



Centre for Alternative Dispute Resolution



CONFLICT RESOLUTION THROUGH MEDIATION

- BY FIRDOSH KASSAM

Alternative Dispute Resolution in India has assumed great significance as the Justice dispensing system in India is under tremendous stress primarily due to the huge number of cases being filed in Courts, huge pendency of cases and lack of adequate infrastructure to dispose them and inordinate delays. Litigation has increased manifold and costs of litigation have increased and also the Indian Courts find themselves ill-equipped and under-staffed to handle the huge influx of cases. The situation is compounded with the multi-tiered Appellate system. All this has led to frustration, disillusionment and loss of faith in the legal system.

Alternative Dispute Resolution popularly known as ADR has caused a lot of sensation in most of the countries and people are being made aware of the great significance in dispensation of justice particularly in a country like India where there are more than 30 million cases pending and it takes minimum 15 to 20 years for the disposal of cases. It has been repeated in a very well known magazine that if the filing stops it will take nearly 200 years to dispose of the backlog of cases.

One of the prominent Judge of the Apex Court in India has very rightly said and I quote "It is to be remembered that delay in disposal of cases has affected the entire system. To some extent, it is malignancy because unscrupulous litigants take advantage of such delays. For removing this malignancy, surgery is a must. That surgery is to be performed by the Chief Justices of the High Courts and the District Judges all over the Country. It is expected that the surgeon should not have shaky hands. He must be confident of what he is expected to do. Further, it is for the Judges or Chief Justices of the High Courts to see that the procedure prescribed under the CPC is strictly followed."

The search for a simple, quick, flexible and accessible dispute resolution system has resulted in the adoption of 'Alternative Dispute Resolution' mechanisms. ADR is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. It only prescribes the procedures of the courtroom for the simplicity, informality and expedition of ADR. The primary object of ADR system is avoidance of vexatious, expense and delay in the promotion of the ideal laid down in the Constitution for expeditious "access to justice".

Conciliation and Mediation is not new to the ethos and Indian culture where the Panchayat system (village elders) has been resolving disputes for centuries. It was during the British regime that the adjudicatory mode of dispensation of Justice was established. Even then the mode of Conciliation and Mediation prevailed and Mahatma Gandhi who is known as the Father of the Indian Nation himself practiced Mediation. He wrote and I quote ".....But both were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter into men's hearts. I realized that the true function of a lawyer was to unite Parties riven asunder. The

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lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul.”

The United Nation took a timely decision to give the UNCITRAL Model to see that speedy Justice is available for International Commerce due to Industrialisation and Globalisation and the trades flourishing in many countries.

India adopted the UNCITRAL Model and repealed the Indian Arbitration Act of 1940 which had led to frustration amongst the Litigants as most of the matters went in appeal. As far back as 1981 the Supreme Court which is the Apex Court in India in frustration with the Arbitration Act of 1940 made the following remark and I quote ““the way in which the proceedings under the Act of 1940 are conducted and without an exception challenged in Court, has made lawyers laugh and legal philosophers weep.”

After the enactment of the Arbitration and Conciliation Act of 1996 there was apprehension among the Judges as the word Alternative was misconstrued even by the Judges that it would substitute the established Court systems and take away the powers of the Judges. Instead of the word ‘Alternative’ the appropriate word could have been ‘Adoptive Dispute Resolution’ or ‘Effective Dispute Resolution’

The Advocates also when they first heard about the progress of ADR termed the same as an Alarming Drop in Revenue. The Judges from India were taken to USA to the Apex Court in Washington as also the other Courts in California to see how the ADR system works in USA. The Judges on this trip experienced the way ADR works and being very impressed, one of the Chief Justice remarked and I quote “seeing is believing”

Since then ADR has taken a big shift in India and today the Indian Government and Judiciary is geared up to set up Centres for ADR all over the country supported by the World Bank to implement the programmes as speedily and effectively as possible. The trainings have been conducted in practically most of the High Courts and District Courts in India in the last 5 years and tremendous progress has been made in implementing ADR throughout the Country.

Section 89 and Order X of the Civil Procedure Code has also been amended to the effect that when a matter comes before the Trial Court the Judge has discretion to refer it to any of the modes of ADR namely : 1. Conciliation 2. Mediation 3. Arbitration 4. Lok Adalats 5. Legal Service Authorities. The last two are public hearings and mainly relating to monetary claims and hundreds of cases are disposed of during the day in the Lok Adalats (Public Courts). The Legal Service Authority also provides assistance to any of the persons who cannot afford Litigation by referring to one of the modes of ADR mentioned above.

The Apex Court in India has itself taken a vital role in the implementation of ADR and one of the Chief Justices who recently retired has said and I quote “Let us hope the coming years would be years of “Conciliation, Mediation and Arbitration” and not of “Litigation”.



There are many advantages to the ADR methods:

- A settlement takes place without the necessity of filing a suit or even when a suit has been filed, without the necessity of a trial.
- Secondly, the cost factor is lesser. It reduce legal costs.
- Thirdly, the focus is not on attacking the opponent.
- Fourthly, the parties are satisfied with the solution they arrive at, and the same is not with a decision that is imposed on them by a Court.
- Fifthly, there is more timeliness in solution here than in the Courts of law which reduces time spent on litigation
- Sixthly, privacy and confidentiality is assured which is not there in Court proceedings. Confidentiality is maintained in business relationships and also in family relationships.
- Seventhly, the proceedings are conducted in an informal way with less technical procedure compared to Courts.
- Lastly, the disputes are resolved effectively. There is permanent and holistic resolution of the dispute in a spirit of 'Give and Take'

The Mediator must have various skills in order to successfully guide the process of Mediation, which are briefly described as follows:

1) **ACTIVE LISTENING** - The best way to concentrate, is to learn the art of listening through Meditation which helps a person to concentrate and to improve their power of concentration. Eye contact as well as active listening is very important. The easiest way to make a person listen is to practice the following exercise called SOLER.

Shoulder square - Keep your shoulders square while listening

Open Gestures - Keep your Gestures open and not closed

Lean Forward - When some interesting point is being made just lean forward

Eye Contact - Watch everyone in the Mediation Room

Relax - Always remain relaxed and not frustrated or angry or tired

Meditation also helps in the Spiritual growth besides bringing peace to the person practicing Meditation.

2) **COMMUNICATION** - The next important skill in Mediation is the communication skill. The way the Mediator communicates with the Parties and the Advocates, brings out the credibility and acceptability of the Mediator.

3) **OPTION GENERATION** - When the parties are in disputes it is as if the parties are in the woods and they do not know how to come out of the woods. The Conciliator or Mediator is above the woods and he knows exactly how to bring the parties out of the woods by generating options for them. The Mediator through his expertise, maturity and thinking power can generate good solution for the parties to resolve the dispute and this is one of the best options of the Mediator to prove that the matter can be resolved by generating options for the parties.

4) **REFRAMING** - The next skill of Mediator is to reframe hard or abusive language used by one of the litigants to bring down or change the interpretation of hard language, otherwise the other Party would be angry and upset, for eg. If one litigant says that the other litigant is a liar it



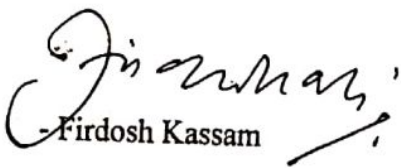
is bound to upset the other Party. The Mediator would intervene immediately, regarding the hard language used, mentioning to the litigant that the Mediator knows that the litigant is upset and what he means to convey is that the other party is not speaking the truth. Reframing helps to cool down the party using abusive language and to maintain the decorum of the process.

5) **TRANSPOSING** - Another quality of the Mediator who is conducting Mediation is to transpose the Parties by making the Plaintiff as Defendant and Defendant as Plaintiff. For eg. If a wall is painted golden in colour on one side and silver on the other side a person entering from the side where the wall is painted golden would say that the wall is golden and a person entering from the side where the wall is painted silver would say that wall is of silver colour. If the parties are allowed to argue they can fight over the matter which would lead to a dispute. In such cases it is better to transpose the Parties.

6) **REALITY TESTING** - The main skill of the Mediator is to go to the root cause of the dispute and bring the issue to the surface. When the matter comes before the Mediator, he should look at what are the issues that are dividing the parties and from where did these issues start. When the issues surfaced, there is clarity before the Mediator as to how he can deal with those disputes and find some common ground to make the parties reach an amicable settlement. When settlement is reached a good Mediator does Reality testing whether the Settlement would really work for the parties

7) **CONFIDENTIALITY**- The backbone of Mediation is total confidentiality which is to be maintained throughout the process of Mediation. The ethics of Mediation are to protect the Parties and assure them that the entire process is totally confidential and nothing said or any proposals or counter-proposals made during the process of Mediation, will be reported to the Court when the matter is referred back to the Court. Whether the Mediation succeeds or not, the Mediator would not give any reasons why the Mediation did not succeed or which Party is right or wrong. In Confidentiality, the Mediator also mentions to the Parties and the Advocates that he shall not come as Witness for any of the Parties and also that he shall not act as an Advocate of any of the Parties if the Mediation does not succeed. When this awareness is brought to the Parties they can open up their hearts to the Mediator, if not in the Joint Session then in the Private Session.

The resolution of disputes through the methods of Conciliation and Mediation will be faster, less expensive and involves less procedural formalities. It is expected that this provision will provide the public much needed relief. Resolution of disputes is an essential element of social peace and harmony. ADR's time has come and the future of the legal system would be Mediation rather than Litigation. With the dawn of the new age of globalisation and free trade economy and time being of importance, more and more individuals, businesses and agencies are convinced of the need to adopt ADR methods to settle disputes.


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