

Absence of Universal Mediation Procedure & Ethical Norms – The Risks Faced by the Mediator

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Introduction

Mediation is perceived to be the most effective way in resolving disputes. It is presumed that people prefer a more non-adversarial, non-competitive, less-damaging, less-costly, more time-effective way of settling their disputes. Mediation is also supposed to be the way forward in order to implement a successful reform in the civil justice system. In spite of the so called highly acclaimed, efficient and effective process, have you ever wondered as to why mediation has very few users? Why is it that, after almost half a century of mediation programs implemented by institutions, courts and policy-makers, mediation is still a marginally used method of dispute resolution, in spite of its obvious advantages? Why mediation has not become the success it was supposed to be?

I feel that the fundamental issue is the lack of a universal definition of the process. Mediation or its process is understood by Mediators and Users differently in different parts of the world. There is no common understanding of what mediation is and what type of practices mediators adopt. The Ethical Standards adopted by the mediators and the Code of Conduct applicable to the mediators differ. It is only fundamental that when a User pays for a service, he expect at least a minimum of consistency of its concepts and procedures.

This heterogeneous understanding of what mediation is, constitutes one of the major causes of the failure to generate trust with people and thus limiting its use. Only if we are ready to face the reality and acknowledge that the age of romance in mediation is over and take a more pragmatic approach, can we make mediation the success it ought to be. Mediation will not create significant impact until this transitory stage is overcome and a clear, consistent definition and description of its fundamentals is sorted out by mediators themselves.

This paper tries to analyze the risks faced by the mediator and mediation as a whole due to the absence of uniform mediation procedure and ethical norms – Not only the mediator loses his credibility, it also leads to the ultimate lack of confidence in the mediation process. Being capable of offering the same explanation of the process across the whole world should only strengthen mediation, making the process more intelligible and more predictable for Users. There could be no doubt that the parties to mediation must have a clear understanding of the role of the mediator and the principles that govern the relationship with the mediator and the parties. With the growth of mediation, emphasis must be given to adopting standards or guidelines for mediation as a whole. Not only does such a framework provide needed guidance, but it has the added benefit of giving the participants confidence in the process.

What is “Mediation”?

Recently a party, who had earlier participated in a mediation proceeding before me, met me at a function. He told me that he had attended another mediation proceeding a few weeks earlier and described the practice of mediation that he had experienced there. He asked me whether it was really mediation. He told me that he was uncomfortable with the practice and certainly would not attempt to use the process again for any of his disputes.

This is not a solitary case. These types of queries are clearly eye openers for anyone who advocates the process and advantages of mediation.

What is really mediation? *Black's Law Dictionary* defines mediation as a private informal dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement. *World Intellectual Property Organisation (WIPO)* defines mediation as a non-binding procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute.

But it is interesting to note that there is no common understanding of what mediation is and that there is no consistent body of practices with respect to mediation.

In fact Michael Leathes had tried to address this problem during 2011 in one of his articles¹, where he said, "Every mediation institution has its own definition. Most are 20 to 60 words strung in segmented, sometimes complex, sentences. Many – though not all – service providers tend to see the world more through their own private lenses than from the vantage point of their customers. They wind up describing what they do, rather than properly defining mediation itself. Consequently, they unwittingly limit what mediation is, or could be, by virtue of the narrow zone within which they operate."

In 2012, Michael² updated his article to reflect stakeholder comments and proposed definition of mediation as "*negotiation facilitated by a trusted neutral person*".

But the problem still continues. There still seems to be no uniform practice as to the "facilitated negotiation by the trusted neutral person". You find different types and modes of "mediation" being offered in different parts of the world, which the User finds difficult to digest.

When we define "mediation" as facilitated negotiation, it means self-determination by the parties and the voluntary character of the process. Then how do we classify mediation processes where the parties are forced to attend and take part against their own will and processes where the parties cannot decide over the issues or where a decision is suggested to or imposed on them?

We also have to understand that there is a difference between "mediation" and "intercession". According to the *Oxford Advanced Learner's Dictionary*, to intercede means "to speak to somebody in order to persuade him to show pity on somebody else or to help settle an argument". Don't we see mediators conducting "mediations"

¹ "Stop Shoveling Smoke! Give Users a Classic Definition of Mediation" by Michael Leathes - Director of the International Mediation Institute (IMI)

² Supra 1

as per this definition? We have also seen in many mediations and also during many conferences where mediation is described as persuading parties to “give and take” and arrive at a settlement. I think this process is more akin to “broking” and the mediator is equated to a “broker” (which incidentally also has a dictionary meaning “negotiator” or “middleman”). Are we undermining the process and status of mediation?

Promoting Mediation – Outcome?

In spite of the fact that even after almost four decades³ of active mediation promotion activities by policy-makers, organisations, mediators and courts, mediation could still claim only a negligible share in the dispute resolution options, in spite of its obvious advantages. Mediation has definitely not become the success it was supposed to be.

The prime reason for the initial kick-start of Mediation as evolved in the 1976 Roscoe Pound Conference⁴ was mainly the increasing costs of litigation and delay in judicial resolution. But, as I have mentioned earlier, the age of romance in mediation is over. From the very beginning, mediation was promoted as the best answer to over-crowded courts and expensive lawsuits. If that be so, if more Judges are appointed and efficient court management system is introduced to bring down the time lag, why should people opt for mediation? Doesn't mediation have something more to offer? Promoting mediation comparing it with the faults and drawbacks of judicial resolution may not hold good any more. Many mediation promoters have opined that putting mediation under the banner of ADR – referring it as “Alternative Dispute Resolution” is one of the causes of hindering the growth of mediation as it would presuppose that something else is the “primary” dispute resolution method and therefore ADR should be termed as “Appropriate Dispute Resolution”. One of the strong reasons for redefining the same has been the argument that mediation is the appropriate dispute resolution process for many disputes, which cannot be obtained by any other methods of dispute resolution processes. If that be the case, then we need to promote mediation on its own merits rather than depending on comparison with other modes.

The statistics of the use of mediation vis-à-vis litigation/arbitration seems to indicate that the promoters of mediation has failed to convince the Users the merit, advantages and credibility of mediation and take full advantage of its potential. As mediators, we always complain that the public is unaware of the process, that lawyers tend to discourage it and that mediation is not regarded as a serious profession. When the promoters of mediation themselves cannot agree on a common definition of mediation and a uniform process of mediation, it would be harsh to blame that Users are ignorant and unaware of the obvious advantages of mediation.

Taking Charge – The Wrong Way

³ Taking the “National Conference on the Causes of Popular Dissatisfaction with Administration of Justice” conducted in 1976, popularly known as the Roscoe Pound Conference, where the modern mediation concept was evolved and developed.

⁴ Supra 3

The proponents of mediation know that mediation process is cost-saving, time-effective, confidential and user-friendly. As mediators and mediation proponents we always felt that the bright future of mediation is imminent, but found it to be frustratingly out of reach. We found it rather strange that the people are reluctant to use methods of dispute resolution other than the regular litigation and they seem to be unreceptive to the benefits they get when opting for mediation! Mediators and its proponents thought that Users have to taste the process of mediation to know its advantages. This probably led to the idea of mandatory use of mediation.

Of course, it led to the increased use of court-sponsored mediations and more people used the process. But did it really serve the purpose? Did the “tasting” of “mediation” prompt the Users to try mediation again without compulsion?

First of all the idea of mandatory mediation is an oxymoron. Isn’t it irrational and illogical to compel people to negotiate, if they are not willing to do it voluntarily? Secondly, who is promoting this? Either the mediators themselves or the policy makers or courts who want to bring down court docketing. Wouldn’t it sound like a self-serving argument? Forcing people to get to mediation by rules and regulations makes it a mockery of the definition of self-determination by the parties and the voluntary character of the process.

Wrong Notion

Sending people to mediation because courts are over-crowded is not exactly the wisest strategy in promoting mediation. Advocating mediation as cost-effective has also misfired. I think both these strategies have failed. It sends the message that mediation is a cheaper alternative to “serious” justice, therefore a service designed for those who cannot afford the costs of litigation. “Cheap” always sends out a message that it is of inferior quality. It may also convey a meaning that these are for cases of no importance for the courts or society. When we say mediation is “cheaper” and recommend mediation because the court is “overcrowded”, we are in fact relegating mediation to a status of inferior quality. Even though we all like to believe that we are civilized and reasonable, we have our own egos. We are failing to understand that for parties involved in a dispute, their dispute is important and when they really feel entitled to something or want something badly, costs are of no concern.

This could be the reason that mediation is primarily associated and considered by people as a method of resolving family disputes, neighbourhood disputes and community disputes and do not consider it as a process of resolving serious contractual or business dispute.

Identifying Pitfalls

How do we make Users believe that mediation is the best available option for resolving their disputes? I think we require a serious brainstorming session among the mediators, institutions and users! The proposal by the International Mediation Institute⁵ to have another Global Pound Conference, to put *inspiration* back into mediation and stimulate real growth, seems to be a wonderful idea.

I think we need to identify the pitfalls. In spite of all the so-called drawbacks of the litigation system, why do people still opt for it? In the court system, there is an established structure which the people are aware of – resolution of dispute according to pre-determined rules of law by judges who are appointed and trained by a system and under an established code of conduct. Vis-à-vis mediation – there is no common definition of mediation, there is no regulation affecting the appointment or code of conduct of the mediators, there is no clear regulation for disciplinary proceedings against any misconduct or fraud committed by any mediator. It is only natural for people to want to seek recourse in a system that is transparent, unambiguous and professional.

It is true that mediation is voluntary and non-binding. Does it mean that the process has to be left free from all types of regulations and the mediators are to be left to themselves to perform according to their own moral and ethical standards? It is true that mediation is confidential and nothing is kept on record, except the final settlement agreement that is entered into between the parties. Does it mean that there need be no professionalized system of appointment, agreed mediation procedure, agreement to mediate etc.?

Risks Faced by the Mediator

The fact that even after four decades of practice of mediation, we are still unable to have a universal definition of the process, practice procedures and ethical norms, is not only a threat to the development of mediation as an effective, trust worthy and acceptable dispute resolution process, but also pose great risks to mediators.

Recently, in India, a person who acted as a mediator in a financial dispute between a company and some of its investors was arrested by the Police based on a complaint given by some of the investors. According to the Police, the person attended several meetings with the investors and representatives of the company and played a major role to settle the matter and his role is highly suspicious and there is possibility of his involvement in the abetment of the fraudulent transaction and cheating. Obviously the “mediator” because of the “confidential” nature of the process did not have any record to show that he was appointed as a “mediator”. Fortunately for him, the High Court quashed the complaint on some other technical ground⁶.

Changing the Scenario

As I mentioned earlier, we need to have a serious brainstorming to find out the answers to change the present scenario. A paradigm shift is necessary. I am unable to put forth any foolproof suggestions. But I may put forth my thoughts for your consideration.

⁵ “Time for Another Big Bang in Alternative Dispute Resolution - The World Needs a Global Pound Conference” by Michael Leathes, Deborah Masucci

⁶ The details of the case and the name of the parties and mediator are not disclosed due to confidentiality issues. The case happened in North India and the High Court passed the order in 2013, quashing the complaint based on some irregularity in the First Information Report (FIR), without going into the merits of the case.

I think the primary requirement is to have a uniform and universal definition of mediation and its process – fine tune and refine the process to stand on its own merit, rather than advancing its values comparing it with other dispute resolution methods.

When we term mediation as “Appropriate” Dispute Resolution, we should highlight the advantages of its merits. Rather than having an adjudication based on “positional-based” laws and rights, resolution is achieved by maximizing mutual gain by an “interest-based” process. Particularly in international arena, where common law and civil law systems exist, adjudication becomes a particularly complex issue. Dispute resolution on an international level requires a flexible forum, which can accommodate the principles of all parties concerned and where the culture and traditions of the parties are taken care of. This is possible only in a mediation process.

The current way of describing mediation as a process where the mediator helps the parties “attempt” or “try” to settle the dispute on a mutually acceptable manner, is unhelpful for the cause – conveying to the Users doubts as to whether a certain result can be achieved. Why should someone opt for a method and trust and pay someone who is just going to “try” or “attempt” for a settlement. As mediators, we have to “deliver” and not “try” or “attempt” and the “delivery” is to “facilitate negotiation for resolution”. The difference between “settlement of dispute” and “resolution of dispute” needs to be clarified. Settlement – is more akin to using pain killers and band aids to relieve the pain and stop the bleeding. Stop taking the pain killers or remove the band aids and the pain and bleeding may very well resume. The word itself – settlement – implies a less than satisfying notion of accepting less than you hoped for – you settled (for less). Resolution is different. It implies completion; its goal is to resolve the matter. If settlement treats the symptoms and stops the bleeding and pain, the goal of dispute resolution is to find out the underlying causes and seeds of the problem and cure the disease. There is permanence and thoroughness to dispute resolution – cure the ailment; solve the problem. Mediation is the only dispute resolution mechanism which helps resolution. It is the only process which focuses on needs, empowerment, restructure perspectives or relationships and seeks to resolve not only the underlying problem, but adds value – in fact dispute is considered as an opportunity.

We should not overlook that the human trait of vengeance and ego is ingrained in our DNA, whether we like it or not. A “peripheral agreement” or a “give and take” gospel of mediation settlement may not hold good for all disputes. Even though we behave civilized and reasonable, our first instinct when we have a dispute is to retaliate against the party who has wronged, rather than to reconcile with that party. In commercial or business disputes, parties need to get a “gain” out of the process. Highlighting the “compromise” factor in mediation may have a negative impact and the party will hesitate to opt for mediation as it gives out the signal of “weakness”. The mediated outcome should maximize the gain for both parties, as far as possible. The in-built training received by lawyers to act as “gladiators” in litigation has to be overcome. The role of lawyers participating in mediation and the concept of mediation advocacy has to highlight the expertise of the lawyers in negotiation skills and advising the parties to maximize their mutual gain by

identifying innovative options. I think this would take away the basic resistance of lawyers towards mediation. At present their role is relegated secondary to the party and their trait of professional ego is hurt. A leading lawyer is unwilling to attend as a mediation lawyer in a mediation proceeding. Once their role as a professional, having expertise in principled negotiation, bringing out maximum gain for the parties, is restored, I feel there would be more encouragement and support from the lawyer community towards mediation.

Similarly the credibility, acceptability and respect for the mediator is an important factor. As I had mentioned earlier, in case of a judicial resolution, in spite of all its so called drawbacks, people still have faith in the system mainly because of the faith they repose on the judges, who are apparently selected, appointed and trained by an accepted system. When the concept of court-annexed mediation was introduced in India, we found a rush of mediators coming in. Most of them were known failures in their profession and wanted to try their success in the new profession. This naturally undervalues the mediation process itself. There is a need for accredited training, evaluation, certification and continued assessment of the mediators, to maintain high quality standards. This not only reposes faith on the mediators, but also enhances the credibility of the mediation process.

The next requirement is to have a uniform and universal regulation mechanism. The mediation process has to be uniform throughout the world – adopting standards or guidelines for mediation as a whole. I do agree that there would be cultural and regional differences in the approach. But any party opting mediation anywhere in the world should experience identical process. The parties to mediation must have a clear understanding of the role of the mediator and the principles that govern the relationship. We need to have accepted mediation quality standards, codes of professional conduct and disciplinary processes to apply and enforce them.

A clear framework with professional standards, not only improves the quality of mediation and mediators, but also has the additional benefit of giving the Users confidence in the process.

Initiating Leadership

With the growing interest in mediation by courts, organisations, mediators and policy makers regionally or country-wise, mediation standards and guidelines have been developed by various courts and organisations in various regions. This is also equally risky as lack of standards. As opined by Michael⁷ while defining mediation by service providers, where they tend to see the world more through their own private lenses, the localized standards and guidelines are also made according to their own ends, which in some cases means nullifying precisely those characteristics of mediation, setting up criteria for training and certification, designing codes of conduct and rules of procedures, which may be contrary to standards and guidelines made elsewhere.

⁷ Supra 1

There needs to be convincing global leadership to spearhead this cause and put up standards and guidelines on international uniform pattern, so as to remove the ambiguity and propel the use of mediation.

I feel the International Mediation Institute (IMI) cannot shy away from taking this initiative and responsibility, when its primary mission is to set and achieve high mediation standards and facilitate consistent, credible and satisfactory outcomes to the Users. IMI already has made its Code of Professional Conduct for mediators, Professional Conduct Assessment Process and Mediator Certification Process. At present it is applicable only to IMI Certified Mediators. It needs to be popularized and adopted by regional institutions, courts and mediators. I feel IMI has to take the assistance of major regional mediation associations like the Asian Mediation Association (AMA) to adopt standardized training procedures, mediation quality standards, mediator certification process, code of conduct and assessment. There is a need to discuss with all bodies dealing with mediation process, including the courts, policy makers, institutions and mediators the need to adopt a common universal standard. We need to address the Users about the advantages of using mediation, which is a party-directed and party-controlled process advancing their overall commercial needs and objectives. The Users need to understand that mediation is a unique process which preserves value, maximize gains and they should discover the joy of resolving disputes for long term gain, in a cooperative manner.

I think only by making mediation a truly global profession, can we reignite the lost inspiration and momentum of mediation and inspire more people to use the process.

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