of lawyers will also shift from merely litigating matters in courts to being a part of mediations and promoting better business environment structure and policies. This would also lead to an effective cleansing of the legal system, mould lawyers as social engineers and make the profession more inclusive.

Conclusion

> *"Litigation is not the way to good governance."*
> -Justice T.S. Thakur Chief Justice of India

While Section 89 of CPC seems promising, there are several irregularities in the provision. It would be most beneficial if this provision is remedied. It must also be remembered that most of the people are not aware of the process of mediation, and thus find it difficult to consent for it. If the process of mediation is made clearer and even compulsory, despite initial resistance, people will understand its value and will start approaching mediation centers in large numbers. India has seen huge success when it comes to mediation so far. Lawyers as well as judges have advocated bringing mediation into the mainstream. Therefore, it would be feasible for all concerned if Section 89 either mandates for it or makes the procedure of mediation clearer.

Mediation will cure India of the terrible affliction of pendency and pave way for an effective disputes redressal mechanism. It would be apt to conclude in the words of Right Honorable Lord Phillips C.J.: "In this field, as in others, India is ahead of us. I was aware before this visit of the amendment made to your Procedural Code by the famous S. 89 and of Sabharwal C.J.'s support of mediation in Salem Advocate Bar Association, Tamil Nadu v. Union of India. On this visit I have been learning with admiration of the progress made in instilling a culture of ADR in this jurisdiction. I hope very much that we shall follow where India is leading."

For further information on this topic please contact Nitin Walia or Smrithi Suresh at KMNP Law by telephone (+91-11-4550 2527) or email (n.walia@kmnplaw.com). The KMNP Law website can be accessed at www.kmnplaw.com.