E-Negotiation: Emerging Trends in ADR

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Abstract. Negotiation is an unconsciously has become a part of our life and we don't even realize in our life that when we start negotiating. It starts from our childhood to adolescents from a chocolate to bike for getting good marks in the examination. But besides this we never realize that sometimes this acumen can help us becoming one of the successful negotiators in our professional life. Earlier in case of disputes the corporate houses prefer to have arbitration clause to avoid court hassle but now the companies are moving step forward to seek out the differences through negotiation that they are not turned into disputes with time. The communication technology has also helped the same by providing an e-platform in the form of electronically mediated negotiation. The paper is an attempt to discuss the relevance and steps of negotiation in commercial disputes and relevance of e-negotiation in the same lines.

Keywords: Alternative dispute resolution · e-Negotiation · Traditional negotiation · Commercial contracts

1 Introduction

Negotiation means getting the best of your opponent.

Marvin Gaye

Alternative dispute resolution has emerged as one of the powerful tool for dispute resolution which doesn't have judicial character. This alternative dispute resolution has become a part of our personal and professional life. If someone is struck up in matrimonial dispute the court will first refers the parties for mediation before even starting the case as far as commercial contracts are concerned the corporate houses have a specific clause in almost all the contracts relating to arbitration in case of dispute and these days even for negotiation to sought out the difference. In some cases, with our consent and in other cases unconsciously we are adopting the alternative dispute resolution techniques as a part of our day to day life. The four common mode of dispute resolution are:

1. Mediation
2. Negotiation
3. Conciliation
4. Arbitration

S.C. Satapathy and A. Joshi (eds.), *Information and Communication Technology for Intelligent Systems (ICTIS 2017) - Volume 2*, Smart Innovation, Systems and Technologies 84, DOI 10.1007/978-3-319-63645-0_10

Indian legal system has recognised Mediation as a method to resolve dispute between the parties. Mediation is a form of a third party intervention with the consent of the parties to a dispute. It is a process which is not as participatory as a negotiation or conciliation process; it is a process in which parties do not directly negotiate, but rely on the finding of the mediator. Mediator acts as a facilitator and helps the parties to resolve the dispute in a peaceful manner. A mediator's function is to provide solution to a dispute in the hope that the parties will accept it. The mediator is a neutral person with knowledge and expertise in the subject-matter of the dispute and helps the parties to reach a best possible solution. The decision of mediator is signed by the parties and enforceable in the court of law. On the other hand the negotiation is initiated by the parties on its own and the negotiator can be the parties itself or the negotiator can help the parties to break deadlock and begin negotiation on any issue of their common interest which can be business deal or personal matter or state issues if it is between two international parties.

The purpose of conciliation is not to change the nature of a dispute, that is, whether it is a legal or paralegal dispute, but to point out the strengths and weaknesses of the application of the conciliation process in settling a dispute or a difference. In a conciliation process the need for accommodation of ideas and concessions must be emphasised for mutual benefits. Quantification of losses both in financial terms and non-financial terms must be identified. A conciliator's function is therefore to clarify to the parties their respective position and to convince them of the legal consequences if a dispute is not settled amicably. In other words, it is the function of a conciliator to alert the parties of the adverse consequences that might take place if a dispute is not settled outside the court [1].

Arbitration is another method to resolve commercial disputes. It is procedure in which a commercial dispute is submitted, by agreement of the parties, to an arbitrator/s to decide. The decision of the arbitrator will be binding on the parties and it can be changed in the court of law only if it contrary to law and on very specific grounds. In arbitration, the party are free to choose jurisdiction i.e. seat of arbitration, rules of law by which parties intend to be governed or decide the dispute. The arbitrator is also bound to give the award in time bound manner. The arbitration is different from negotiation and mediation because in arbitration there is no win-win situation for both the parties and the arbitrator is duty bound to decide on merits. Whereas in negotiation both the parties feel satisfied with the outcome and the final outcome is not subject to any challenge in any court of law.

The same has been recognised by the Arbitration and Conciliation Act, 1996 which had been drafted on the UNCITRAL Principles. The disputes need to be resolved with ease, quickly and low cost. Though arbitration has become a clause in standard form of commercial contracts but negotiation and mediation is still a discretionary option which has been underestimated as dispute resolution mechanism. Only, when the litigation is pending under Section 89 of Civil Procedure Code, 1908 the Court observes that the

dispute can be resolved through settlement between the parties the Court can pursue the same.[1] But in this alternative also negotiation is missing.

2 Negotiation as a Method of ADR

Negotiation is the one mode of ADR which is under estimated. In this case the parties to the disputes agree upon courses of action, bargain for collective advantage, or make an effort with an outcome which serves the mutual interests. Negotiation is a part of our life and we experience the same in all roles of life from matrimonial disputes to all aspects of life. The basic difference between negotiation and mediation is that whereas in the former process the parties settle their differences through active participation, the latter is more non-participatory and is reliant on a third party's intervention. Of the two processes of settling disputes, perhaps negotiation is more effective than mediation, in a negotiation process the parties, by consent agree how to settle their disputes, whereas in a mediation process the parties' consent is depends on the role of mediator [1].

The role of a negotiator is to determine the grounds of common interest as well as differences in the subject matter. A trained negotiator regularly works to trash out the alterations amongst the parties by providing most suitable solution for the parties. In this procedure, the negotiator endeavours to bargain the outcome of both the parties by adjusting to the demands. A positive negotiation in the advocacy approach is when the negotiator is able to attain a desired result without affecting the future business and this type of approach is fruitful to both parties. For example the Ambani brothers the property worth rupees 99,000 crore business empire was bifurcated with the help of family friend K.V. Kamath, Chief Executive Officer (CEO) and Managing Director of

[1] Section 89 of Civil Procedure Code, 1908 Settlement of disputes outside the Court.

1. Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for—
   a. arbitration;
   b. conciliation;
   c. judicial settlement including settlement through Lok Adalat; or
   d. mediation
2. Where a dispute had been referred-
   a. for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act
   b. to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
   c. for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
   d. for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

ICICI. This is classic and most successful example of property settlement without moving to the Court of Law. This type of settlement generally aims to results into win-win situation for both parties. Negotiation is emerging as one of the powerful tools even the law firms are recommending the same as a part of commercial contracts. The sample of the same is mentioned below for discussion purposes [2]:

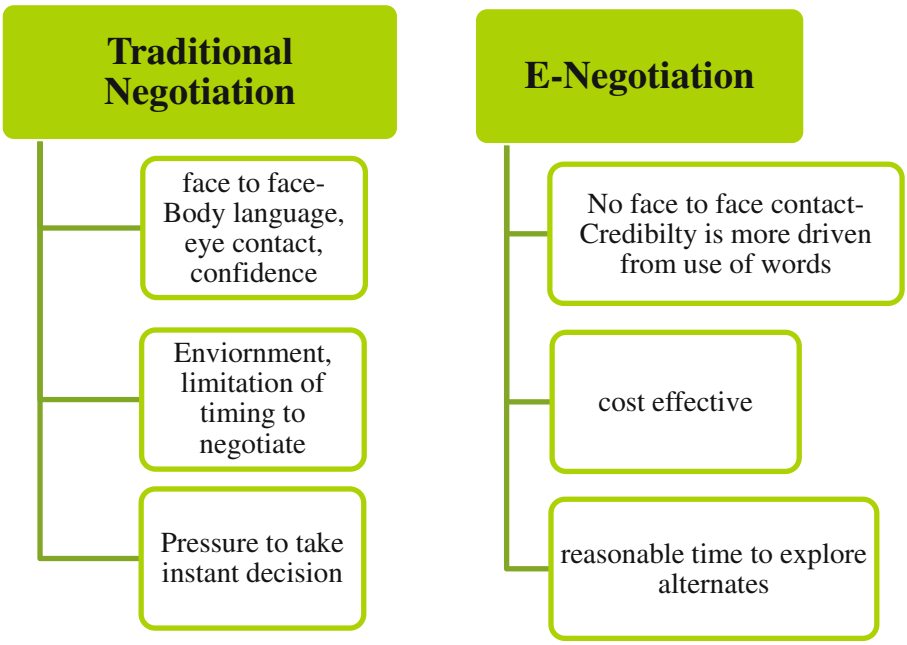
> *All disputes arising out of or in connection with this Agreement shall to the extent possible be settled amicably by negotiation between the parties within [30] days from the date of written notice by either party of the existence of such a dispute. If the parties do not reach settlement within period of [30] days, they will attempt to settle it by mediation in accordance with the Centre for Effective Dispute Resolution (CEDR) Model Mediation Procedure. Unless otherwise agreed between the parties, the mediator will be nominated by CEDR. To initiate the mediation a party must give notice in writing (ADR Notice) to the other [party OR parties] to the dispute requesting a mediation. A copy of the ADR Notice should be sent to CEDR. The mediation will start no later than [x] days after the date of the ADR Notice.*

The clause definitely lays down the negotiation as the first option whenever the dispute arises. The negotiation doesn't have any set rules or steps it depends from person administrative skills to manage the things in pressure but generally there are certain steps which are taken into consideration by everyone who is negotiating.

1. The first golden trio of negotiation is PPT i.e. Person, Place and Time. Before starting the negotiation the negotiator is bound to verify that the person which whom he want to start negotiation is authorised to negotiate on behalf of other party. Place refers to where the negotiator starts the negotiation the issues is negotiable or not. Negotiator has to invest time if he wants to come out with fruit bearing results for both the parties. When such kind of process starts you can't specify how much sitting are required. It is also called the opening statement for the purposes of negotiation.
2. Before initiating the negotiation the parties should know the background of each other, areas of common interest, areas of differences and the impact of their differences in long run. If the parties are unable to sense the impact in long run the negotiator should be a person who could sensitize the parties on these issues.
3. The second step is the most sensitive one i.e. seeking clarification or information regarding the issues on which the parties has locked the horns and all the issues affecting the information. The role of negotiator is very crucial in this regard as it is the ice breaking session between the parties. In this parties are also made aware of each other interest, limitation and the justification for the bids negotiated between the parties. This step is also very significant to identify the difference between the parties which helps the negotiator to bargain more effectively.
4. The third step is ***Moving Forward*** which means the talks initiated between the parties don't lead to stagnation. The negotiator should have the capability to keep the bargaining moving.
5. Final step in this regard is fixing the deal means the terms or condition bargained and the parties have agreed to settle the dispute.

3 Emerging Trends of E-Negotiation

The Digital India project is the dream project and the first priority of Central government to transform India to digital and knowledge based society. The objective of the project is to provide solution in every sphere of life through E-means i.e. E-solutions through E-Governance. The object of Indian government is to ensure all work is done electronically and become a complete paperless nation by 2019. Though this dream seem to be distant but still as per the Goldman Sachs [3] study predicts India as the third world economy by 2050 after United States and China. The strong consumer base of 175 million in India will result into $60 billion in gross merchandise value (GMV) by 2020 [4]. Another study of Goldman Sachs proposed that India's overall e-commerce market was expected to crack the $100-billion mark by 2020. It had said the overall online market in the country including travel, payments and retail could reach $103 billion, of which the e-tail segment would be valued at $69 billion [5]. This economy boom has laid down another aim to Indian Government i.e. resolving of disputes. With the digitalization of market and increase in e-commerce the necessity of online dispute resolution has also turned to be in demand. There are many economies and commercial contracts which are moving towards e-negotiation especially in case of online shopping. It is a more effective measure than the traditional negotiation mechanism because the pricing mechanism in e-negotiation is automated and intelligent. In this world of cyber negotiation the e-mail negotiation is nascent and cogent solution for the parties at distance. The e-negotiation is different from traditional negotiation on the various aspects which are as follows:



Though e-negotiation is not a settled concept but in its nascent stage still this method has some both positive and negative aspects. E-negotiation has certain clear advantages over the traditional negotiation. E-negotiation addresses two steps of negotiation i.e. time and distance in a positive manner. This type of negotiation does not have to wait till all the parties come together on a table. The negotiation can be initiated by just writing an e-mail to the authorised person on behalf of the other party. In this negotiation, the parties can negotiate even they are located into opposite directions or different countries. It is both cost effective and time effective as the time taken in travelling and in conducting the negotiation is reduce drastically. In negotiation the most important factor is communication but in e-negotiation the writing and use of words play crucial role. As body language and conduct of the parties are missing to support the negotiation. The language of communication should be simple and in synchronized manner. This type of negotiation can only be initiated if it had been properly planned. Before starting this negotiation the negotiator is aware of background and difference between the parties and also has a tentative aim to achieve through bargaining. If the bargaining aims are not clear, this type of negotiation may result in to a monotonous and useless exercise that will frustrate the entire settlement process. Without setting an aim in e-negotiation will be like firing without aim. This type of negotiation can also be done by making the parties the part of this process. It affords an opportunity to the parties to observe the negotiation and help them to obtain a target beneficial to both parties.

There have been several studies [6] conducted on traditional negotiation vis-a-vis e-negotiation to check the effectiveness of one over the other. It has been observed that electronic mediated negotiation does not yield any significant difference outcome of the negotiation. E-negotiation has been proved beneficial with respect to price and time duration.

4 Conclusion

The Arbitration and Conciliation Act, 1996 recognize arbitration and conciliation as methods of ADR. The mediation is also recognised tool of ADR and supported by the rules made by different High Courts and Supreme Court from time to time to provide a binding force behind them. Though there has been specific rules drafted for the purposes of enforcement of conciliation and mediation agreement but however, negotiation or e-negotiation has no such legal sanction or enforceability. Though with the changing time and cloud computing we are developing the techniques on automated negotiation systems and there is a continuous research is to find a dependable e-negotiation system.

On the other hand the corporate houses are working on their drafting skills to make a dispute resolving with multi-party settlements, saving the time and handling the difference before they are converted into disputes. Though negotiation and e-negotiation is an underrated instrument of ADR but it can be proved very effective in many aspects like jurisdiction, time, distance, cost, procedural technicalities of law and lifelong commercial relationship of the parties are not spoiled. But there is a need to make negotiation an effective tool to resolve the dispute at par with other methods of ADR.

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