Mediation: A Need Of The Hour In The 21st Century

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"The beginning of dispute settlement in this nation should not take place in the courts. After other options have been thought about and explored, they ought to be the final venues for conflicts."

– Sandra Day O'Connor

Abstract

A more effective, less formal, and quicker method of resolving disputes is mediation. It also reduces the number of court cases pending by avoiding procedures and enabling a peaceful resolution of the disagreement. Arbitration is developing as a vibrant area of law as more and more people are drawn to this quicker, less demanding, and less expensive way of resolving disputes than the drawn-out, time-consuming, confusing, and expensive court procedures.

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Methods of Resolving Disputes and Conflicts[1, 2]

When a huge number of people are collaborating, conflicts are inevitable. "Differences in opinion or any other form of dispute between two or more parties" is how conflict is defined. Conflicts must be settled quickly and effectively. In addition to finding a solution to the issue, it's crucial to prevent emotional stress from being placed unduly on the individuals involved in the conflict. Effective conflict resolution would include striking a balance between settling the issue to achieve a decision and protecting the emotional well-being of the people concerned.

Conflict resolution or dispute settlement is the process of resolving disputes between parties. The terms "dispute settlement" and "conflict resolution" are sometimes used interchangeably, despite the fact that conflicts are typically more complex and protracted than disputes. Strategies for resolving conflicts between groups, including individuals, organizations, and governments, are helpful.

However, the number of qualified and knowledgeable non-legal conflict resolution specialists in the field of alternative dispute resolution is increasing. Arbitrators and mediators are typically retired judges or private attorneys (ADR).

ADR, or alternative dispute resolution, is a group of methods or strategies that allow parties to a dispute to come to a mutually advantageous conclusion. It comprises of techniques that allow parties to settle disputes without going to court. Approaches to alternative dispute resolution (ADR) are now well known and growing in acceptance on both a national and international level. ADR techniques have been around for a while and were applied before civilization got advanced.

❖ **Advantages of ADR[3]**

Alternative dispute resolution (ADR) procedures have a range of benefits, which are as follows:

Procedures for alternative dispute resolution (ADR) have a number of advantages, including the following:

a single action: ADR enables parties to agree to resolve an intellectual property dispute that is subject to the law in numerous jurisdictions in a single process, avoiding the expense and difficulty of multi-jurisdictional litigation as well as the potential for contradicting results.

Party autonomy: ADR gives parties more control over how their dispute is resolved than would be the case in court cases due to its private nature. In contrast to court matters, the parties will pick the most appropriate arbitrators for their disagreement. Additionally, they have a choice as to the proceedings' language, venue, and applicable statute. A quicker process can also result from increased party

autonomy because parties are free to formulate the most effective procedures for their conflict. This will save money on materials.

Neutrality: In order to prevent any home court advantage that one party might have in court-based litigation, where familiarity with the pertinent law and local procedures may offer significant tactical benefits, ADR should be unbiased to the parties' rules, terminology, and institutional culture.

The ADR procedure is private and confidential. The parties may therefore agree to keep the procedures and any results secret. When business reputations and trade secrets are on the line, it is especially crucial that they focus on the merits of the conflict rather than how it will be perceived by the general public.

Finality of Awards: Arbitral awards are rarely appealed, unlike court judgments, which may typically be contested in one or more rounds of proceedings.

Enforceability of Awards: Under the 1958 New York Convention, which is also known as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitral awards are typically recognized on an equal footing with domestic court judgments, without regard to their legal merits. This makes cross-border award enforcement more simpler.

- **Modes of Additional Dispute Resolution[4, 5]**
  - **Mediation**

Although the mediator's ruling is not legally enforceable, mediation helps with negotiating. There are three parties involved in mediation: the mediator, who has no allegiance to either side of the disagreement or faction, and the two parties involved. The mediator's primary responsibility is to offer a comprehensive viewpoint and suggest a workable solution to help the parties come to a mutually agreeable resolution. The mediator lacks any judicial authority or decision-making power.

In accordance with the practice, the parties will meet jointly to go over the mediation guidelines, which include a secrecy provision. The requirements and rules are flexible and can be altered with the consent of all parties. The mediator then conducts a private, one-on-one interview with the parties to ascertain their positions and areas of disagreement. This helps the mediator arrive at a resolution that is more palatable to both parties. The main reason why mediations are so successful is that they are so economical. The agreement formed here is legitimate and can be carried out just like any other contract, even though it is not legally binding. Second, mediation does not result in a lose-lose scenario; even if the parties are unable to come to an agreement at the end of the mediation, the door to conventional litigation is still open.

- **Negotiation**

Any gathering of two or more parties with the goal of coming to a mutually beneficial agreement is referred to as a negotiation. It may only be shared between the parties or the parties and their attorneys. Both litigation and alternative dispute resolution involve some level of negotiation. Positions taken by third parties during talks rarely need to interact with the parties and lack the authority to compel a conclusion. The first informal step in resolving a dispute is negotiation, which involves outlining the problem and the parties' competing interests. Only when both parties believe they have an edge and the outcome is a win-win for both parties are negotiations effective. It is crucial for the negotiator to be well-prepared when a third party is present during a discussion.

- **Mini-Trials**

The last institution in a dispute resolution framework is mini-trials. After all relevant facts and circumstances have been established, it is held. Mini-trials are flexible in nature and have developed basic litigation norms. Instead of negotiation and mediation, the strengths and weaknesses are reevaluated, and each side is represented by their separate counsels. In this instance, a mediator who is a third party acts as a counselor or advisor. The council makes a non-binding decision following all conversations with the disputed parties, which encourages them to look for a more amicable resolution.

- **Arbitration**

The disputing parties select the unbiased and impartial arbiter, who may be a human or an organization, in the arbitration process. The dispute might still be going on or develop at some point in the future. It is agreed upon prior to the arbitration that the arbitrator's rulings will be final and binding, but they won't necessarily be. Either before the conflict arises, to prevent more issues, or after the dispute has developed, the parties should apply their settlements or disputes here. In many ways, arbitration is analogous to the legal system. The laws and regulations that must be adhered to are predetermined. The procedural system is similar to the widely used Arbitration Law approach.

Additionally, there are two categories of arbitration: judicial arbitration and private arbitration. The sort of ADR that is employed the most frequently is private arbitration. Future conflicts will be governed by the prior decisions made in private arbitration, and the parties have agreed to hold matters that fall under the decision criteria out of court for private arbitration. This arbitration is typically used to resolve disputes between employers and employees. Our traditional courts use judicial arbitration since it is required and permitted by the relevant laws and regulations. It

complies with both local and national laws. A flexible approach to conflict resolution, arbitration allows the parties to impose and build a structured framework.

The following are the distinctions between various forms of Alternative Dispute Resolution (ADR) systems:

ADR Methods-	Arbitration	Mediation	Conciliation	Negotiation
Neutral Third Party-	Adjudicator	Facilitator	Facilitator, Evaluator	Facilitator
Nature of the Proceeding-	Legally Binding	Not legally binding	Not legally binding	Not legally binding
Level of Formality-	Formal	Informal	Informal	Informal
Level of Confidentiality-	Confidentiality as determined by law	Confidentiality based on trust	Confidentiality as determined by law	Confidentiality based on trust

❖ **Legal History of ADR in India**

The Bengal Regulations, which were established in 1772 and 1781 and recognized non-traditional judicial dispute resolution panels and permitted the submission of complaints through an arbitrator, recognized alternative dispute settlement once the British arrived. The Arbitration Act VIII, which was later passed in 1857, codified the judicial practice. This Act's Sections 312 to 325 addressed lawsuits initiated through arbitration, which recognized the ADR committee without the need for civil courts to get involved. The English Arbitration Act of 1889 gave rise to the first piece of pillar legislation, the Arbitration Act of 1889. The ADR provisions were found in Section 104 of the IInd Schedule of the Arbitration Act of 1940, which replaced the Act of 1889.

In India, Lok Adalats are also a topic of ADR. In 1987, they received the legislative authority that went into force in 1995. The Arbitration Act of 1996 replaced the Arbitration Act, which was repealed in 1996.

The Law Commission of India's 222nd Report claims that the Constitution of India protects everyone's equal access to justice, particularly under Article 39A, which provides that no one should be denied the right to seek justice because of their financial situation or any other kind of disability. According to the research, the ordinary people in India must have access to the legal system in order to have the "ability to justice." Even this, though, has been made difficult by issues like poverty, illiteracy, ignorance, society and political backwardness, and so on.

The Indian Government shall implement Section 89 of the Code of Civil Procedure, 1908, and replace the old Arbitration Act, 1940, with The Arbitration

and Conciliation Act 1996 in accordance with the directives of the United Nations Commission on International Trade Law (UNCITRAL).

The 1999 change to the Code of Civil Procedure, 1908 marked a significant advancement in the implementation of the "Court Referred Alternative Dispute Resolution" procedure by the Indian Parliament with the application of Section 89 and Order X Rules 1A, 1B, and 1C. The Arbitration and Conciliation Act of 1996's Section 8 must be followed. If all of the evidence is accepted, there is an arbitration agreement, and the parties have submitted an application before the first statement on the substance of the dispute is made, the court must refer the case to alternate dispute resolution in India. In India, the decision to submit a matter for arbitration, alternative dispute resolution, or electronic dispute resolution is entirely up to the court.

❖ **Mediation with Respect to United Nations**

1. The United Nations Commission on International Trade Law (UNCITRAL) A Model Law on International Commercial Conciliation was adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 2002 with the goal of facilitating the creation of legal frameworks that are harmonious for "proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute."
2. Singapore ConventionThe "Singapore Convention on Mediation," also known as the "United Nations Convention on International Settlement Agreements Resulting from Mediation," is another significant accomplishment. The Singapore Convention tries to bring international arbitral judgments issued under the New York Convention into line with the enforceability of mediated cross-border commercial disputes, however, there are several inconsistencies that will be covered in more detail later in the article. The agreement includes 53 member countries, including India, China, and the United States, and 6 states have ratified it, according to the most recent findings. It was approved on December 20th, 2018 and became available for signing on August 7th, 2019.

   Applicability of The Singapore Convention[6]

   Before this convention went into effect, mediation agreements may be enforced through contracts. The only situation where this rule does not apply is when mediation is employed in conjunction with arbitration or litigation and a settlement is obtained through mediation that can be put into effect as

an arbitral award or a decree. The purpose of the convention and the subsequent Model Law is to establish a framework for the enforcement of negotiated settlement agreements resulting from international business disputes. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards serves as a comparison for this.

3. The New York Convention On June 10, 1958, a diplomatic convention of the United Nations established the New York Convention, also known as the Convention on the Recognition and Implementation of International Arbitral Awards. It became effective on June 7, 1959. Its importance cannot be emphasized, and it is widely acknowledged as one of the most important treaties in the area of international trade law. In the world of international arbitration, it is frequently referred to as a pillar. In addition to considering and enforcing awards made in other states, subject to such limited limitations, it requires contracting state courts to give effect to an agreement to arbitrate when they are confronted with an action in a topic covered by an arbitration agreement.

❖ **Various Styles of Mediation**

In the 1960s and 1970s, only one type of mediation was taught and used; this type is now referred to as "Facilitative Mediation." In facilitative mediation, the mediator creates a framework to help the parties reach a win-win resolution. The mediator helps the parties define and assess resolution choices by probing the parties' viewpoints, validating and normalizing them, looking for underlying interests, and asking questions. The facilitative mediator should refrain from offering the parties suggestions, passing judgment on the case's result, or speculating on what the court will rule. The mediator is in charge of the mechanism; the parties are in charge of the outcome.

Evaluative Mediation: This technique was modeled after settlement conferences presided over by judges. An evaluative mediator aids the parties in reaching an agreement by highlighting the flaws in their arguments and projecting how a judge or jury will rule. An evaluative mediator can offer the parties either official or informal suggestions for resolving the conflict. Instead of focusing on the parties' needs and aspirations, evaluative mediators focus on their legal rights, and they evaluate using legal concepts of fairness. In a practice known as "shuttle diplomacy," evaluative mediators often meet separately with the parties and their attorneys. They aid parties and attorneys in weighing the benefits and drawbacks of going to court rather than reaching a deal through mediation. The evaluative mediator, who significantly affects the mediation's outcomes, shapes the mechanism. The

evaluative mediator, who significantly affects the mediation's outcomes, shapes the mechanism.

The newest of the three ideas is transformative mediation, which Folger and Bush introduced in their book THE PROMISE OF MEDIATION from 1994. The fundamental tenets of transformative mediation are "empowerment" of each party to the fullest extent feasible and "recognition" of each party's needs, wants, beliefs, and points of view. During the mediation process, transformative mediation has the capacity to change any or all of the parties or their relationships. The parties themselves are the only ones who can "recognize" one another, therefore transformative mediators visit with both parties at the same time.

Arb-Med and Med-Arb Mediation: The terms of the mediation-arbitration hybrid known as Med-arb are first agreed upon by the parties. They typically concur in writing that the procedure's result will be official, unlike in other mediations. They then try to resolve their dispute with the help and aid of a mediator.

Arb-med is a different type of mediation where a knowledgeable, impartial, and neutral third party hears the proof and declaration of the parties in an arbitration, composes an honor but keeps it a secret from the parties, attempts to meddle in the parties' dispute, and unlocks and grants her recently agreed restricting honor if the parties refuse to agree.

Despite the fact that mediation is frequently referred to as a very deliberative process, a court that is eager to pursue a speedy and affordable settlement may order it. The likelihood of reaching a settlement through court-ordered mediation is low when parties and their attorneys are reluctant to participate since they might only be giving it a half-hearted effort. However, as more parties become aware of the advantages of participating in the process, settlement rates soar.

E-mediation: In e-mediation, a mediator provides mediation services to parties who are physically separated from one another or whose dispute is so acrimonious that they are unable to stand to be in the same space.

"Legal Sancity of Mediation: In View of the Constitution of India"

The idea of the welfare and well-being of the people forms the foundation of the Indian Constitution. It is the state's duty to provide the harmed party with justice through judicial or extrajudicial dispute resolution mechanisms that guarantee prompt and effective justice as well as the protection of fundamental rights. But after 56 years after the Constitution's adoption, some people are starting to question whether the document has failed us or whether we have failed it. We're asking out loud now: Who is to blame if the justice delivery system failed us or if we failed the

justice delivery system? However, no one cares about these queries; they are irrelevant. They are merely interested in finding an inexpensive, adaptable solution to their dispute that is not based on a strict formula of legal requirements or technicalities, so that their dispute can be resolved as soon as feasible and possibly within a reasonable time period. ADR, or alternative dispute resolution, is most likely to be the answer to both of these queries.

The vast, nearly unmanageable docket of litigation before Courts is the focus of the present discussion on the need to develop Alternative Dispute Resolution techniques. The justification for ADR is seen in terms of lowering court case backlogs. The fundamental idea behind ADR advocacy is that courts are failing to handle the volume of cases they are now facing. Reducing the burden of arrears is undoubtedly one of the most important objectives. However, it is crucial to stress that this is merely one of the crucial objectives, particularly in the context of mediation. Additional instrumental and supporting tasks that mediation serves as a processual interference in the judicial system are just as important, if not more so. In its instrumental role, mediation serves as a tool for achieving predetermined objectives. The core function of mediation emphasizes the significance of mediation as a tool. While the problem of arrears has reached alarming dimensions, calling for a search for alternatives and supplements to litigation, the traditional method of resolving disputes, there is also a need to concentrate on the trademarks of the judicial process. The foundation of the judicial system in India was laid by the formation of a strong convention of independence and impartiality throughout the past century.

A quick review of current legislation finds a number of statutory provisions that specifically mention alternative conflict resolution/settlement processes, including the following:

i. Section 30 of the Arbitration and Conciliation Act, 1996
ii. Section 4 of the Industrial Disputes Act, of 1947
iii. Settlement under various provisions of the Code of Civil Procedure, 1908 such as Section 80, Section 89, Section 107(2), Section 147, Order X Rules I-A, I-B, and I-C, Order 23 Rule 3, Rule 5 B of Order 27, Order 32 A and Order 36.
iv. Various Provisions of the National Legal Services Authority Act, 1987 which deal with setting up of Lok Adalats
v. Provisions of the Hindu Marriage Act and the Special Marriage Act.
vi. Settlement proceedings under the Family Court Act.

Mediation: A Part of ADR[789]

Mediation under statutory provisions in India[1011]

The Industrial Disputes Act of 1947's Section 4 appoints conciliators who are tasked with mediating and advancing the settlement of industrial disputes through specifically outlined procedures for conciliation proceedings. When done correctly, the process is quick and inexpensive. The goal of introducing such a clause has been defeated because only a small number of cases have been resolved. Unfortunately, there are still many instances in court that could have been resolved by this clause, and new cases are being filed every day.

The 1908 Code of Civil Procedure had a revision in 2002. The referral of court-pending cases to ADR was made possible by Section 89 and Order X Rule 1A. Additionally, Order XXXIII of the CPC suggests mediation for familial/personal ties and claims that the typical judicial technique is unsuitable for the delicate subject of personal relationships. Despite the fact that many Indian courts now have mediation centers, there is no solid evidence to support the effectiveness of this service.

Under Section 442 of the Companies Act of 2013, when combined with the Companies (Mediation and Conciliation) Rules of 2016, even the National Company Law Tribunal and Appellate Tribunal may submit conflicts to mediation.

The Micro, Small and Medium Enterprises (MSME) Development Act of 2006 mandates conciliation in disputes over payments to MSMEs. The Micro & Small Enterprises Facilitation Council must be consulted in accordance with Section 18 of the aforementioned Act, which stipulates explicitly that any party to a disagreement over any sum due under Section 17 (disputes over payment of payments to MSMEs) must do so. The provisions of Sections 65–81 of the Arbitration and Conciliation Act, 1996 shall apply when the Council receives a referral; it shall either perform conciliation itself or request the assistance of any institution or organization providing alternative conflict settlement services by making a referral to such an institution or center.

Family and individual legislation, such as the Hindu Marriage Act of 1955 and the Special Marriages Act of 1954, in particular, mandate that the court first seeks mediation between the parties.

According to Real Estate (Regulation and Development) Act, 2016, Section 32(g), problems between promoters and allottees may be settled amicably through a dispute resolution forum set up by customers or promoter groups.

Code, as well, are relevant. The Legal Services Authorities Act of 1987 established statutory agencies at the federal, state, and local levels with the purpose

of ensuring that no one is denied justice because of their financial situation or another barrier to access to justice.

In addition, the 129th Law Commission of India Report advises that courts submit cases to mediation on an obligatory basis.

In a number of cases, the Supreme Court has recognized mediation and general ADR procedures in addition to the constitutional provisions.

- Aside from the constitutional provisions, the Supreme Court has recognized mediation and general ADR procedures in a variety of cases:
  i. ONGC vs. Western Co. of Northern America[12]
  ii. ONGC vs. Saw Pipes Ltd.[13]
  iii. Rajasthan State Road Transport Corporation vs. Krishna Kant[14],
  iv. K.A. Abdul Jalees vs. T.A. Sahida[15],
  v. Ghanshyam Dass vs. Domination of India 1984 (3) SCC 46[16],
  vi. Raghunath Das vs. UOI[17]
  vii. Afcons Infrastructure Ltd. vs. Varkey Construction Co. Pvt. Ltd.[18]

A Final Thought

When it comes to international commercial issues or conflicts between two governments, mediation has become the most effective dispute-resolution procedures over time. It has developed through time into a mechanism that guarantees the enforceability of foreign judgments and offers flexibility to uphold the party's autonomy.

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