ADVERSARIAL PROCESS PROBLEMS: THE NEED FOR MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM

- *Anirudh.R*[1]

There are different processes through which disputes can be resolved. The most common dispute resolution process is the "adversarial process". Simply put, we go to court and argue in front of the judge and explain as to why you deserve to win more than the other. This is what is called as the win-lose situation.[2] But it is only fair to point out that this is not an easy process. It is rather a time consuming and an expensive process involving complex procedures to be followed. One has to go through various steps of the process to get the so called *deserved justice* and the final step to achieve this justice is to head to the Supreme Court. Importantly, it would affect relationships of the parties. This is an aspect which many don't give much importance to. While this may be a well-known process, it is definitely not the easiest process. This is one of the sole reasons for why there is a call for other ways to administer justice. Therefore, over the period of years, various alternative dispute resolution processes like arbitration, mediation and conciliation were established.

The problem with the adversarial process is that this it ends up pointing out who is right and who is wrong as per the legal and contractual rights mentioned under the law. But, what this system fails to see is that most often there is a hidden conflict which is masked by an apparent conflict. The adversarial system focuses more on the apparent conflict rather than the hidden conflict. Therefore, it is necessary to ask: Isn't it obvious that for a dispute to occur there must be a reason for why this dispute has occurred in the first place? The true reason for a dispute

---

1 Third Year Student of Ba. L.lb (Hons.) at NALSAR University of Law, India.

2 DAVIS, DOUGLAS, *MAKE PEACE NOW: FOR GOD'S SAKE, STOP THE BICKERING!*, AUTHOR HOUSE. (2014).

often lies in the hidden conflict. But, this reason in the hidden conflict is rarely addressed in the adversarial process.

For example, say a father and a son together own a partnership firm. But the father seems to dictate terms to the son and this angers the son. Finally, when the son is not able to take orders, he calls for winding up the firm and asks for the profits. Now, if this matter were to go to court, the court can simply order the father to share the profits and then wind up the firm.

The Court would not address the relationship conflict between the father and the son. The Court would instead address the provisions of partnership law and the son's legal entitlement to wind up the firm. Looking further, this case would probably take a long time to get resolved and it may end up at the Supreme Court. It results in both parties spending a lot of money to pay court fees and among others. Importantly, relationships can get strained. And adversarial process will produce a winner and a loser. In a process like mediation, there is a high chance that both parties can achieve a win-win solution without having to strain their relationship.[3]

Mediation is a unique process because it is voluntary meaning which parties cannot be forced into mediation without their free consent. The parties have the option of choosing their mediator. A mediation process can be tailor-made, in the sense, there is no exact procedure which a mediator must follow like a lawyer would be following the Civil Procedure Code or the Criminal Procedure Code etc. Further, non-legal issues (relationship issues, for instance) can be discussed and examined in a mediation process which is not so typical in a judicial process. Mediation process encourages parties in dispute to directly participate through communication and actively make decisions to resolve disputes between each other. In contrast, this is clearly not true with arbitration or a judicial process where only the judge or the arbitrator has the exclusive right to make decisions.

However, this is not to say that there are no risks involved in mediation. Although, it is voluntary, the mediation process can be used as a delaying technique by either party. A party may deliberately delay the process and terminate it after achieving his end. Whatever is said and

[3] Robert M. Cover, "Violence and the Word", *Yale Law Journal,* Vol. 95, No. 1601, 1986.

done in mediation is confidential, however the disclosure made in mediation process can be used by a party to assess strengths and weakness of the other party and to strategize litigation. However, a skilled and an experienced mediator would try to find a way to avoid or minimize these risks. As earlier said, mediation process can be terminated but in contrast, a judicial process or arbitration cannot be terminated unless the parties enter into an agreement.

Mediation aims at identifying the conflict and resolving the conflict rather than faulting and blaming the parties for the mistakes done.[4] It makes the dispute as the problem to be solved rather than making the parties as the problem. This is the reverse concept which happens in the adversarial process which assigns the blame and culpability of the parties. Mediation has the capability to resolve disputes very quickly with the cooperation of the parties. This means that parties can save a lot of time as well as money. The role of a mediator is to facilitate the communication between the parties and not argue for either of the parties or be biased towards one party. A mediator can further bring out the strengths and weakness of their positions in an adversarial process as a means to offer better solutions through mediation. By examining the weakness and the strengths of the parties, a mediator can provide to the parties the BATNA (Best Alternate to a Negotiated Agreement) and WATNA (Worst Alternate to a Negotiated Agreement).

If the situation warrants, the mediator rather looks into the relationship of the parties and the reason for why the relationship is being strained. In many of the cases, two parties enter into the mediation room aggressively but towards the end of the session, both parties may leave satisfied.

In most judicial or arbitration process, parties are often represented by their lawyers and therefore, direct communication between parties is absent. The parties are unable to explain what they really want or why they want something in these processes. But in a mediation process, both parties are communicating with each other face to face which helps both the parties understand what they really need or want.

A mediator asks questions in such a manner that it hits both parties emotionally and mentally. The concept of cross-examination comes in

[4] Lee Jay Berman, "Tools for Resolving Conflict in the Workplace, with Customers and in Life", *BRILLIANT RESULTS MAGAZINE*, November 2004.

an adversarial process. During the cross-examination, a lawyer may pose questions which can be hurtful, accusatory and can potentially affect relationships. In an adversarial process, there is very little room for mistakes and such mistakes can be considerably costly. But, in mediation, mistakes are not as damaging or expensive when compared to the adversarial process. In fact, there is a need for the parties to open up and communicate more to resolve the dispute. In the case of mediation, the mediator does not cross-examine and only encourages the parties to communicate and address the conflict. If at all a mediator is to ask questions, it would be to resolve a dispute and to arrive at a win-win solution.

A feature of mediation is to make the parties trust the mediator and in turn they are more comfortable in explaining the problem. Comfort of the parties is not an objective in the adversarial process. In mediation, the mediator is required not to use harsh words and it gives the mediator a duty to explain this aspect to the parties as well. This factor is absolutely necessary to make the process smooth.

But imagine if the mediation process is able to assist in resolving a number of disputes which, in courts, would take years to adjudicate. This could also mean another thing. If the mediation process is able to assist in resolving many disputes, several cases which go to the court will decrease. This also means that the cases which come to the judges can be efficiently handled by them. Mediation is flexible enough that parties can choose the mediator and ultimately the decision making is in the hands of the parties. But, in the case of a judicial process parties do not have the right to choose a judge nor have a say in the decision making. Although, in arbitration, the parties have the right to choose an arbitrator, the parties do not have control over the decision maker.

To look at the procedural part of mediation, it always begins with the point of the mediator introducing himself before the parties. Sometimes, the party will not require the mediator to explain this part, but as a procedure to make the process smooth and flexible, he will be required to provide the introduction to the parties. As a mediator, it is his or her duty to make both the parties as comfortable as possible and to gain their confidence in him. This enables the parties to provide more information than what they would have done if they were in court.

But what happens if some kind of information which was told in mediation was used against one of the parties, supposing the mediation

does not work. This is one of the essential attributes of mediation. Confidentiality is one of the most valued aspects in the mediation.[5] And similarly, the mediator, as well, is bound by this factor. The mediator cannot be asked to come to court and testify against one of the parties. This is again to point out another feature of mediation.

But can a dispute be solved in different ways? Is there only one answer to the dispute? Is it only the law which we need to follow to solve a dispute? This is true if the parties are to pursue the judicial process. But in the case of mediation, there are different ways of looking at a conflict. If the problem comes to a court, *what will the court do*? They look at precedents or look at the provisions of a particular law and hence give a judgment. But, in the case of mediation, a mediator has so many ways of assisting the parties to solve the disputes because, on communication, he would understand that there is an underlying conflict rather than an apparent conflict. He could find ways to solve a problem. This method is also known as the *lateral thinking method*. This method asks us to think out of the box. For instance, if there is a glass and paper with a small hole. The question is: *how do you push the glass through the hole without making the hole bigger or without breaking the glass*. A more realistic example is: "*Who does the orange belong to?*" In a court, the lawyers and the judge would try to ascertain on who is entitled to this orange. But, in a mediation process, a mediator would try to find out why the parties want the orange. The mediator soon finds out that one party wants the peel of the orange while the other party wants the pulp of the orange. And as simple as that, both parties get what they want. This is the win-win situation which a mediator aims at getting. You just have to think outside the box to get the answer. This is something which seems to be lacking in the adversarial system.

But, it all diverts to one question. *What kind of cases can be resolved through the mediation process?* The case of *Afcons Infra v Cherian Varkey*[6] provides for the kind of cases that cannot be approached through the mediation process. They include issues ranging from criminal offences, serious fraud or coercion cases to disputes concerning election to public offices. But strictly speaking, these are not to be taken as a criterion or a

---

[5] CIArb, *Practice Guidelines: Confidentiality in Mediation* (September 7th, 2007), available at <https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/1-guidelines-on-confidentiality-in-mediation.pdf?sfvrsn=2> (last accessed on 6th July 2016)

[6] *Afcons Infra v. Cherian Varkey*, Civil Appeal No. 6000 of 2010.

requirement for a dispute to be considered in mediation. But, it is important to note the point that anything that is going against public policy should not be entertained through mediation. In fact, earlier in a case, a court in India referred a rape case for mediation but later the Supreme Court refused to accept this judgment and ordered that rape cases cannot be sent to mediation.[7] But, if in the mediation process, if the parties are being very uncooperative or has confidential information which is likely to affect the other party if not disclosed, the mediator has the right to send this case back to court.

From the above pages, the very concept of mediation has been explained and why there is a need for mediation as an alternative dispute method. But, it is necessary to discuss about the mediator's characteristics, his role as well as the lawyer's role in mediation.

A mediator, as earlier said, is supposed to be impartial in mediation process. This specific characteristic is a similarity between this process and the adversarial process. But, out of all this, the mediator must make sure he facilitates communication which involves *asking the right questions at the right time*. While, this may be commonly heard and is often not given much thinking about, *active listening* is one of the most important requirements for a mediator. If there is no listening on his part, he very often asks the wrong questions to the parties. The other requirement is that a mediator is not to do *reactive listening*. The mediator's job is to facilitate communication between the parties. It is not his duty to take decisions on their behalf. The main problem with reactive listening is that *mediators sympathise and not empathise*. Sympathy often leads to giving preference to one party's opinion over another. For instance, in the father-son partnership example, a mediator is not to sympathise with the son or the father by either saying that *the father should not have bossed around, is this how a father should be? Or the son should get used to it because it is after all his father*. This is a main problem which mediators must step away from.

But what can a mediator do if the mediation process has reached an impasse?[8] Remember the time when the concept of *think out of the box* or several solutions is possible. This is the right point to use these concepts

---

[7] Utkarsh Anand, "Supreme Court says no to Compromise, Mediation in Rape Cases", *THE INDIAN EXPRESS*, 8 July, 2015.

[8] JOHN. W. COOLEY, *THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION* (2nd ed. 2006) p. 241.

in mediation. When the parties have reached a stop and that the parties don't agree anymore on an agreement, the mediator can attempt to brain storm more ideas and solutions for the parties which the parties can look into. The mediator may, however, bring out another technique to make the mediation proceed. The mediator may ask both the parties for the best alternative to a negotiated agreement and the worst alternative to a negotiated agreement. This can help the parties to settle somewhere in between both of their alternative agreements. These are simple characteristics and the role of mediators.

An interesting question is *what would be the role of lawyers during the mediation process*? A lawyer is not only useful during the mediation process but even before the mediation process has begun. The lawyer can explain to his client about this process and therefore, this allows a client to participate in this process in much more consistent way. A lawyer can advise the client on the timing of the entry into mediation process.[9] A lawyer can contribute to the mediation process by highlighting the strength and the weakness of the client's position. Further, a lawyer can assist the client as well as a mediator by coming up with the *Best Alternate to Negotiated Agreement* and the *Worst Alternate to Negotiated Agreement*. This allows the client to arrive at an informed decision. Further, a lawyer can advise the client on substantive law to widen the scope of solutions to resolve the conflict.[10] In most cases, the parties seem to trust their lawyers. So, when two parties approach a third party (the mediator), they require the trust of this third party. But, if they are with their lawyers, the parties are more confident in most scenarios and hence cooperation can be achieved.

But amongst all these characteristics, there are always problems with the lawyers alongside the parties. One reason is that very often the lawyers argue for what they want rather than what the parties want. This reason makes the process much harder. Second reason is that there have been several criticisms towards mediation by lawyers themselves because they believe that this process disrupts a lawyer's profession. The third reason is that lawyers sometimes refuse to cooperate with the mediators. But, it is always safe to say that nothing is without its own limitations.

---

[9] Geetha Ravindra, "Role of Attorneys in Mediation Process", American Bar Association available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/role_of_attorney_in_mediation_process.authcheckdam.pdf. (last accessed on 1 July 2016).

[10] Ibid.

This finally concludes to the point of negotiations and hence settlement. For the mediation process to be concluded it can be terminated at any point of time by the parties or they can head towards negotiation and settle thereafter. If negotiation does happen, it needs to be in writing. There needs to be a mediation report made by the mediator and a mediation agreement which states the *what, when, how, who and whom*. And of course, the agreement should be enforceable. But, if closely noticed, there is no *why*. The reason is to recollect the earlier paragraphs. It was said that aim of mediation is to solve the conflict and not the person themselves. It is not to say why the parties have agreed to settle. But, it is important to remember this point as well. A party can leave at any point of time because it is voluntary. So, a party is at the liberty to leave even before a page in the agreement is not signed. While, this has been a problem before, it is still fair to say that such situations have been rare. Although, mediation is voluntary, in some jurisdictions, there exist precedents where mere refusal to participate in alternate dispute resolution processes or where the outcome is no better off than the offer arrived at during mediation can be subjected to sanctions including cost sanctions.[11]

But, to finally put this to rest, it is necessary to remember that reaching a settlement is not the only thing mediation aims for. But, it is to see if they have left satisfied and their relationships have been secured.

One of the best mediators in India once told that a good mediation is when the parties, after settlement, ask the question: What did the mediator do?

.

[11] *Halsey* v. *Milton Keynes General NHS Trust ETC*, Civ. 576 EWCA [2004].