

MEDIATION: A MAGICAL TOOL FOR DISPUTE RESOLUTION

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When we begin our mediation training and practice, we often hear (and speak) of the magic of mediation. When it works, it truly is wondrous. It's easy to see why a mediator feels like a wizard with supernatural powers, enabling lambs to lie down with lions. Based on my experience in the realms of magic and mediation, here is my hope.

Once upon a time, if you could take a cup of water, put it in a box, push a button, and make that water boil without raising the temperature inside the box, you'd have a miracle on your hands. Ditto for talking to someone, or even seeing them in real time, on the other side of the planet or even in outer space! How magical is that! And yet, thanks to technology, even the youngest child is jaded by these daily experiences.

My fondest wish is that our social evolution keeps pace with our technological progress, so that the peaceful resolution of disputes will similarly become as commonplace as microwaves and mobile devices. Then it will no longer seem that mystical forces or card tricks, or magic pennies are needed to bring together the bitterest of enemies for a common purpose.

CONCEPT AND PROCESS

The use of mediation as an example of modernization in the Pakistani' legal system is ironic in two respects. First, the words "mediation" and "modernization" hardly seem to belong in the same sentence; mediation is one of the oldest forms of peaceful dispute resolution. Second, Pakistan has been a latecomer to recognize the benefits of mediation; other cultures have used mediation to resolve disputes for centuries.

Having finally realized the benefits of mediation as a dispute resolution mechanism, Pakistan has made mediation a critical part of its efforts to solve its serious court congestion and backlog. In most jurisdictions in Pakistan, mediation is now offered as one of several alternatives to the traditional legal process. Indeed, in many jurisdictions, mediation has become the most popular method of alternative dispute resolution.

Mediation is a procedure designed to resolve disputes through agreement, i.e., through the mutual consent of the parties. Although the procedure is frequently confused with arbitration, it is fundamentally different. In arbitration, the neutral reaches a decision based upon evidence presented by the parties; in mediation, the neutral facilitates discussion between the parties with the objective of reaching an agreement between the parties. Mediation relies upon the consent of the parties; arbitration does not.

A successful mediation is thus dependent upon two inter-related factors: The willingness of the parties to resolve their dispute; and the skill of the mediator in guiding the parties to the point where agreement is possible. Being involved in ADR since its inception for the last more than two decades in Pakistan, and a frequent participant in almost all program, I can say that there exists a point in every dispute where the parties can reach agreement; it is the duty of the mediator to help the parties find that point. The existence of parties acting in good faith to resolve their differences, however, will significantly assist even the best mediators in

achieving their objectives. The combination of a talented mediator and motivated parties will generally result in resolution of even the most difficult disputes.

BENEFITS OF MEDIATION

The benefits of mediation are so obvious; it is surprising that it took a clogged judicial system for Pakistan to embrace the concept only when the courts began to be overburdened with cases. Mediation as an alternative dispute resolution mechanism is:

1.Fast

As the amount of time necessary for the parties and the mediator to prepare for the mediation is significantly less than that needed for trial or arbitration, mediation can occur relatively early in the dispute. Moreover, once mediation begins, the mediator can concentrate on those issues he or she perceives as important to bring the parties to agreement; time consuming evidence-taking can be avoided, thereby making the best use of the parties' time and resources. Even if the entire evidence gathering has already occurred, it almost invariably takes less time to mediate a dispute than to try it in a court.

2.Flexible

There exists no set formula for mediation. Different mediators employ different styles. Procedures can be modified to meet the needs of a particular case. Mediation can occur late in the process, even during trial or before any formal legal proceeding begins. The mediation process can be limited to certain issues, or expanded as the mediator or the parties begin to recognize during the course of the mediation problems they had not anticipated.

3.Cost Efficient

Because mediation generally requires less preparation, is less formal than trial or arbitration, and can occur at an early stage of the dispute, it is almost always less expensive than other forms of dispute resolution. If the mediation does not appear to be headed in a successful direction, it can be terminated to avoid unnecessary costs; the parties maintain control over the proceedings.

4.Brings parties together

In Pakistan, parties often form opinions about their dispute that over time become intractable. The other side becomes the "enemy"; winning becomes a matter of principle. The only side a party can see even if counseled otherwise by their attorney is their own. Sitting down in a neutral setting with the opposing side can bring a better understanding of the problems with one's own case, particularly if guided by a skilled mediator. Listening to the opponent's case and having it evaluated by a neutral can give pause to even the most ardent believers in their own cause.

5. Convenient

The parties can control the time, location, and duration of the proceedings to a significant extent. Scheduling is not subject to the convenience of overworked and sometimes bureaucratic courts.

6. Creative

Resolutions that are not possible through arbitration or judicial determination may be achieved. For example, two parties locked in a dispute that will be resolved by an arbitrator or a judge may be limited to recovery of money or narrow injunctive relief. A good mediator makes the parties recognize solutions that would not be apparent and not available in the traditional dispute resolution process. Two companies may find it more advantageous to work out a continuing business relationship rather than force one firm simply to pay another money damages. The limit on creative solutions is set only by the variety of disputes a mediator may encounter.

7. Confidential

What is said during a mediation can be kept confidential. Parties wishing to avoid the glare of publicity can use mediation to keep their disputes low-key and private. Statements can be made to the mediator that cannot be used for any purpose other than to assist the mediator in working out a resolution to the dispute. Confidentiality encourages candor, and candor is more likely to result in resolution.

WHAT IF THE MEDIATION FAILS?

In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation. Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities. Mediation in particular case, need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

TYPES OF MEDIATION

- a) COURT-REFERRED MEDIATION– it applies to cases pending in Court and which the Court would refer to mediation under Sec 89 of the Code of Civil Procedure, 1908 or any other law which authorises the court to refer the case for mediation.
- b) PRIVATE MEDIATION- In private mediation qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation is used in connection with disputes pending in court and pre-litigation disputes.

ADVANTAGES OF MEDIATION

The parties have CONTROL over the mediation in terms of 1) its scope (i.e. the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its outcome (i.e. the right to decide whether to settle or not and the terms of settlement)

Mediation is PARTICIPANTE, Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.

The process is VOLUNTARY and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.

The procedure is SPEEDY, EFFICIENT and ECONOMICAL.

The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.

The process is conducted in an INFORMAL, CORDIAL and CONDUCIVE environment. 1.6

Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

The process is CONFIDENTIAL.

The process facilitates better and effective COMMUNICATION between the parties which is crucial for a creative and meaningful negotiation.

Mediation helps to maintain/ improve/ restore relationships between the parties.

Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process- in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICIAL SETTLEMENT.

A mediation settlement often leads to the SETTLING OF RELATED/CONNECTED CASES between the parties.

Mediation allows CREATIVITY in dispute resolution. Parties can accept creative and non conventional remedies which satisfy their underlying and long term interest. When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

Mediation PROMOTES FINALITY. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

REFUND OF COURT FEES is permitted as per rules in the case of settlement in a court referred mediation.

DIFFERENCE BETWEEN JUDICIAL PROCESS, ARBITRATION & MEDIATION

JUDICIAL PROCESS	ARBITRATION	MEDIATION
Judicial process is an adjudicatory process where a third party (Judge/other authority) decides the outcome	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration 1940	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and

		flexibility.
The decision is binding on the parties	The award in an arbitration is binding on the parties	A binding settlement is reached only if parties arrive at a mutually acceptable agreement
Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties	Adversarial in nature as focus is on determination of rights and liabilities of parties	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liability
Personal appearance or active participation of parties is not always required	Personal appearance or active participation of parties is not always required	Personal appearance and active participation of the parties are required
A formal proceeding held in public and follows strict procedural stages	A formal proceeding held in private following strict procedural stages	A non-judicial and informal proceeding held in private with flexible procedural stages
Decision is appealable	Decision is appealable	Decision is appealable
No opportunity for parties to communicate directly with each other	No opportunity for parties to communicate directly with each other	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator
Involves payment of court fee	Involves payment of court fee	In case of settlement, in a court annexed mediation the court fee already paid is refunded as per the Rules.

CONCLUSION

Mediation is a valuable dispute resolution tool which is most popular mode of Alternate Dispute Resolution Mechanism in most jurisdictions around the World because the means of reaching an agreement can be as varied as the disputes that need to be resolved. Mediation procedures can be tailored to a variety of factors: the personality of the mediator; the nature of the dispute; the time or resources available; and the antagonism between the parties. The procedure can thus minimize contentiousness, cost, and resources. If it is unsuccessful, the parties can always resort to the courts or other means of dispute resolution. In short, mediation is a valuable weapon against delay, cost, and injustice, which is now available in Pakistan through different models at different levels and introduction of ADR in our legal system shall reduce the backlog and provide expeditious justice and inexpensive justice to the litigants of our homeland who are suffering the pangs of the system.