MEDIATION: ITS ORIGIN & GROWTH IN INDIA

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I. BACKGROUND

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.

Another form of early dispute resolution, used by one tribe to this day, is the use of *panchas,* or wise persons to resolve tribal disputes. Here, disputing members of a tribe meet with a *pancha* to present their grievances and to attempt to work out a settlement. If that is unsuccessful, the dispute is submitted to a public forum attended by all interested members of the tribe. After considering the claims, defenses, and interests of the tribe in great detail, the *pancha* again attempts to settle the dispute. If settlement is not possible, the *pancha* renders a decision that is binding upon the parties. The *pancha's* decision is made in accordance with the tribal law as well as the long-range interests of the tribe in maintaining harmony and prosperity. All proceedings are oral; no record is made of the proceedings or the outcome. Despite the lack of legal authority or sanctions, such mediation processes were regularly used and commonly accepted by Indian disputants.

Mediation bears a striking resemblance, in some respects, to the ancient dispute resolution processes. In mediation the parties are encouraged to participate directly in the process. The expanded framework of discussion in mediation consists of both the applicable law and the underlying interests of the parties. The mediator, an expert in the process of dispute resolution, controls the proceedings, much like a tribal chief serving in the role of peacemaker. But under the ancient methods if mediation failed, the same person was authorized to render a binding decision.

After the British adversarial system of litigation was followed in India, arbitration was accepted as the legalized ADR method and is still the most often utilized ADR method. Mediation (as is now understood globally and unlike the ancient methods, which is by definition non-binding, and encourages the parties to voluntarily reach an agreement that meets all the parties' needs) has only in the past few years begun to become familiar to lawyers and judges generally, except in traditional community settings and except where mediation has been court-directed or statutorily-prescribed, such as in the intra-governmental disputes between government agencies and undertakings, in labor disputes and in public utility services disputes. So when we compare the US and Indian system, over the last twenty (20) years, American lawyers and judges have warmly embraced mediation as a primary tool for resolving conflicts in court and out of court, while Indian lawyers and judges are still warily examining mediation, discussing whether and in which types of cases mediation should be used – similar to what was happening in the US in the 1980's.

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Mediation is no panacea, no magic solution to overcome the institutional challenges of national court systems. Similar to other alternative dispute resolution techniques, however, it does offer a cluster of features that differ from the formal judicial systems of Europe that have had global influence over the primary ways in which legal conflicts are resolved. In this regard, mediation both builds and diversifies the capacity for resolving conflicts in society. With many qualifications and exceptions, European-style courts are state institutions, conducting public, formal proceedings, that presuppose literacy, posture the parties in a conflictual, legal position-based, backward-looking fact finding processes that result in binary, win-lose remedies, subsequently enforced through social control over the losing party. In contrast, mediation and other clusters of consensual dispute resolution techniques, except for arbitration are private, informal, oral, more collaborative, facilitative, future-looking, interest-based processes that bring parties to a calibrated, multi-dimensional, win-win remedy that is more durable because of the parties consent in the outcome.

Because of these basic contrasting features, for many non-European legal cultures, mediation bears a comforting alternative and similarity to traditional forms of dispute resolution that predate colonial influence. Reformers have grown increasingly interested in reviving or extending traditional forms of dispute resolution (such as the methods used by the traditional *panchayats* in India) and integrating them into the formal litigation system.

Another dispute resolution process, *lok adalat,* has received more favorable attention since its re-introduction in the 1980s. Originally, *lok adalat* was an ancient method for dispute resolution used by tribal people. The Legal Services Authority Act (1987) promoted the resurgence of *lok adalat* to provide litigants with the means to resolve their disputes early and affordably. In essence, *lok adalat* may be compared to settlement conferences as they are traditionally conducted in the United States, except that the neutrals in *lok adalat* are senior members of the Bar. These *lok adalat* "judges" preside in panels over a lengthy calendar of cases that are set on a single day and are usually heard in open court (in the presence of other parties and attorneys). Customarily, *lok adalat* judges are highly evaluative from the outset of each hearing. Represented parties do not play an active role in presenting or negotiating their dispute. Instead, attorneys advocate on their behalf. Importantly, litigants may participate in *lok adalat* without paying a *fee,* thereby making it accessible to parties with limited financial resources. Historically, *lok adalat* has been used primarily in personal injury cases and other injury claims involving insurance companies. Parties have the right to decide whether to submit their dispute to *lok adalat.* Because *lok adalat* has resulted in the disposition of a measurable number of disputes and is considered to be an effective and affordable alternative to trial, it will continue to be an important dispute resolution tool.

The development of mediation in India holds enormous promise. In particular, the neutralizing communication skills and powerful bargaining strategies of facilitated negotiation can strengthen the system's capacity to bring justice to the society. Despite the demonstrable value of these techniques, however, several large obstacles block the path to mediation in India. Exposure to these facilitated negotiation processes, though spreading rapidly, remains limited.

II. PRESENT SCENARIO

A. Statutes:

After the enactment of the Arbitration & Conciliation Act, 1996, even though conciliation was given statutory recognition for the first time in India, the awareness of such an option was very limited to lawyers and litigants. The term “conciliation” even though considered synonymous and used interchangeably with “mediation” in most countries, was given a slight difference in the statute. The concept of mediation and conciliation was made familiar or given official court recognition only in 1996 and by the amendment of the Civil Procedure Code (CPC) in1999 by inserting Section 89. The statutory language of the Arbitration and Conciliation Act, 1996 and of Section 89 of the Civil Procedure Code, demonstrates clearly the existence of differing definitions and meanings for "conciliation" and "mediation". Generally both mediation and conciliation is the assistance of disputants by an impartial third party in resolving disputes by mutual agreement. However, a conciliator can be a pro-active and interventionist, because of his statutory power "to make proposals for settlement of the dispute" and to formulate and reformulate the terms of the settlement agreement. The definition of "conciliator" in the statute is consistent with Rules for Conciliation promulgated by the United Nations Commission on International Trade Law (UNCITRAL).

B. COURTS

In 1994-95, the Indian Supreme Court initiated an Indo-US exchange of information between high-ranking members of the judiciary. As part of this effort, former Indian Supreme Court Chief Justice A.M. Ahmadi met with US Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia. Another integral member of the US team was then Chief Judge J. Clifford Wallace, of the 9th US Circuit Court of Appeals.

In 1996, Ahmadi formed a national study team to examine case management and dispute resolution as part of a joint project with the United States. This Indo-US study group suggested procedural reforms, including legislative changes that authorized the use of mediation. New procedural provisions eventually were enacted in 2002, providing for case management and the mandatory reference of cases to alternative dispute resolution, including mediation (Code of Civil Procedure Section 89).

Even though the Arbitration & Conciliation Act, 1996 was enacted to give impetus to conciliation and giving statutory recognition to conciliated settlements, giving the same status of a court decree for its execution, no real effort was taken by the courts or by the lawyers to utilize the provisions and encourage the litigants to choose the method. Even though some mediation training and familiarization programs were conducted it did not create the real effect.

The amendment of the CPC referring pending court matters to ADR was not welcomed by a group of lawyers and the amendment was challenged. The modalities to be formulated for effective implementation of Sec. 89 also came under scrutiny. For this purpose, a Committee headed by former Judge of the Supreme Court and Chairman of the Law Commission of India, Justice M. Jagannadha Rao, was constituted to ensure that the amendments become effective and result in quick dispensation of justice. The Committee filed its report and it was accepted and the Hon’ble Supreme Court of India has pronounced a landmark decision “Salem Advocate Bar Association, Tamil Nadu v. Union of India” (2005), where it held that reference to mediation, conciliation and arbitration are mandatory for court matters. This judgment of the Supreme Court of India will be the real turning point for the development of mediation in India. But the growth of mediation should be carefully moulded so that the system gains the faith and recognition of the litigants.

III. CONCLUSION

In the United States, lawyers and the local and state bar associations, as well as the American Bar Association and the Federal Bar Association, were as enthusiastic as the judges in their promotion and utilization of mediation. American lawyers understood that the legal system was overloaded and on the point of collapse from the courts being wrongly utilized for disputes that could be better and more efficiently handled by mediation and other ADR procedures. By the mid-1980's, lawyers and State Bar Associations had professionalized mediation in the US, by developing mediator training standards, by providing lawyer training in mediation and by prescribing ethical standards for lawyers when acting as mediators and when acting as advocates in mediation. As a result, trained lawyer mediators made mediation a substantial part of their law practice. By responding positively and emphatically to incorporate mediation as a welcome and useful ADR tool in the American legal system, lawyers have not lost business to mediation, but have rather become ensconced as mediators and as the gatekeepers for mediation in the US legal systems. In the US, although lawyers initially felt threatened by mediation and resisted it as an unwanted change in the status quo, the lawyers quickly realized that mediation was just another tool in their lawyer tool bag.

In India, while judges have been quick to recognize increased use of mediation as a helpful mechanism for reducing case backlogs and delays, Indian lawyers have not rushed to embrace mediation. As with American lawyers in the early 1980's, Indian lawyers are conservative. They do not like change and are reluctant to expose their clients to the uncertain risks of an unknown ADR process. Also, understandably, Indian lawyers view mediation as potentially depriving them of income by settling cases prematurely and thereby obviating legal fees that would otherwise be earned. The same has been true for American lawyers during the growth of mediation in the US over the last twenty (20) years. In the first place, by their early acceptance and use of mediation, lawyers became not only the best trained and most qualified mediators (incorporating their mediator work into their law practices), but the lawyers who did not become mediators became the gatekeepers for mediation, selecting over 80% of the cases that are mediated and choosing the mediators for such cases.

Private litigants, too, may harbor anxiety about mediation as an alternative to the court system. Fearful of exploitation, distrustful of private proceedings, comforted by the familiarity of the court system, insecure about making decisions about their own interests, or interested in vexatious litigation or in delaying the case for economic reasons, some litigants may prefer the lawyer-dominated, public, formal, and evaluative judicial process.

These impressions are inaccurate for a variety of reasons. First, mediation will not frustrate the preferences of such litigants; indeed, their right to trial will be preserved. An effective mediation process can quickly allay these fears. Litigants involved in the process are much less likely to be exploited. They will quickly understand that the mediator has no power or social control over them or their resolution of the dispute. Second, effective facilitators will gain their trust over time. Third, if the parties still feel the need for an evaluation of the legal issues, the mediation can be accordingly designed to deliver that service. At times, litigants can better save face with members of their family, community, or organization, if they can cast responsibility for the result on a neutral third party, and for this group, a strong evaluative process may be appropriate. Surveys of litigants find that mediation receives the highest satisfaction ratings of any dispute resolution process.

While judges and the courts provided the initial impetus toward mediation in the United States, it was the lawyers' and law schools' acceptance of the court's challenge to find better ways of resolving disputes that lead to rapid and widespread acceptance of mediation in the United States. Globally, however, the explosion of mediation in Europe and in Asia is being spearheaded by corporations, as multi-national corporations ("MNC's") seek quicker, cheaper and less disruptive means for settling internal employer, management and shareholder disputes and external commercial disputes with trade and distribution partners around the world. At the first annual European Business Mediation Congress convened October 21-23, 2004 by CPR Institute of Dispute Resolution, 140 attendees (including representatives from most of the world's largest law firms) responded to a Survey on European Business Mediation indicating that 60% viewed MNC's as necessarily leading the charge in globalization of mediation, while, 25% viewed lawyers as the leaders, and only 7% viewed courts as the leaders in mediation on the international commercial scene. Now that major corporate clients have discovered mediation and are pushing for it, lawyers who resist the increased use of mediation in India will likely lose credibility with existing or potential MNC clientele.

Once it is understood that mediation is intended to complement (not replace) the judicial process, that it is highly adaptable to different contexts, and that expertise in India is already growing rapidly, the apprehensions may quickly dissipate.