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Negotiation as an Effective Dispute Resolution Mechanism: its Importance and Prospects for Settlement

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Abstract: ***Negotiation is an effective technique to use in other alternative dispute resolution means. Roger Fisher and William Ury call it 'back-and-forth communication to reach a settlement agreement'. Laws relating to negotiation in India's national law are impliedly available. UN Charter provisions, the Vienna Convention on the Law of Treaties and judgements of the International Court of Justice recognise the process of negotiation in the resolution of international conflicts. Negotiation is categorised in three categories: (i) distributive/positional, (ii) integrative, and (iii) principled. Mainly, collaborative, competitive, and cooperative approaches are adopted by negotiators/parties in the process of negotiation. The process of negotiation passes by four stages: (i) opening, (ii) exchange of information, (iii) bargaining, and (iv) closing (settlement agreement). Adoptability of negotiation in other ADR means must be mandatory in countries' legal framework.***

Key words: Alternative Dispute Resolution, Amicable Settlement of Disputes, Process of Negotiation.

Conflict and its resolution have been important concepts since the beginning of human existence on Earth. Whenever there is conflict or dispute, there is resolution also. The origin of the court system was to resolve conflicts and disputes under state judicial administration. The development of modern civilization increases the burden on the court for resolving disputes. The different alternative methods for resolving disputes are invented to reduce the burden of the course and secure justice for people. The method of negotiation is one of the alternative dispute resolution modes for resolving disputes.

Negotiation is such a method in which the conflicting parties resolve their dispute in a peaceful manner. The parties communicate with each other to reach an acceptable mutual settlement agreement. Simply, the negotiation is based on communication (dialogue), compromise, mutual intention to resolve problems, and mutual respect for each other.

Definition of negotiation- The term negotiation is used in different ways in the legal field. It can be a deliberated dialogue for the resolution of a dispute/conflict or a transfer or act of putting into circulation a negotiable instrument.

According to Black's law dictionary, negotiation is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter.[1]

Lon L. Fuller also defined negotiation as a means to an end and a road on which parties must travel to arrive at their goal of mutually satisfactory settlement; he also mentioned this process as a process which can easily be transformed from problem solving tool into competitive game.[2]

Roger Fisher and William Ury defined negotiation as "Back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed."[3]

The term negotiation is defined on the website of department of justice Canada as direct or indirect joint action of opposing parties to resolve disputes between them.[4]

Ordinarily, the negotiation is a conversation between two or more parties to resolve a dispute and make an agreement. The parties or court may adopt this process to resolve disputes without creating a courtroom scene. Negotiation has been proven to have its worth in resolving national and international conflicts. On the one side, issues/conflicts of a political nature, antilogies between the public and government on any law, and communal tensions and societies had been resolved national issues, and on the other side, on the international stage, commercial disputes and border-related issues were also resolved through negotiation.

Constitutional and statutory provisions relating to negotiation- National law Rules: The Constitution of India indirectly mentions constitutional law provisions related to negotiation. There is no direct provision in the Constitution of India regarding the process of negotiation, but Articles 51, 73 and 253 are related to international affairs. Articles 73 and 253 empower executives of the Union and State, respectively, for implementation of foreign affairs and treaties. Article 51 emphasises the promotion of international peace, security, and just relations among nations. As per early discussion, negotiation is useful in international conflict. When any agreement has been made in the negotiation process to resolve international issues, the executives are empowered to execute such agreements.

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Statutory provisions: The tool of negotiation for resolving conflict is not a pseudo forum. It is recognised by some statutory provisions in India. Section 89 of the Civil Procedure Code, 1908, and section 30 of the Arbitration and Conciliation Act, 1996 are legal provisions applied to the negotiation process impliedly.

Section 89 of the C.P.C.1908 envisages the process of negotiation indirectly. The court may direct the parties to the suit to go for either mode of settlement outside the court. When the trial court thinks fit to resolve any pending matter before it may be resolved through alternative dispute resolution, then such matter may be sent to one of the ADR modes. Section 89 is the base foundation for the process of negotiation. The negotiation is a part of the procedure followed in any ADR means.

Section 30 of the Arbitration and Conciliation Act 1996 encourages arbitral tribunals to use other resolution tools to promote settlement at any time during the arbitral proceedings. The parties may also initiate negotiation proceedings before entering the arbitral process. The Arbitration and Conciliation Act also promotes conciliation and negotiated settlements before the end of arbitration proceedings.

International law rules: There are certain laws at the international level that promote negotiation in resolving conflict between parties. Article 2(3) of the UN Charter contemplates that the countries shall settle their disputes by peaceful means.[5] Along with this, article 33 (1) emphasises the Pacific settlement of disputes. According to article 33(1), the disputant parties shall, first of all, seek a solution by negotiation, etc. The UNSC ordinarily calls parties to negotiate before imposing any sanction or embargo.[6]

There is a Vienna Convention on the Law of Treaties, 1969, which codifies certain principles for making a treaty. Negotiation is the first step into making a treaty.[7] A negotiating party (country's representative) must have full authority and must present an official authority letter to negotiate and to make a treaty. The making of a treaty is also the result of negotiation.

The importance of negotiation may be extracted from the cases of the North Sea Continental Shelf. In these cases the International Court of Justice emphasized that the negotiation must be meaningful, parties must act in good faith, and formal meetings in negotiation without genuine intent are insufficient.[8] This case established the 'doctrine of genuine negotiation.' Additionally, in the case of Nicaragua versus the United States, the International Court of Justice reaffirmed and strengthened the process of negotiation, and it is the best alternative legal means. Besides it, the International Court of Justice stated that there is no requirement of a prior exhaustion condition to seize the court's jurisdiction.[9]

Recognition of negotiation by the Indian court's case laws- In the matter of Salem Advocate Bar Association v. Union of India,[10] the apex court upheld the validity of section 89 of the Civil Procedure Code, 1908, and paved the path of institutional ADR mechanisms for the resolution of the disputes. This foundational case had made a strong foundation for the ADRs, including negotiation.

In the landmark judgement of Afcons Infrastructure Limited v. Cherian, Berkeley Construction Company,[11] the Supreme Court interpreted the rule under Section 89 of the Code of Civil Procedure, 1908, and removed drafting anomalies in Section 89. Along with this, it emphasised the value and worth of the alternative dispute resolution.

Type of negotiation- Distributive/positional bargaining: Negotiation is an integral part of day-to-day life, whether we are going to the market for shopping or when parties are gathered around a round table to resolve their conflicts. Negotiation may be of a distributive nature. In this type of negotiation, a distributive bargaining scenario can be imagined.[12] The distributive negotiation approach is used when the parties are trying to divide something up and distribute something.[13] This distributive negotiation is a competitive, zero-sum bargaining approach in which one party gains at the other party's expense. Distributive negotiation is very much indicative of a win-lose situation.

There may be slightly different aspects of distributive negotiation, as parties may make concessions to meet their reservation price; it is called position negotiation. This position negotiation is slightly different from distributive negotiation. The negotiators have a reservation price in their mind beyond which they will not go down to make a settlement agreement.[14]

Integrative bargaining: This type of negotiation becomes collaborative in nature and an interest-based way to resolve conflicts. In this negotiation, the parties to dispute try to identify mutually beneficial resolutions. This negotiation is known as a win-win negotiation. The strategy used in integrative negotiation gives priority to developing such agreements, which are mutually beneficial for disputing parties.[15] In this negotiation, the parties work together to make the pie, not focus on cutting the pie. This method functions after understanding parties' interests and, after that, creates a solution and makes a settlement.

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Principled negotiation- The principled negotiation is introduced by Rosa Fisher and William Ury.[16] This negotiation is an extended version of the integrative negotiation. This is a very specific procedure in which the outcome is win-win as a concept of integrative negotiation. In this type of negotiation, parties/participants become problem-solvers, not opponents. The problem or issue in dispute must remain separate from the parties, and the negotiators and parties must focus on interests, not on making the bottom line or creating win-lose situations. Additionally, negotiators/parties must make multiple mutual gain options and must use objective criteria.

Approaches/Strategies- The parties/negotiators adopt different approaches/strategies in the negotiation process for resolving conflicts. There are different strategies that are mentioned by the different authors. There are mainly five approaches that are used in the process of negotiation. Some of them are:

Collaborative: This approach in the negotiation process is used when both side negotiators want to work together to achieve mutual resolution and wish to make a mutual settlement agreement. In this strategy, the parties share information and explore continuous issues. The "existence of a common strongly felt need"[17] is one of the most important conditions for success in the negotiation process. The collaborative strategy is an approach that enables the parties/negotiators to achieve very good outcomes and good chances of success. This also reduces areas of conflict and expediting the use of resources.

The success of collaborative strategy depends on both parties' willingness to collaborate and the need of substantial preparation. Along with these factors, collaborative parties may face challenges from a competitive opponent.[18]

Competitive: In the competitive negotiation strategy, there becomes a win-lose situation. The negotiators make strong statements about their parties' positions and make high opening demands with the expectations of large concessions from opponents.[19] This approach may be most successful in the few disputed issues. Additionally, there are fewer chances of exploitation by the opponent with the risk of undermining the matter against a well-prepared opponent.[20]

Cooperative: In this negotiation strategy, parties work together to make a mutual settlement; this may be beneficial to both/all parties. The parties discuss issues openly and reached a best-settlement agreement. Basically, cooperative negotiation seems analogous to collaborative negotiation. This strategy makes such a win-win atmosphere in which parties mutually cooperate with each other.

There are some other approaches/strategies, such as accommodating, compromising, and avoidance.[21]

Process of negotiation: The process of negotiation is divided mainly into two parts: (i) preparation before initiating negotiation and (ii) procedure of negotiation proceedings.

Preparation before initiating negotiation- There are several steps for the preparation of negotiation before starting the negotiation process. First of all, the parties/negotiators are required to evaluate their goals and procedural background in the conflict. The parties/negotiators must make a "bottom line" or walk over points along with BATNA (best alternative to negotiated agreement) in the feeling situation of the negotiation. The parties must separate disputes into main issues and secondary issues so that they can be used as bargaining positions in the negotiation.

There is liability of the negotiators to study and analyze the applicable laws and prepare with the strengths and weaknesses of their case. The parties must also review all data, facts, witness statements, etc. Finally, the parties must make sure about clear, logical arguments that could convince the opponents.[22]

Procedure of negotiation proceedings- There is no standard enacted procedure for negotiation in resolving conflicts. Yet there are mainly four stages[23] of the process of negotiation:

1. Opening
2. Exchange of information
3. Bargaining
4. Closing/making of agreement

Opening of the negotiation- The first phase of the negotiation is to create a healthy environment for fruitful negotiation. There are some golden rules in the opening phase for helping in clearing confusion and setting structured negotiation. The parties/negotiator must ensure that the present person has authority to make a decision and reach a binding settlement agreement. The parties/negotiator had to make an agreement about a mutually agreed-upon agenda, time limits for the negotiation, disclosure of the information (confidentiality), and the whole negotiation procedure.

Exchange of information- After following the first phase of the negotiation process, the parties must follow the second stage, i.e. the exchange of information. Every party must present its perspective

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regarding the dispute and explain its concerns and objectives. Sometimes, it can be seen that skilled parties/negotiators use open-ended questions[24] to disclose other parties, interests, and flexible areas. The parties/negotiators must follow some skills like careful listening and observation because it may be helpful in identifying important and sensitive issues of opposite parties.

Bargaining- After the exchange of information between each other (parties), the parties actively work to achieve their goals (mutually beneficial settlement). In this step, the parties/ negotiators make offers and counter-offers with concessions. The skilled negotiators must make slow and measured concessions to approach their limits.

Closing phase (Settlement Agreement)- When parties/negotiators cross the third step, they must look forward to making an agreement on the basis of their negotiation progress. The negotiators must fish out the zone of agreement after careful review of all settled issues. It is essential for parties to summarize agreed-upon terms of the possible settlement and to ensure a reduction in the risk of future disputes. After completing all these necessary steps, parties/negotiators prepare the settlement agreement. Additionally, the parties must ensure the registration of the agreement (optional) and the enforcement of such settlement agreement.

Conclusion and suggestions- Negotiation has proved its worth as an effective tool to resolve conflicts, whether it is national or international. The core purpose of the negotiation process is to help parties to resolve conflict without engaging in lengthy procedures. Cooperative negotiation essentially creates a win-win atmosphere by the end of the process, leaving positive impacts on the parties involved and opening opportunities for future relations between them. The negotiation process is the most efficient tool for helping parties resolves their disputes in an amicable manner. The best part of this procedure is its flexibility. Additionally, this procedure involves parties directly in reaching a settlement according to their desires. The collaborative negotiation technique is more beneficial in the resolution of matters relating to business, trade, or family disputes.

Negotiation must be used properly within other alternative dispute resolution tools at the disposal of the matters. Arbitrator/mediator/neutral party must use negotiation techniques properly. They must use their communication skills for build rapport and trust between disputing parties, so that dispute can be resolved easily without harming future relationship. Additionally, section 30 of the Arbitration and Conciliation Act 1996 must be invoked properly in the arbitral proceedings. There must be legal provisions relating to the mandatory negotiation before entering the trial of the matter.

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