Common Mistakes in Mediation

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Abstract

ADR or "Alternative Dispute Resolution" is an attempt to devise machinery which should be capable of providing an alternative to the conventional methods of resolving disputes. This article concentrates on highlighting the common mistakes which negotiators commit while mediating or negotiating. This article will be helpful to both negotiators as well as mediators to do self-study and improve over it. Knowing the mistakes would make negotiators to avoid it and for mediators could be alert to such tactics.

Introduction

ADR (alternative Dispute Resolution)[1] has become a buzz word. It looks like; everybody is busy in catching the ADR bus. As testimony to this statement we can see mushroom growth of ADR competitions at Law Schools, these were developed to teach and harness ADR skills, in addition to the orientation of the Law Schools another interesting growth also confirms this understanding i.e. mushroom growth of ADR associations and institutions.

Associations and institutions are attempts to institutionalize the ADR process. The institutionalization can iron out all the rough edges and drawbacks in the concept and process of ADR. It also brings uniformity in process, and most importantly, individual heroisms including whims and fancies could be curtailed to a large extent. Institutionalization also infuses confidence in disputant.

Another advantage of institutionalisation is, it helps to instil idea ADR into the mind of reasonable man. Therefore, the idea of ADR has graduated to a next level, where institutions of ADR are going to propagate the idea. This process of institutionalization assures that the idea of ADR would be long lasting. On the other hand, sadly, institutionalisation ensures that the idea wouldn't progress or evolve. As

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1 The debate rages on the use of word 'Alternative'. Many are of the opinion that it should 'appropriate'. The debate is dealt with at the later part of the discussion.

mentioned above institutionalization brings in uniformity in addition it will also bring in rigidity. However, to live long this sacrifice is necessary.

The ADR buzz has even caught up with legislatures. They are one of the major instrumentality in bringing this word and concept into prominence.[2] There is a need to study on the influence of international community (specifically by business community) on Indian legislatures to shift the focus from judiciary to ADR. During the penultimate decade of the previous century, there were two important documents propagated by the UNCITRAL[3] institution at Hague. These documents were concerning Arbitration and Conciliation. The influence of these documents culminated into the Arbitration and Conciliation Act in the year 1996. In addition to 1996 legislation, the legislature finding ADR as a fool-proof answer to the perennial and cancerous disease called 'Docket Explosion'. This belief or faith has given much needed push to the concept of the ADR.

Along with legislatures, judiciary also developed fondness to this word ADR. This led to series of historical developments like, establishment of Supreme Court ADR centres and similar centres at High Court levels. However, Judiciary encourages the ADR on one hand and on the other it is reluctant to grant complete freedom to the parties and private persons (like Arbitrator, Mediator, Conciliator and Negotiator). They continue to exercise strangle hold on the proceedings.[4] The 'fear of injustice' or 'fear of exploitation' has made them opt for this dichotomy. This fear still lingers on, however, as the acceptance of ADR rises, the fear tends to lose its grip. The day is not far, when the judiciary will express same faith in ADR as expressed by others.

Professionals are not lagging behind, after initial reluctance, now they have largely accepted this new system of resolution of disputes. The acceptance is not yet complete, legal Professionals do involve themselves in mediation or arbitration process, but it is far from satisfactory. Mediation is the major contributor for the development of concept of ADR in India. This concept enjoys confidence of the disputants after Arbitration.

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2 Through amendment of Civil Procedure Code in the year 2002 and steady growth and development of court annexed mediation centres all over India are the testimony for the statement. Before this amendment, series of attempts were made under Arbitration and Conciliation Act, Family Courts Act, Industrial Disputes Act.

3 United Nations Commission on International Trade Law.

4 The contention gets support from series of judgements which made arbitrator subordinate to Court proceeding which was never envisaged by the legislature while enacting Arbitration and Conciliation Act.

The skills of the mediator ensure the success of mediation. But it will remain as a half-truth if the negotiating parties are not given due credit for the success. Therefore, 'successful' mediation is the combined effort of both mediator and negotiator.

The mediation as a skill has not completely developed in India. The law professional with experience of a decade or two, will not be able to understand the niceties of the mediation. The exposure to law profession brings in a kind of rigidity which is fatal for mediation.

This article concentrates on highlighting the common mistakes which negotiators commit while mediating or negotiating. This article will be helpful to both negotiators as well as mediators to do self-study and improve over it. Knowing the mistakes would make negotiators to avoid it and for mediators could be alert to such tactics.

Common Mistakes

Aggressive negotiation is the most common mistake. 'Aggressive' means, a person being harsh on the other party, also on problem. The party is trying to gain maximum from the negotiating table can be termed as 'win-lose' negotiator. He firmly believes that mediation is designed for own benefit. He believes in grabbing all possible gains rather than creating a value on the mediation table.

Sometimes such aggressive negotiator gets a better deal. But he or she may damage the relationship in the process, and may even precipitate a deadlock, thereby converting promising discussions to breakdown unnecessarily.[5]

Sober pacifier or win-win negotiator is in contrast to aggressive or win-lose negotiator. 'Pacifier' may be more focused on relationship and almost certainly is more interested in making friends. Such 'pacifier', may fail to protect the interest in tough encounters, as trade-offs are not always beneficial. In the name of long-term relationship, naïve win-win negotiators (pacifier) may give up achievable gains.[6]

The negotiators are expected to 'profit' their own parties. How does a negotiator gain more by 'giving in'? It is by creating more 'value'. Therefore, the 'value' is expected to be created by the negotiator. However, it is important to note that creation of value is not a natural process but a process which has to be cultivated consciously. It has to be practiced. It has to be mastered through experience. In this regard, the common mistake is to overlook the importance of creation of 'value'.

5 'David A. Lax and James K. Sebenius, 3D NEGOTIATION- POWERFUL TOOL TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS, 14 (Harvard Business Press, Massachusetts, 1992).

6 *Ibid* at p.14.

This is a common mistake where the negotiator spends time in claiming value rather than creating it.[7] As mentioned above value can be created. When parties discuss, they discuss to resolve the problem in hand. However, the same parties can overlook the existing problem by looking at the future, as Voltaire said, 'present is always pregnant with future'. Therefore, the mediation should ensure 'birth of future' in a hale and healthy condition.

The common mistake relating to 'value' creation is, almost all the time it is by giving 'discounts' or 'cash flow'. But 'value' can also mean precedent, relationships, reputation, political appearance, fairness, or even how the other side's self-image fares in the process.[8]

Another common mistake is ignoring the 'interested parties'. During mediation, the invitation is sent to few interested parties. The list is prepared by considering the direct involvement of the parties. The simplest example would be of buying a car. The interested parties are dealer and buyer. However, the other important players would be sales-rep, spouse, children, other dealers in the line. Therefore, the deal should be negotiated by keeping all the interested parties in mind. The above simple example itself potentially has many hidden interested parties. Therefore, listing all the interested parties is important part of mediation which is generally ignored.

On the contrary, it is again a mistake to involve too many parties for mediation. Too many cooks spoil the broth. Too many parties can complicate the mediation unnecessarily. However, including all necessary parties is important. Therefore, it is essential to develop a list which neither too long nor too short. How to achieve it? It is impossible to achieve the desired perfect list. Therefore, to avoid such complications it is advised to hold the mediation at different stages and levels. Not expecting to invite all stake holders under one roof, across one table.

Another mistake is ignoring 'cultural dimensions'. Cultural dimensions to the mediation process pose a unique challenge. A buyer from business community or agricultural background, salaried employee, they come with different cultural background. Family owned industries has different process of decision making as compared to multinational companies. Therefore, the culture of the corporation will alter the composition of the mediation table.

The negotiator should take into account all the people who are involved in implementation of the agreement. The mediation may have been organized between

7 *Ibid* at p.14.
8 *Ibid* at p.14.

highest authorities of the entity and it would be implemented by lowly placed officer, it is advisable to include those lowly placed officials in the mediation process. The involvement of these officials wins the commitment for the agreed terms.

Here is a real-life situation. Two heads of the institution were discussing a new work culture in the institution by shifting of cyber room from one building to another. After painstaking discussion, both reached to agreement on shifting. Then came the most important aspect of the discussion, the date, duration and cost. At this stage the cyber in-charge, lowly placed official was included in the discussion at the insistence of the author. The whole discussion was settled with in few minutes and to the surprise of the heads, it was implemented in record time and at low cost. Recognition and listening to the involved persons helps in getting commitment.

Another most common mistake committed during mediation is forgetting the purpose of mediation. Many of the parties negotiate to exploit other party or to protect the relationship. Many people tend to think of mediation as an event, where we sit at a table with someone, playing the mediation game, trying to satisfy our own interests by squeezing or perhaps by engaging in collaborative problem-solving mode. The truth is that mediation begins much earlier than we think. It begins as soon as we set out to satisfy an interest, and culminates in an agreement that ideally satisfies our interests fully. Do not confuse the grand finale — the handshake, the signing of the contract — with the work, research, and preparation that gets us there.

The next mistake is relating to the attitude. The parties participating in mediation are always with an attitude of 'everything for me'. Mostly party will have this approach, when the interests of the parties are not interdependent, or contradictory or mutually exclusive.[9]

This attitude mostly leads to a sin on mediation table of 'deceiving' the other party as to their true views. If this attempt is successful, it will affect all future relations once such deception surfaces including future mediations. If not, successful it will bring in distrust among the parties. Even if the party genuinely wants to settle the dispute, such attempt consumes lot of time in rebuilding trust it would involve exorbitant cost. However, the problem is that once the trust is broken it can never be brought to its original position. The scars tend to remain and it raises its ugly face frequently. This creates difficulty in reaching an agreement and sometimes it may include the risk of no agreement.

9 Christopher W. Moore, NEGOTIATION, *available at* : http://www.au.af.mil/au/awc/awcgate/army/usace/negotiation.htm.

Chances of common mistake surges, when immediate substantive gain precedes over current or future relationships. Such mistakes includes[10]

Misrepresentation occurs in mediation where a person deliberately takes a position on something which is not true in some way. For example, a buyer takes a poverty position, saying they only have a certain amount of money and can afford only that much, but actually they can afford much more than represented. A trade union negotiator takes a hard-line position in pay negotiations, saying the members are ready to go on strike when there is actually dissent about this in the ranks.

Another compelling factor which encourages misrepresentation is lack of knowledge of other party. When a person is aware that, the other party is a newcomer and has no previous experience in negotiations or dealings, the expert would definitely misrepresent the factual situation. In case of real estate deal, if a person with life's earning meets a real estate developer, the knowledge difference (in the field of construction) between the two parties is huge and unbridgeable. At the same time, it is impossible for the real estate business man not to use his advantageous position for his own benefit. Most important question left to be answered is, whether such misrepresentation is a mistake?

Once a rich man from America made a statement 'it seems to me" he said "that integrity isn't really a value in itself; it is simply the value that guarantees all the other values.[11] This statement speaks in volume. It is an answer to the question. Therefore, idea of misrepresentation is captivating; but it should be avoided at any cost.

Bluffing is stating or indicating interest to commit some action with no intention to perform. For example, an owner promises to do complete repair before selling the car, which he never intendeds to do. Employer threatens a workman of disciplinary action, when he never had intention to do. A seller quoting impossible qualities of the products, which he never believed it to possess, is also a kind of bluffing.

These are the common actions found at the time of mediation of business disputes. The bluffing is mostly adopted against the end user or customer. Bluffing is quite different from misrepresentation, on the face of it both relates to wrong representation of facts. However, the difference is misrepresentation is with an intention to deceive

10 The four methods generally used for deception are discussed by Anton, R.J. (1990). Drawing the line: An exploratory test of ethical behavior in negotiation, International Journal of Conflict Management, 1, 265-180.

11 www.briantracy.com/blog/leadership.

whereas bluffing is with an intention to pursue the customer. Interestingly, the law considers misrepresentation as illegal whereas bluffing is pardonable.

Deception is the use of false arguments that leads the other person to an incorrect conclusion. For example, the owner of the property informs the prospective buyer that other buyers are pressurizing him to complete the deal, whereas no buyer is interested in buying the property. A car dealer tells the owner of a car that there is little demand for this model, leading them to accept a lower trade-in value.

Falsification is the simply telling lies or otherwise providing false information with the assumption that it is complete and true. For examples, in a job interview a person says they have an MBA when they do not. A sales person tells a potential customer that there are no major problems with a product when there has been several significant failures.

Like earlier situation, deception is pardonable to some extent whereas falsification is punishable. The law has the same approach to these two concepts, it considers deception as persuasion and falsification as deceiving.

The negative tactics further include[12],

Initial large demand- this approach is to intimidate the other party and make it believe that they are not inclined to settle for lesser amount. This approach hurts the relationship between the parties. In addition, it will be difficult to save face, if such demand is handled efficiently.

Low level of disclosure- this attitude is frequently adopted to put other party in uncomfortable position. This approach also makes them secretive and non-trusting. Such attitude of dodging questions rather than answering gives wrong indication of their approach. This secretive approach is necessary for litigation, whereas for mediation, the dispute should be an open book. The communication between parties being privileged, the parties are under least risk, therefore they should express themselves.

Lack of commitment: The attempts of the parties to gain maximum from the mediation process make them vulnerable to future litigation. The parties may gain on mediation table, but they will fail to get the commitment towards the settlement agreement. Even though settlement agreement achieved during mediation is

12 Christopher W. Moore, Negotiation, *available at* : http://www.au.af.mil/au/awc/awcgate/army/usace/negotiation.htm.

enforceable as a contract, real victory lies in getting unbridled commitment towards such agreement. Therefore, common mistake of most of the parties is failure to gain commitment settlement agreement.

Bargain over Positions: The mistake of parties is that they routinely engage in positional bargaining. Each side takes a position, and argues for it. In the beginning of the mediation process parties decide on its position that 'I am a victim', 'I am right', I am doing a favour'. Once parties gain such position it becomes impossible to mediate objectively. The position achieved incapacitates the person from seeing the other party's perspective.

Once the position is exposed and explained the parties tend to lock themselves into that position. Then the party tend to give more clarification as to their position, as more clarification is issued the parties spend rest of the time and energy in defending the position against attack.

As the commitment to the position increases unknowingly the ego gets identified with the position. Suddenly the parties see new interest in the mediation i.e. to save face. Finally, parties pay more attention to positions and less attention to meet the underlying concerns.

The one of the basic problems with positional bargainer is 'limited resource'. As he identifies himself with the position, he is mentally blocked to explore the other alternatives. This incapacitates the party from contributing to mediation.

The positional bargainer treats other party as an opponent. This attitude makes him to go hard on mediation table. This attitude makes the party to ignore the objective of the mediation and concentrate on bashing other party to satisfy once own ego. This makes the party to be offensive at all times

Concession as weakness: Many times, the parties are scared generate options, especially concessions. The fear is created as concession may be perceived as weakness. It is important to note that such fear is well placed as, mostly concession leads more demands. But such misconception can be easily avoided if concessions are given after making them feel about the confidence over dispute. It is important to render concession cautiously rather than avoiding it altogether.

Conclusion

The author has attempted to identify some of the common mistakes by the negotiators in any of the ADRs including mediation. These mistakes may be committed by

themselves or by the opposite party. It is important to avoid committing these mistakes and more important is to notice such mistakes by the other party and handle it efficiently.

The article falls short of giving solutions to these common mistakes, because the best solution does not lie in development of new tactics but in identifying such mistakes. If the party is unknowingly stepping on these mistakes, it needs to be classified as mistake. Once it is classified, the mistake dies slow and natural death and party is free of such mistake.

If these mistakes are committed by the other party, it is your duty to bring to the notice of the other party. Best possible solution would be to bring it to the notice of the mediator and take his help to find a solution to it.

It is important to note that mediation is a cooperative process. The party need to cooperate and ensure cooperation in reciprocity.

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