

Worldwide Use of Mediation

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(I)

Introduction

Mediation is being used throughout the world because the existing litigation system and arbitration system are declining.

Nowadays, the court procedure is complex and stereotypical. The process of trial and judgment is too lengthy. Submission of evidence takes too long a time and needs too much money. Lawyers' debate is excessively abused. Justice is difficult to access. Litigation becomes costly. Backlog of court cases is heavy in most of the countries in the world. 'Explosion of Litigation' may take place at any moment. To a certain extent, the operation of the courts is running against 'Natural Justice' and 'Due Process'.

Arbitration is following what the courts are wrongly doing. The arbitration process has reduced to as complex as litigation. The time-span of arbitration is getting longer and longer than litigation and the cost of doing arbitration is much more expensive than litigation.

Some years ago, a man indignantly paraded up and down everyday outside the British Royal Court in London, carrying two boards on his shoulders, back and front, said:

‘ARBITRATE, DON’T LITIGATE!’

But one day, he disappeared. It was said that it was not due to natural cause, but because he had come to realize that there was really no more difference between litigation and arbitration.

(II)

Declining Facts

Litigation

In India, each judge has in average 2147 pending cases in hand. The backlog of cases in Indian courts comes up to 31,280,000 cases which can not be cleared up before the year of 2330 if the courts work at the current pace.

In China(PRC), more than 200,000 cases were pending in the courts in 2012.

In Hong Kong SAR, there were thousands of pending cases in the courts in 2012.

In other Asian-Pacific courts, backlog of cases is enormous all the time.

In Nigeria, about 50 judges in Lagos, each judge having 300 and more pending cases. The average life-span of a case can be 10 to 15 years.

In South Africa, 115,584 cases were filed in 1996-1998 and 128,000 cases in 2004-2005, only 62% of the cases were settled in those years.

In Italy, the time-limit for trialing and judging a case in the lower courts is 3 years. If appeal, it takes about 10 year altogether to close the case. Since 1954, the number of the accumulated cases has been 3 times of the number of the cases newly filed every year.

In UK, 73% of the disputants complain that the British judicial system is obsolete, too stiff and procrastinating. At least 161 weeks are needed for ending a case in the courts in London and 195 weeks in the courts outside London.

In Germany, the cases handled by 4771 judges in the lower courts are examined only by 1416 judges in the courts of appeal, delayed inevitably.

In Belgium, ‘Explosion of Litigation’ is threatening to take place.

In U.S.A. and other American countries, the backlog of cases is heavier than Europe.

Arbitration

ICC arbitration court, the world-recognized representative of international arbitration organizations, generally takes 2 years to end a case, however, it is also not uncommon to take 3 or 4 years to close a case. ICC arbitration fee is extremely high. The claimant has to pay in advance about 300,000, 600,000 and 900,000 USD (including fees advanced for arbitrators, lawyers and other actual expenses) for a case claiming 1,000,000, 5,000,000 and 10,000,000 USD respectively. These figures are

only the figures of advanced fees and the final figures could be 20% more.

The other major international arbitration organizations are more or less the same as ICC so far as the time and expenses are concerned.

Hong Kong arbitration is also very expensive, even more expensive than arbitration in Europe.

(III)

Use of Mediation

People are disappointed with the existing system of litigation and arbitration. They have been seeking alternative methods for resolving their disputes. They have discovered that mediation is just what they want as mediation is so much quicker and simpler and so much less expensive than litigation and arbitration, and the mediation procedure has a high rate of success. A successful outcome of mediation is much more constructive for the parties than a court judgment and an arbitral award. The solution is not simply 'black and white', and there is no clear winner and loser because there is no time to investigate who is legally 'wrong' or 'right'. The time necessary to get to the point of a full analytical resolution of complex commercial disputes by legalistic procedure is not worth the 'Money'. A successful mediation also means that usually both sides instead of only one or neither, come out of the process with a measure of satisfaction(win-win).

Thereby, more and more people are using mediation to settle their disputes. Concurrently, about 80 countries and international organizations have made mediation laws and established mediation service institutions to promote and support the use of mediation to resolve disputes, with a view to satisfying the requirement of the people on the one hand and to dissolve the negative effects which have been brought about by the declining systems of litigation and arbitration on the other hand. The doings of some of the 80 countries and international organizations are as follows:

In Asia

China(PRC) has enacted a People's Mediation Law and published more than 70 regulations to promote mediation and the use of mediation to resolve disputes. The Supreme People's Court has announced and implemented the Policy of 'Priority for Mediation' and 'Combining Adjudication with Mediation' when hearing civil cases. A 'Great Mediation Movement' is going on throughout the country.

Hong Kong SAR has carried out Judicial procedure Reform, emphasizing the use of mediation to settle disputes. The Mediation Center of Hong Kong has been established. Quite a number of mediation service organizations are existing. HKIAC has set up two mediation councils to deal with mediation matters. People are encouraged to mediation prior to litigation and arbitration. The Law School of City

University of Hong Kong, Columbia Law School and CIETAC have jointly and successfully held Asia-Pacific ADR (focusing on mediation) Mooting Competitions in Hong Kong with competing teams from 20 countries, making contribution to the mediator-training for the development of mediation in the world.

India enacted an Arbitration and Mediation Act in 1996. Mediation is mandatory under the CPC of India. Many mediation institutions are existing and thriving. The Delhi and Bangalore Mediation Centers have successfully mediated 39,969 cases in two months, lightening a part of the huge backlog of 31,280,000 cases in the courts.

Sri Lanka has enacted a Mediation Board Act and set up Mediation Commissions. The courts very often refer cases to the Commissions for settlement by use of mediation. The rate of success is high.

Japan has a long tradition adverse to litigation and even to arbitration, preferring consultation and WOXUAN (a procedure similar to mediation) in dispute resolution. About 1/3 of the civil court cases and most of the arbitration cases have been settled by use of mediation.

Singapore set up its Mediation Center in 1997. Mediation has become a part of the Singapore legal system. Mediation is widely and successfully used in Singapore.

Dubai has created a Mediation Center which has successfully mediated about 1/3 of the pending cases in the Dubai court in one month.

In Europe

EU has issued a 'Directive' demanding its member states to establish legal system of mediation to settle disputes by use of mediation. The demand has been satisfied.

UK has carried out a reform of its civil judicial system, emphasizing the use of mediation to settle disputes. LCIA is using mediation in addition to arbitration to resolve disputes. CI Arb is promoting mediation at home and abroad. Many mediation service organizations such as CEDR have emerged with vitality. People are advised to settle their disputes by use of mediation.

France has set up a French Mediation Center. The French Civil Procedure Code sets forth that a part of the function of a judge is to conciliate the parties. In recent years, the French courts have rather often settle disputes by mediation with a high rate of success.

Germany, with its 2002 Civil Code, urges the courts to resolve disputes by mediation. Many mediation courts have been established within the courts of law. Mediation Councils have been set up in many provinces. DIS has published 4 sets of ADR rules. The German traditional custom of mainly relying on litigation to settle disputes has begun to change.

Italy has set up many mediation organizations since 1993. The 1998 legislation requires the Chambers of Commerce to conciliate the parties

when dealing with commercial disputes. The 2003 Decree does not allow litigation before mediation. The Italian Mediation Center and ADR Center and Italy-China Mediation Center have been established to resolve disputes by use of mediation. The possibility of ‘Explosion of Litigation’ has been decreased.

Belgium has had the Belgium Arbitration and Mediation Center (CEPANI), the Federal Mediation Commission and the Brussels Commercial Mediation Center all the way in action. The Belgium Judicial Code has extended mediations to the solution of almost all civil and commercial cases. A part of ‘Explosion of litigation’ has been dissolved by use of mediation.

Sweden set up a Mediation Institute in 1999. Judges are required to resolve disputes by use of mediation whenever possible. In 2004-2005, 74% cases were settled by court-annexed mediation.

Norway has 435 Mediation Commissions. About 170,000 cases are resolved by use of mediation every year. A certain type of criminal cases can be mediated.

Russia has enacted its Federal Law on Mediation. Mediation has been integrated into the legal system of Russia. A National Organization of Mediation has been founded with co-founding entities including the Center for Mediation and Law, the Association of Lawyers, the Chamber of Commerce and Industry, the Federation and Union of Industrialists and

Entrepreneurs. The Code of Conduct for Mediators has been launched. Since 2012, mediation courses have been taught in universities. The Mediation Judge's Law has also been enacted.

Ukraine promulgated its Law on Mediation in 2011 and thereafter set up the Ukraine Mediation Center in compliance with the EU Directive.

Croatia established out-of-court mediation centers in 2002 and then set up the Mediation Centre within the Croatia Chamber of Commerce. A new Mediation Act was enacted in 2011 to promote the settlement of commercial disputes by use of mediation. Mediation is vigorously growing up in Croatia.

In South Pacific Region

Australia set up its Arbitration and Mediation Institute in 1975 and enacted its Commercial Mediation Act in 1997. The Australian Center for Peace, Conflict and Mediation has also been established to promote the resolution of disputes by mediation.

New Zealand has developed mediation significantly since last century. 50 and more mediation statutes have been promulgated. The Arbitration and Mediation Institute and the ADR Lawyers' Organization have been set up. People are aware of the advantages of mediation and prefer mediation to litigation and arbitration in the settlement of their disputes.

In America

U.S.A. has established court-ordered and court-sponsored mediation systems. Under some of these systems, mediation is mandatory. Legal rules relating to mediation can be found in more than 2500 statutes. Ten states and the District of Columbia have adopted the Uniform Mediation Act and each state has made its own laws to develop mediation. Some U.S. jurisdictions have had procedures that allow for the conversion of a settlement agreement into an arbitral award. Mediation has become a way to lighten the backlog of cases in the U.S. courts.

Canada has significantly developed mediation in the provinces of Quebec, Ontario and Vancouver by enacting mediation laws and setting up mediation institutions.

Peru encourages the settlement of any disputes that can be freely disposed by the parties by use of mediation except criminal and mis-behaved disputes. The National and International Mediation and Arbitration Centre is existing within the Lima Chamber of Commerce for out-of-court resolution of commercial disputes. Arbitrators are entitled to promote conciliation at any moment.

Argentina enacted its Mediation Law in 2010, which set forth mandatory mediation prior to litigation proceedings. A Mediation Institute is existing within the Ministry of Justice to settle disputes by mediation.

Brazil is not a stranger to mediation. Judges are obliged to mediate

disputes prior to the hearing of them.

In International Organizations

ICC resolves commercial disputes by arbitration and by ADR procedures particularly mediation. ICC has promulgated a set of new ADR rules to promote out-of-court resolution of commercial disputes by use of mediation. ICC is promoting mediation throughout the world.

WTO has developed a dispute resolution system of its own, which emphasizing the use of mediation to settle disputes at almost all the stages of dispute resolution process.

WIPO sets up the Arbitration and Mediation Center to settle disputes by arbitration as well as mediation. In fact, most of the cases handled by WIPO have been settled by use of mediation.

ICSID has all the way emphasized the use of mediation to resolve disputes. In fact, most of cases dealt with by ICSID have been settled by use of mediation.

Asian Mediation Association (AMA) was founded in 2002, with a view to unifying the Asian mediation organizations to better promote mediation and the use of it to settle disputes in Asia.

UNCITRAL published the UNCITRAL Conciliation Rules in 1980 and 20 years later the UNCITRAL Model Law on International Commercial Conciliation, whipping up waves of mediation legislation and a rise of mediation activities over the world.

The above-mentioned doings are the true reflections of the development of mediation and the use of it to resolve disputes throughout the world.

(IV)

Problem

A big barrier is blocking the way of further developing and using mediation to resolve disputes. The big barrier is the unenforceability of the successful outcome of mediation (the settlement agreement). The existing reality is that in most of the countries in the world, the settlement agreement is unenforceable.

1. unless it turns to be a consent arbitral award (China, Japan, Austria, Switzerland, Italy, Belgium, the Neither Lands, Finland, Norway, Denmark, Spain, Singapore, Australia, New Zealand and so on).

2. unless it is reached and the mediator turns to be an arbitrator under the national law and renders a consent award based on the settlement (Hungary, Croatia, the Republic of Korea, etc.)

3. unless the parties explicitly agree in the settlement agreement to request the court to enforce it (USA).

4. unless it has been confirmed by the court (China and a number of other countries).

5. unless it is reached through court mediation and a court judgment is made in accordance with the contents of the settlement (China and so

on).

6. unless it is reached through mediation conducted by another court appointed by the court which hears the case or through out-of-court mediation ordered by the court and a judgment is made on the basis of the settlement agreement (UK, German, and many other countries).

7. unless it is reached in the process of arbitration and an arbitral award is rendered pursuant to the settlement agreement (China, India, Japan, the Republic of Korea, Singapore, Sri Lanka, Saudi Arabia, Slovenia, Hungary, Sweden, Croatia, Austria, the Netherlands, Canada, some U.S. jurisdictions, ICC and WIPO).

In a word, the settlement agreement is not enforceable at all if it is not converted into a court judgment or an arbitral award. However, such conversion is actually nothing but a legally self-deceiving trick which causes enormous waste of time, money and energy. Such conversion should be avoided and the settlement agreement should be enforced on the following grounds:

1. The parties have legitimate rights to dispose their civil and commercial dispute in accordance with their own willingness. The settlement agreement is the true reflection of the parties' disposal of their civil or commercial disputes in accordance with their own willingness. The parties' own willingness should be respected.

2. To have the settlement agreement unenforceable is actually to

support the declining system of litigation and arbitration.

3. Without enforceability, the settlement agreement (the successful outcome of mediation) is of no real significance to the parties and even to the mediation industry.

4. Article 14 of the UNCITRAL Model Law on International Commercial Conciliation stipulates that if the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable and its No.4 Note provides: ‘when implementing the procedure for enforcement of settlement agreements, an enacting state may consider the possibility of such a procedure being mandatory’.

In fact, the Model Law is enlightening the enacting states to have the settlement agreement enforceable and even mandatory. Therefore, it is justified for all countries to have the settlement agreement enforceable without any unnecessary conditions.

(V)

Conclusion

1. A reform of the existing system of litigation and arbitration should be carried out as soon as possible.

2. Mediation should be still more widely used throughout the world in the next ten years.

3. Settlement agreement should be enforced without any unnecessary conditions.

Finally, I hope that, after a reform or improvement of the litigation and arbitration system and a solution of the problem concerning the enforcement of settlement agreement, the disappeared man would come back someday, during the next 10 years, also carrying two boards, back and front, but saying:

“Mediate, Arbitrate and Litigate!”

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