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EDITOR'S NOTE

A little smile, a word of cheer,

A bit of love from someone near,

A little gift from one held dear,

Best Wishes fot the coming year...

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Why Mediation Will Grow

The synergy of the fast developing and the developing global partners of mediation

: JOSEPH WW CHAN

In dispute resolution or conflict management, there are partners in the global development of mediation. The West is generally regarded as the fast developing partner, while in other parts of the world, mediation is developing, or just started to develop. But, will mediation grow? This is a question not only concerning the saving of money for the public coffers and the litigants' pockets, it is also an interesting theme for the legal profession and the judiciary. Mediation, along with other ADR approaches, is a matter of judicial governance, and governance includes the notion of efficiency.

The Multi Facets of Modern Disputes

In modern societies, with the spread of information, education, cultures, exchanges and competitions, things are becoming more and more sophisticated, and changing from time to time at a much faster pace than before. There are all kinds of conflict which arise from many reasons. Conflicts caused by genuine difference of opinions or misunderstandings are common in community affairs and commercial dealings. This is the result of the assertion of individual thinking which is being made possible by innovations of information technology brought by persons like Bill Gates, the late Steve Jobs and others. Today a dispute may entangle with a number of issues, be it personal, social, political, economic, legal and international[1]. Resolving disputes will cost more and more because of the increasing complexity of modern developments in all areas of human life. The reality is that many aspects of arguments nowadays is in fact a mix of all types of factors, and conflicts are often not easily resolved by going to the court which is a system bound by strict procedures. If the contention is international, there may be a large number of intertwined legal points involved. Mediation which is a kind of alternative dispute resolution (ADR) methods is not a court proceedings and it fits nicely in resolving a complicated dispute because of its flexibility.

Is Complexity of the Law a threat to the Legal System?

Will people reject the law? One of the hallmarks of a democracy is its independent judiciary. In a civil case, the process is to find out what is justice and who is right by an independent dispute resolver, the judge. The loser is punished by costs and has to pay damages or compensation to the winner. During the past century or so, the law has been developed gradually by

(Footnotes)

[1] For example, the consumer disputes outside the US caused by the collapse in 2008 of Lehman Brothers were international in nature.

persons connected with it, and there are now well defined statutes and thousands of court decisions. In common law territories, the fine points of the law are nearly all embedded in a huge number of cases, and new judgments are decided day after day. Even lawyers may find it a bit difficult to keep abreast of the development. People may begin to think that the complexity of the law in a way does not fit into the modern society where efficiency counts. If without ever increasing legal aid, one may find a time that the people themselves will ask why we need such legal complexity and they may want to disregard part of the law that has been built up conscientiously for so many years by the judges and the legislators. When people are frustrated and reject expensive justice, they may simply ask the question of who is the boss in a democratic society. It seems quite likely that the complexity of the law will eventually be a threat to the legal system. It is perhaps a sensible duty of the judges and other members of the judiciary, as servants of the people, to help to simplify legal processes.

Mediation and other ADR methods

The ways to resolve conflicts are classified into two types. The first is litigation, that is, to go to the court which is bringing a civil case to a publicly funded place called a court of law and let the judge decides. The second type is the various methods of alternative dispute resolution (ADR) which include negotiation, mediation, conciliation, expert determination, and arbitration etc.[2] Inside the domain of ADR, mediation and arbitration are by far the most popular approaches. Methods of ADR are measures which are not conducted within the court system with minor exceptions in certain jurisdictions.

A negotiation between the disputing parties without a facilitator, e.g. the mediator, is sometimes ineffective. Expert determination[3] is not required in many occasions except an expert is really needed in certain arguments that warrant the use of expert knowledge and determination, for example, a dispute between two power generating companies concerning technical issues. The expert usually does not give an account of the knowledge and law he/she is relying on. As to arbitration, it is a more formal procedure than mediation and normally costs more, and the arbitrator or arbitrators will decide on the case and give an award. The arbitrator has powers under a statute[4], though the parties can change them in the arbitration agreement.

Mediation, whether conducted internationally between countries, or between companies across countries, or at the local level, is a mixture of the art of relationship building and the justification of legal rules[5]. A judge is buttressed by the establishment and an arbitrator[6] is enabled by statutes, while a mediator depends much more on his/her knowledge and skills. The art of relationship building is based on a general understanding of the society[7] and the relevant communications skills employed in the various stages of the mediation process, for example, opening talk covering agenda and ground rules setting, listening and reframing skills, patience, reality tests, and closing statement. There are different types of mediation[8]. In a facilitative mediation, the mediator will not give any advice or opinion and is providing an opportunity for the parties to let off steam

(Footnotes)

[2] There are other methods of ADR, for example, a Mini-Trial in which a neutral third party assists the parties to evaluate their positions; a Summary Jury Trial in that the parties observe the reaction of a mock jury; an Early Neutral Evaluation in which a neutral third party gives an evaluation or assessment that is not binding; and a process called Med-Arb which is the using of mediation first and then arbitration if mediation fails. Med-Arb can be the other way round, that is, Arb-Med.

[3] A similar method is called expert adjudication in that the adjudicator usually gives an account of the knowledge and law he/she has used in his/her decision.

[4] In the UK, there is the Arbitration Act and in Hong Kong SAR, there is the Arbitration Ordinance. In Australia which is a federation of six states and two mainland federal territories, there are federal legislation and state legislations on arbitration.

[5] For example, the keeping of confidentiality.

[6] Being supported by an arbitration statute, an arbitrator may think that he/she is a 'judge without a robe'.

[7] If mediation is conducted between countries, it is the general understanding of international relations.

[8] Apart from a Facilitative Mediation which is based on interests and the mediator is not supposed to give any advice, there are other types of mediation such as an Evaluative Mediation in which the mediator may intervene and give an advice based on legal positions, not interests; a Settlement Mediation in that the mediator steps in to assist the parties to reach a settlement based on legal positions; and a Therapeutic Mediation in which the mediator tries to restore the relationship of the parties and then moves forward to help the parties to reach a settlement, this method is often used in family disputes.

or air their views before helping them to focus on the interests that they are facing. If a settlement agreement is reached between the parties, the mediator needs to draft the agreement based on what are agreed and let the parties to sign. Another kind of ADR is conciliation which is very similar to a facilitative mediation[9] except in conciliation, the conciliator may suggest advices or proposals. The flexibility of mediation is one of principal factors that makes it different from arbitration. In arbitration, there is normally a legislation regulating arbitration and the arbitrator's award is usually final. Secondly, the arbitrator is in fact an adjudicator empowered by statute, though not called a judge, he is still the decider of the case. However, in a facilitative mediation, the mediator conducts the process without even giving any opinion, let alone a decision. The parties are being assisted by the mediator, not judged or adjudicated. Thus mediation is often called an assisted negotiation. In fact, the parties decide their own case. So, flexibility is one of the notable features of mediation.

Furthermore, in arbitration, the arbitrator is chosen by the parties. The selection of an arbitrator is similar to the choosing of a mediator. However there are more choices when choosing a mediator because the profession currently permits all kinds of competition among the mediators themselves. Mediators are not housed within one or two organisations. In both arbitration and mediation, the expenses of appointing an arbitrator or a mediator are borne by the parties. Both arbitration and mediation are held in private in a venue paid for by the parties. But obviously, the cost of mediation is less expensive than arbitration because of the lack of a well structured self-protection system for the profession of the mediators. Too much regulation may stifle development as well. This is arguably the case for arbitration. The main difference between the two methods is in arbitration, the arbitrator will decide on the dispute and his/her decision is binding. Enforcement of an arbitrator's award is similar to a court decision. The win/lose result of arbitration is the same like a court case, i.e. an outcome which is an adjudication of legal rights. On the other hand, in facilitative mediation, the mediator is not expected to decide on the dispute. He/she is helping the parties to negotiate a settlement agreement which is a contract. The settlement agreement is in substance a compromise of interests. When one is talking about interests, it is a matter of societal interests, be it personal, political, economic or others. If the parties are willing to compromise, they will usually abide by their decisions. To the parties, they may treat it as a win-win situation.

A Settlement focused on Interests

The importance of fairness, speed and cost-effectiveness is always emphasised in conflict resolution. Is it right or fair to settle a dispute based on interests? It all depends on the acceptance of the people. This is a matter of legitimacy. It sounds more social or political than legal. Some civil disputes, e.g. community quarrels and family feuds, may have its roots from largely communal differences and personal feelings and it is advisable to deal with them in a setting that can let the parties to express their views. Also maintaining business relationship is an important interest business executives like to take into consideration when resolving arguments with customers and others. In commercial cases, businesspersons need to be vigilant on the expenses. They want to settle their disputes in a speedy and less-costly way. To cater for these situations, a type of conflict resolution has to be developed so that the conclusion is preferably not a decision of who is right or wrong.

Mediators come from all walks of life, for example, some of them are engineers and doctors, and they know their respective fields well. In litigation where certain specialist knowledge is required in order to assist the judge or the parties, like in engineering and medical disputes, the engagement of expert witnesses can be very costly and often delaying the process. Therefore in quite a number of instances, mediators with professional background can speed up the mediation process to the benefits of the parties, and to a certain degree the society as well.

In solving a conflict, the spirit of a facilitative mediation is concentrated on interests rather than legal rights. So parties to a dispute are facilitated to realise what are their interests. After saying their ideas or arguments, the mediator assists them to resolve their contention based on what is best in their interests, and reach a

(Footnotes)

[9] In facilitative mediation, the mediator conducts the process through different stages: introduction, joint session, caucus, joint session, and settlement agreement or no agreement, while the parties decide the result. But, in conciliation the conciliator may not handle the process in the same manner.

settlement agreement. For instance, one of the interests is good relationship. With the rapid outreach of the electronic media, people of the world are feeling ever closer towards each other than before. One can see leaders of large countries of the world meet nearly every year or even more frequently. Better communications promote an atmosphere of better understanding and relationship. For big businesses, the purpose of spending millions per year in public relations exercises and advertising is to foster a good image and better business relationships with all sorts of people, even competitors. So, ensuring good business relationships is one of the paramount interests of a business. After all, the business of a business is the maintenance of a web of good inter-relationships. Mediation is a much less adversarial way to resolve differences. It is clearly a better choice than litigation and a competitive one as compared with other effective methods of ADR.

Possibilities that may hinder the growth of Mediation

To reduce the costs of dispute resolution in commercial cases, there is a possibility that an in-house professional negotiator conducting a direct negotiation on a straightforward case with another professional negotiator of another company that is a party to the dispute. An in-house professional negotiator can be a member of the human resources team and he/she is engaged in workplace mediation from time to time and has the necessary experience and skills to represent the company to negotiate directly with a counterpart of another company, thus the appointment of a mediator in such a commercial argument will not be needed. However, the direct negotiation between professional negotiators as a widely accepted institutionalised pattern of ADR may be something readily used in the future and it is certainly not the situation at present. Besides, it is not suitable for other disputes, such as community and more complicated commercial or other conflicts.

The gradual acceptance by the legal community is crucial. If mediation is viewed as a competitive method to tackle civil disputes, there is undoubtedly a tendency that certain sectors of the legal community could be affected in one way or another. It takes time for a meaningful change of mindset to emerge. The ongoing worldwide development of mediation as a method of resolving conflicts will promote the change. In time, members of the legal professions will have an unavoidably better familiarisation with mediation and that will help the growth of mediation in the long run.

There is probably only one other factor that may hinder the growth of mediation. It is a substantial simplification of the litigation and arbitration processes, but this is highly unlikely as there must be an overwhelming public demand for it and a willingness of giving up certain vested interests by some people associated with such adaptation. In any event, the law is still needed and should be developed.

The combination of growth of mediation

In a modern constitution or any document of other name but largely serves the function of a constitution, sovereignty lies with the people. The national governance[10] of the three branches of government, i.e. the legislative, executive and the judicial branches, is the focus of the minds of the people and they want their public servants to serve them well by providing all sorts of services using public funds which come from all kinds of tax and the money paid as land premiums by the land-users. The need of a better or an even better judicial system is called for among many countries in the world but some of them may not be able to afford it.

Mediation is a kind of improvement of the judicial branch of government. Nearly everyone knows public money is not always enough. There are demands for public spending in many sectors, like education, health care, and housing etc. The court system is established and maintained by public funds. It is generally the case that going to court to resolve a civil dispute costs more than mediation. If the civil workload of the courts is eased by the use of mediation, it means saving public money. This is a part of judicial governance. In some countries, mediation is just beginning to be used more broadly in settling commercial disputes and there is a big potential that the method will be extended to other corners of the society, for example, community disputes, and the resolving of conflicts in the workplace which is in nature a kind of community mediation though the place where the disputes occur may be within a commercial company or any organisations, e.g. a government department. For countries where public money cannot support sizeable legal aid, the need of the development of mediation is convincing. Hence, the combination of growth of the use of mediation is a phenomenon to be reckoned with.

Conclusion

The internet is a powerful and fast machine and plays a big role of educating the people all over the world. Information and knowledge awaken and uplift the people and they will in a short time know quite well about dispute resolution or conflict management. In legal service, the upkeeping of the judiciary and the provision of legal aid in civil cases are sustained by public funds. The judicial mechanism to settle civil disputes between individuals and individuals, individuals and businesses, individuals and government departments, and businesses and government departments, is causing a burden to the public purse. It is also not in the best interests of the whole society even the costs of litigation are paid for by well-to-do people who can afford such expenses. Societal resources can be applied in areas that are more worthwhile if part of the money spent in litigation can be reduced.

(Footnotes)

[10] For national governance, there is a parallel concept of constitutional governance. For entities that are not nations, the proper term would be territorial governance.

The requirement of adopting mediation to solve disputes will grow because of its flexibility, speed and lower expenses. The mediation process is private and informal. There is no rigid procedure. Professional mediators as dispute resolvers are being trained and they practise in different fields. Generally mediation costs less as illustrated by experiences shown in various places. In a number of territories around the world, mediation as a way to resolve civil disputes is still a rather new thing to the general public and promotions are undertaken by a number of governments and persons. No doubt mediation will become popular. With the gradual worldwide acceptance of mediation, the effect will form a part of the combination of growth. In other words, there is much room for expansion of the need or use of mediation. The synergy of the fast developing and the developing global partners of mediation is thus assured. For international businesses, international mediation can be a competitive option to international arbitration in resolving disputes.

(Author: Joseph WW Chan is a part-time lecturer in law, Hong Kong Shue Yan University.)

The Lighter Side

An 80-year-old couple was having problems remembering things, so they decided to go to their doctor to get checked out to make sure nothing was wrong with them. When they arrived at the doctors, they explained to the doctor about the problems they were having with their memory. After checking the couple out, the doctor told them that they were physically okay but might want to start writing things down and make notes to help them remember things. The couple thanked the doctor and left.

Later that night while watching TV, the man got up from his chair and his wife asked, "Where are you going?" He replied, "To the kitchen." She asked, "Will you get me a bowl of ice cream?" He replied, "Sure."

She then asked him, "Don't you think you should write it down so you can remember it?" He said, "No, I can remember that." She then said, "Well I would also like some strawberries on top. You had better write that down because I know you'll forget that." He said, "I can remember that, you want a bowl of ice cream with strawberries." She replied, "Well I also would like whipped cream on top. I know you will forget that so you better write it down." With irritation in his voice, he said, "I don't need to write that down! I can remember that." He then fumes into the kitchen.

After about 20 minutes he returned from the kitchen and handed her a plate of bacon and eggs. She stared at the plate for a moment and said angrily: "I TOLD you to write it down! You forgot my toast!"

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Article

A Comparative Analysis of Mediation vis-à-vis Litigation and Arbitration

: GARV MALHOTRA

Methods used to settle disputes have ranged from negotiation, to courtrooms, and even to physical combat. However, as the human race evolved, man realised for the need for peaceful solutions to the disputes. Over the years it was realised that the process of litigation though peaceful, it did provide not a speedy and mutually agreeable solution. The application of mediation is not intended to replace or supplant the need for public adjudication, but to complement and preserve that core normative purpose of the judicial system. The author looks at the various options.

Disputes are an inherent characteristic of a society which every person abhors and wishes to solve. Historically, methods used to settle disputes have ranged from negotiation, to monarch's courtrooms, and even to physical combat. However, as the human race evolved, man realised for the need for peaceful solutions to the disputes and thus evolved the concept of judiciary where disputes began to be adjudicated by trained jurists. Over the years it was realised that the process of litigation though peaceful, it did provide not a speedy and mutually agreeable solution. The dispute resolution mechanism has now reached a stage where it needs to evolve further by stepping out of the courtrooms and find alternative channels of resolution than the traditional litigation.

It is virtually impossible to survive litigation and remain solvent, but it is occasionally possible to endure it and remain sane. As a modern ordeal by torture, litigation excels, it is exorbitantly expensive, agonizingly slow and exquisitely designed to avoid any resemblance to fairness or justice. Yet, in strange and devious ways, it does settle disputes to everyone's dissatisfaction[1].

In the modern world where the complexity of the legal systems has reached an intolerable and undesirable point, the common man is more prefers alternative effective solutions rather than bearing the brunt of taxing litigation and facing the uncertainty of results which may have ramifications beyond foresight. Due to this, a large number of parties have in recent times started avoiding these cumbersome procedures and are engaging in Alternative Dispute Resolution (ADR) techniques. Alternative dispute resolution 'ADR', includes a wide range of dispute resolution processes, both formal and informal. We adopt a modified functional definition to include those processes that have a certain formality and recognisable process, with an acknowledged commencement and conclusion, and conducted

(Footnotes)

[1] JS Auerbach, Article "Welcome to Litigation"

by third party neutrals other than judicial officers acting in that capacity[2]. Alternative Dispute Resolution (ADR) refers to the wide spectrum of legal avenues that use means other than the traditional judicial systems to settle disputes. The main ADR alternatives to civil litigation are arbitration, conciliation and mediation. Other, more particular ADR processes available are early neutral evaluation, mini-trial, summary jury trial, judicial settlement conference and conciliation. Disputing parties use these ADR methods because they are expeditious, private, and generally much less expensive than a trial. Out of all the streams of ADR, in my opinion, the use of mediation is the most rational, expedient and cost effective.

Mediation is a decision making process in which parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision making and to assist the parties reach an outcome to which each of them can assent[3].

Mediators are independent, qualified and impartial – they are not advocates for any of the parties involved in the dispute and they do not give professional advice of any kind to anyone involved in the dispute. While our definition may be arguable, the fact remains the skills, process and standards implicit in the definition are demanding and not easily acquired[4].

The philosophy of Mediation rooted in human psychology and is based on the fundamental characteristics of humans that one likes to settle one's disputes himself or herself without any authority governing their conduct or results. The parties themselves posses the power to control the process, they also reserve the right to determine the parameters of the agreement. Unlike a judge or an arbitrator, a mediator's job is not to decide the dispute based on its merits but to assist and facilitate discussion between the parties. It is a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement. A mediator assists the parties in identifying and articulating their own interests, priorities, needs and wishes to each other. He uses specialized communication techniques and negotiation techniques to assist the parties in reaching optimal solutions. The exploration of interests of parties provides a powerful negotiation strategy for creating durable settlements of seemingly irreconcilable conflicts[5].

Mediation works purely facilitatively: the practitioner has no advisory role. Instead, a mediator seeks to help parties to develop a shared understanding of the conflict and to work toward building a practical and lasting resolution.

Mediators listen to and use language effectively to take the edge off volatile statements and words.[6]They may reframe a statement as neutrally as possible without trivializing the viewpoint of the speaker. Parties often describe the factual background in a disorderly fashion, and a mediator's role is to bring some order to confusing statements. Finally, an effective mediator will be careful in the choice of words. "Damages" may become "bills or expenses." "Liability" may become "responsibility." "Your side of the story" may be restated as "factual background." Again, here, by rephrasing more neutrally, the mediator defuses the language of its explosive impact without changing the core meaning, and by doing so, may encourage the parties by example to speak with fewer offensive or conflictual phrases and words that put the other side on the defensive[7].

The biggest benefit of mediation is that each party goes home happy as there is a consensual settlement rather than a decision thrust upon them in cases of arbitration and litigation. It is more cost effective and less time consuming as mediation proceeding usually take one or two days to resolve disputes as opposed to months or even years taken by arbitration or litigation. Moreover, in case of a complete breakdown of dialogue between parties, they still have the option to resort to arbitration or the judicial methods as the parties do not forfeit their rights to a traditional legal remedy as Mediation clauses, in contrast to arbitration

(Footnotes)

[2] Aster &Chinkin, *Dispute Resolution in Australia*, (1992) [6] Butterworths, Australia, citing the definition adopted in the Working Party Report, Attorney-General, Victoria.

[3] Boulle, Jones and Goldblatt, *Mediation: Principles, Process, Practice* (1998) [2], Butterworths, Wellington.

[4] Boulle& Wade, *Introduction* (2001) Bond LR 44.

[5] Roger Fisher and William Ury, Getting to Yes (1983).

[6] Gregg. F. Relyea, The Critical Impact of Word Choice in Mediation, 16 Alternatives No. 9, 1 (Oct. 1998).

[7] Mediating Mediation in India, Hiram E. Chodosh available at http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf

clauses, are not "vexatious clauses" *(clausolevessatorie*). If the parties do not arrive at any settlement agreement as a result of the mediation process, they are always allowed to go to arbitration or litigation as mediation clauses are not binding. There is no rigid procedure regarding the place where the mediation proceedings are to be held unlike courtrooms or lex arbitrai in litigation and arbitration respectively.

One can also employ mediation to reduce or prevent violence in sports and in schools, using peers as mediators in a process known as peer mediation[8].

If the parties cannot agree on how to share or cooperate, an effective mediator may explore integrative bargaining strategies. Integrative bargaining explores the investment of resources outside those at stake in the controversy. A wonderful illustration of integrative bargaining is a story is heard in many different cultural contexts. In this story, a camel herdsman dies and leave seventeen camels to his three sons. The will provides that the eldest shall receive 1/2 of the camels, the middle son 1/3, and the youngest 1/9. The sons do not want to wait to breed the camels before their distribution, and they do not want to sell them off because they are worth more to keep than to sell on the open market. They go to a wise man who has a simple solution. He lends them a camel and sends them home to think about their problem and directs them to return the next day and give him back the loaned camel. When they go home, they count the camels; they now have eighteen, which to their pleasant surprise divides evenly: the eldest gets nine; the middle son gets six; and the youngest gets two. The distribution adds up to seventeen. They return the extra camel to the wise man the next day and are forever grateful for his assistance[9].

Mediation is an inherent characteristic of a society as opposed to the other alternatives of dispute settlement and history is witness to the same as mediation has been taking place since time immemorial in different forms all over the world. It is an all pervasive technique which can be used to resolve a vast variety of disputes ranging from neighbourhood quarrels to inter-state disputes.

Mediation creates a fiduciary atmosphere between the parties and the mediator due to its confidential nature through which the parties can vent their frustration, understand and appreciate the other side of the story and finally come to an agreement rather than a judgement. All statements of a party during mediation are confidential and may not disclosed without written consent. Generally, confidentiality in mediation also extends to documents specifically prepared for mediation, such mediation briefs. Confidentiality is paramount to the effectiveness of the mediation process as it creates an atmosphere where all parties are increasingly comfortable to discuss their dispute without fear that their words will be used against them at a later date. Confidentiality promotes open communication about the issues involved between the parties. Most mediators even destroy the transcripts of the mediation proceeding at the end of the mediation in the presence of both the parties to instil a confidence of utmost confidentiality.

A mediator plays a dual role during the mediation process- as a facilitator of the parties' positive relationship, and as an evaluator adept at examining the different aspects of the dispute. After analysing a dispute, a mediator can help parties to articulate a final agreement and resolve their dispute. The agreement at the end of the mediation process is product of the parties' discussions and decisions and not a result of the perspective judgement of the judge or arbitrator.

The disadvantages of arbitration and litigation include the risk losing, formal or semi-formal rules of procedure and evidence, as well as the potential loss of control over the decision after transfer by the parties of decision-making authority to the arbitrator. Mediation is flexible in terms of evidence, procedure, and formality. In addition, parties in arbitration are confined by traditional legal remedies that do not encompass creative, innovative, or forward-looking solutions to business disputes. Mediation leaves scope for parties to come up with out of box solutions rather than being patronized by the precedents of traditional dispute resolution.

Arbitration and mediation both promote the same ideals, such as access to justice, a prompt hearing, fair outcomes and reduced congestion in the courts. Mediation, however, is a voluntary and non-binding process - it is a creative alternative to the court system. Mediation often is successful because it offers parties the rare

(Footnotes)

[8] Cremin, H. (2007) *Peer mediation: citizenship and social inclusion revisited.* Open University Press

[9] Greg Relyea, Mediation Training Materials for ISDLS Bombay Program, at 82 (2003).

opportunity to directly express their own interests and anxieties relevant to the dispute. In addition, mediation provides parties with the opportunity to develop a mutually satisfying outcome by creating solutions that are uniquely tailored-made to meet the needs of the particular parties.

As Mahatma Gandhi said; ". . . both were happy with the result, and both rose in public estimation. . . . I realized that the true function of a lawyer was to unite parties riven as under. The 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 out private compromises of hundreds of cases. I lost nothing thereby—not even money; certainly not my soul"[10].

Mediation is not something new to India. Centuries before the British arrived, India had utilized a system called the *Panchayat* system, whereby respected village elders assisted in resolving community disputes. Such traditional mediation continues to be utilized even today in villages. Also, in pre-British India, mediation was popular among businessmen. Impartial and respected businessmen called *Mahajans* were requested by business association members to resolve disputes using an informal procedure, which combined mediation and arbitration[11].

Mediation has evolved dramatically over the past 20 years; it is now a well-established academic discipline with an extensive research base, general training, education programmes and practical application[12]. It is in fact the key to reducing the *pendentlite* around the globe. The application of mediation to the legal dispute resolution process is not intended to replace or supplant the need for public adjudication and normative judicial pronouncements on the critical issues of the day, but to complement and preserve that core normative purpose of the judicial system[13]. Its practice has to be developed further to suit the contemporary world till it becomes a permanent part of the dispute redressal landscape.

(Footnotes)

[10] Mahatma Gandhi, an autobiography: The Story of My Experiments with Truth, 134 (6th ed. 1965).

[11] Hamline Journal of Public Law & Policy Mediation: Its Origin & Growth in India By Anil Xavier Vol 27

[12] Arbitration and Mediators Institute of New Zealand (AMINZ), Newsletter No. 13 (June 1997).

[13] Mediating Mediation in India, Hiram E. Chodosh available at http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf

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Think ... The Potion

Once upon a time, there was a young woman who was constantly nagged by her mother-in-law. Eventually the young woman could no longer stand this aggravation and went to the local herbalist for some poison to kill the old woman.

After some thought, the herbalist gave her a heavily-scented potion. He told her this potion should be massaged into the skin daily, and after six weeks, her mother-in-law would die. The young woman did as instructed. Each day she gave her mother-in-law a massage with the potion. Gradually the old woman's angry temper seemed to disappear, and empathy grew between the two women. After awhile, they started to understand and respect each other.

The young woman began to regret her desire to kill her mother-in-law, and as time ran out, she became increasingly worried. She returned to the herbalist and begged for an antidote to the poison.

The wise old man smiled and explained that no medicinal antidote was needed. The poison she had been massaging into the old woman's skin was simply a mixture of aromatic oils.

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PCA brings out Rules for Outer Space Arbitration

The Permanent Court of Arbitration in The Hague has adopted the "PCA Optional Rules for the Arbitration of Disputes Relating to Outer Space Activities." The project was set in motion in 2009 in response to a perceived need for specialized dispute resolution mechanisms in the rapidly evolving field of outer space activities. The text was developed by the International Bureau of the PCA, in conjunction with an Advisory Group of leading experts in air and space law.

Mahathir for UN mediation on Kashmir

Malaysia's veteran leader Mahathir bin Mohamad advocated third party - the UN - intervention between India and Pakistan for resolving the Kashmir issue, saying such issues could not be settled through conflict. Speaking to reporters briefly after a speech at the Hindustan Times Leadership Summit in New Delhi, the 86-year old Dr Mahathir, who was Malaysia's Prime Minister from 1981-2003, said such problems between nations could be solved in three ways - negotiations, arbitration and recourse to law. The third party could not necessarily be any country but the UN, he added. He said India and Pakistan could go to a third party. Otherwise this issue would not have been there for 60 years.

IOA to set up Ethics and Arbitration Panels

The Indian Olympic Association at its General Body Meeting recently, had disbanded the Ethics Committee and Arbitration Commission, but apparently after its Secretary General Randhir Singh's sharp criticism, it said these committees will be formed again as per the unanimous decision of the AGM.

Certificate Programs

Certificate in Conflict Management (CCM)
(15 hours)
The certificate program conducted by IIAM, will focus on the dynamics of power in negotiation and explore specific techniques in maximizing each party's potential to negotiate at their best. Through discussion, simulations, exercises and role-plays, it will focus on the structure and goals of the mediation process and the skills and techniques mediators use to aid parties in overcoming barriers to dispute resolution.

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(15 hours)
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CDM is a distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment.

You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded. For more details on CDM, mail to training@arbitrationindia.com