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Smart Resolutions: Leveraging Mediation for Smart Contract Disputes

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ABSTRACT

Mediation, as a cornerstone of alternative dispute resolution, continues to evolve in response to the complexities of the contemporary legal landscape. In the arena of legal dispute resolution, individuals and organizations seek the mechanism that would be flexible, informal and accessible enough to best serve their interests while consuming the least amount of time and money, which provides a robust underpinning for the growth of mediation as a method of dispute resolution. As the demand for effective and expeditious conflict resolution grows, the integration of innovative approaches into mediation processes becomes increasingly pivotal. This article throws light on the advent of blockchain technology-based Smart Contracts, while discussing the edge that mediation has in the disputes arising from smart contracts. The author also contemplates the growth potential for mediation in the present era, by contextualizing it with Online Dispute Resolution.

Keywords*: Mediation, Smart Contracts, Online Dispute Resolution, Innovation.*

I. INTRODUCTION

Today, as technology, innovation and lofty ambitions have mastered the world economy and industries as well as human minds, organizations are on the prowl for efficiency and authenticity by means of creative strategy. In this ever-changing milieu, every opportunity seems like the right one to choose as consumerism dominates our mindsets. Culture, art and businesses thrive by constantly reaping the benefits of trust among individuals which leads nations into flourishing economic, political and social activity. However, nothing feeds self-interest more than knowing that there are prospects for better-tasting profits, food, housing, health and success elsewhere. And nothing jeopardizes human trust like sheer self-interest.

Disputes between individuals and organizations are inevitable as self-interested human beings with varied perspectives cooperate and engage in commercial and related activities. Resolution of these disputes is primal in order to maintain stability, security and peace in societies. Filing a suit in a Court where the Judge presides over adversary parties arguing their cases, following which a decision based on existing legal principles is given, has been the traditional way of

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dispute resolution for centuries. When this led to significant overburdening of the Judiciary and the concomitant pendency of cases in courts, hence arise the arena of Alternate Dispute Resolution (ADR), whereby parties in dispute resolve their conflict outside of the traditional courts with or without the presence of a neutral third-party. Arbitration, Mediation, Negotiation, Conciliation and neutral fact-finding are the popular methods of ADR commonly employed by states.

ADR has gained a crucial degree of traction today as it is an efficient mode of dispute resolution which saves time and money, is flexible according to the needs of the parties in dispute, gives more visibility and an active role to the parties to settle their dispute and preserves the reputation of disputing parties as the entire process is protected by strict confidentiality. Arbitration and Conciliation consist of an objective third-party. In arbitration, the 'arbitrator' who hears the arguments of the opposing parties delivers a binding order based on the law, whereas in Conciliation, the neutral third-party only plays an advisory role whereby they facilitate the settlement of the dispute by offering workable solutions to the parties. Mediation and Negotiation are methods that do not involve a neutral third-party adjudicator who ultimately decides the dispute. Mediation involves a neutral mediator who solely facilitates settling of the dispute between the parties, without imposing a solution or a binding decision on them. Negotiation involves exclusively the disputing parties who are made to peacefully discuss, expose themselves to each other's perspectives and arrive at a solution that would ideally settle the dispute and satisfy the needs of both the parties.

Nowadays, Mediation as a method of alternate dispute resolution, has become primal in fields such as Manufacturing, Mining, Construction, Intellectual Property, Insurance, Contractual disputes, Company law topics such as Mergers & Acquisitions, Family Law matters such as divorce cases and succession as well as in suits for damages and commercial transactions. The reason behind mediation becoming the procedure of choice for individuals and organizations for dispute resolution under a plethora of wide-ranging matters is the freedom and flexibility offered by this method of ADR. While the sparse availability and timings of the court, strengths of the cases, weight of evidentiary rules, attitude and reputation of the legal representatives, esoteric legal language and inflexible procedures which are strange and intimidating to the parties, high transaction costs and public access to the courtrooms thwart speedy resolution of disputes and delivery of justice in traditional courts, mediation provides the disputing parties with the shining boon of self-determination.[2]

[2] Kafeza, I. (2021) *An intelligent mediation platform for smart contracts in ...*, *Ceur-ws.org*.

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Mediation is centred around the values of respect, freedom, equity, access, dignity, privacy, and autonomy.[3] The mediator is solely a facilitator who creates a favourable environment for settlement of the dispute by means of active deliberation between the disputing parties themselves. Mediation also makes room for the possibility of non-settlement of the dispute, if a solution that was acceptable to both the parties could not be arrived at. This provides more autonomy and flexibility to the parties as they are able to self-regulate the procedure as neither the lawyer or the mediator applies any pressure on them to reach a particular conclusion or any conclusion at all. In fact, even the continuation of mediation proceedings through subsequent meetings can only take place if both the parties agree to is continuation.[4] For instance, Article 19(iii) of the WIPO Mediation Rules, 2021 provides for termination of the mediation proceedings by a written declaration of a party to it at any time. Chances of domination and hogging of the procedure by the more powerful party is often derailed as the mediator is present during the discussion to provide both the parties an equitable chance to present their sides and to serve the interest of a fair and reasonable settlement based on the principles of natural justice.

Moreover, it is a sociolegal advantage that mediation makes way for non-legal deliberation between the parties. Although it is an established point of law that the outcome of mediation must be a settlement that is soundly supported by law, the mediated settlement, instead of being dominated by legal maxims and standpoints, is more likely to be based on non-legal principles such as interests and goals of the parties. This allows them to take a broader range of standards into consideration including their business interests, future relationship with the opposite party, etc. instead of a solely rights-based and adversarial procedure that happens in a court or during arbitration. It certainly serves the short and long-term interests of the disputing parties as well as the society at large if the solutions to the conflicts among individuals are an outcome of their will and are based on deliberation, principles and reasoning that are comprehensible to them, instead of ornate legal principles and complex procedures that are inaccessible and mystifying to the layperson. This is one of the strongest reasons for the steady growth of mediation.

In the globalized world, people seek to secure the maximum level of outcome with minimal amount of effort, time and consumption of resources. CEOs and self-help books term this model ‘Efficiency’. This becomes all the more coveted if such efficiency can be achieved according to one’s own terms with added assistance. In the florid and burdened arena of legal dispute resolution, this efficiency interest of disputing parties is served best by mediation as the

Available at: https://ceur-ws.org/Vol-3052/paper26.pdf (Accessed: 12 July 2024).

[3] *Id*

[4] WIPO, https://www.wipo.int/amc/en/mediation/rules, July 11, 2024

mechanism for dispute settlement. This is due to the autonomy and flexibility that is given to the parties to choose the mediator, the language of the proceedings and its location, after which a thoroughly convenient procedure is initiated whereby non-legal and interest-based deliberation takes place as long as the proceedings steer a course towards settlement.

The WIPO Mediation Rules, 2021 passed by the World Intellectual Property Organization, makes several provisions in respect of WIPO mediation which serves as an apt illustration of the freedom, autonomy and flexibility that is attributable to mediation. Article 7 of the Rules provide the procedure by which the disputing parties each get a fair opportunity to choose their mediator from a list of mediators along with their qualifications send to each of them separately by the WIPO Arbitration and Mediation Centre. Article 15, 16, 17, and 18 of the rules make overarching provisions for the maintenance of strict confidentiality of the views and suggestions presented, admissions made, notes taken, information obtained, proposals put forth and settlement reached during the process of mediation.[5] A major advantage of mediation is that the costs of mediation, which includes administrative fee, fee of the mediator, etc. is usually borne by the parties to the mediation in equal shares, which is yet another testament to its success as a fair procedure of dispute resolution.

As the population grows, economic activities thrive and industries flourish, cities become dynamic and people's lives get busier by the passing second, in light of which each individual seeks to be heard and understood as they hustle on with their respective vocations. People seek to prevent and resolve problems that arise in their day-to-day lives with utmost convenience. In other words, people seek an enabler, a facilitator who would satisfy their needs in precisely the manner they find convenient, amid their busy lives, a 'Mediator' who would see them without bias. Due to this and the reasons discussed in the previous paragraphs, the future looks incredibly bright for Mediation as a form of alternate dispute resolution. However, legal professionals as well as the progressive world will have to take cognizance of the fact that it is not just the slow and steady but the innovative and tactful too, that ultimately wins the race in this volatile world.

II. SMART CONTRACTS: THE ADVENT OF AUTOMATION IN CONTRACT LAW

Smart Contracts are computer programmes that are essentially self-executing, self-enforcing e-contracts that are created in the form of an encrypted code using blockchain technology, and are carried out automatically by an algorithm. According to Computer Scientist and Legal

[5] WIPO, https://www.wipo.int/amc/en/mediation/rules, July 11, 2024

Scholar Nicholas Szabo, a Smart Contract is "a set of promises specified in digital form."[6] They are contracts that are similar to traditionally drafted contracts with respect to their content, in that they comprise the contractual obligations of each of the parties to the contract, the terms and conditions of the contract, the procedure for its enforcement and termination, etc. coded in an encrypted and hence, immutable form.

The point to be highlighted about smart contracts is that the transactions stipulated in them are automated. Smart Contracts are constituted by an 'If/when event 'X' happens, event 'Y' will follow' algorithm. For example; if a smart contract is created for shipping, under which the supplier promises to deliver raw materials to the manufacturer at a specified place within a specified time period, following which the payment for the supply will be made by the manufacturer within a specific date, these specifications are stipulated as terms in the code of the smart contract. As soon as it is notified to the computer that the raw materials have been delivered by the supplier, the smart contract will automatically initiate the payment of the stipulated amount from the payor's account to the payee's.

Smart Contracts, though a niche subject, have gained momentum in the fields of Intellectual Property, Shipping and Manufacturing. Even so, there are glaring gaps and creases around the creation, execution and dispute resolution relating to smart contracts that need to be filled and evened out so that this boon doesn't soon reveal itself to be a bane. To begin with, smart contracts are underpinned by the belief of crypto-economists, who are the chief proponents of this form of contracts, that circumventing the legal system is desirable.[7] Employing blockchain technology to 'code' contracts instead of 'draft' them based on the law of contracts means to change the language of legally-binding contracts from legal language (most dominantly English) to computer language, that is the Code. This is indicative of the non-legal nature of smart contracts which opens up a whole new spectrum of tribulations. It can lead to unpredictable and unprecedented liabilities such as liability for the computer programmer who created an erroneous code for a contract as a result of which the contract failed to automatically execute itself, resulting in losses for the contracting parties. Additionally, the code of the smart contract being cryptic to the contracting parties, may be perceived by the parties as a leeway to circumvent the legal rules. Since the contract is not in material form, alterations cannot be made to the existing contract once the algorithm is created, thus making the smart contract detrimentally immutable. Since the contract is self-executory, there's also uncertainty regarding the types of evidence that would be admissible when disputes arise under the smart contract.

[6] Amy Schmitz & Colin Rule, Online Dispute Resolution for Smart Contracts, 2019 J. DISP. RESOL. 103 (2019).
[7] *Id.* at 113.

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Hence, with the expansion of the use of smart contracts today, unambiguous laws need to be established taking into account their regulation, enforcement in cases of erroneous coding, and rules of evidence.

Furthermore, contracts programmed into a code in a computer cannot be deciphered, comprehended and interpreted by lawyers and judges, instead, they can only be understood by computer programmers who are experts in the field of coding. The questions that this conundrum poses are multi-fold. The Courts have been, for centuries, entrusted with the role of interpretation and application of the law in order to resolve disputes. Until the past decade, humanity had never pictured a world where the stories that they created, such as laws and contracts, would become indecipherable to themselves. Such a development reflects the serious elimination of the involvement of the state in private law. Therefore, the million-dollar question becomes this: What is then, an appropriate forum for the resolution of the disputes that arise from smart contracts?

III. MEDIATION FOR SMART CONTRACTS: A SYNERGISTIC APPROACH

Online Dispute Resolution (ODR) has a substantial role to play in speedy and cost-effective administration of justice. Research shows some of the primary ODR models to be Online Arbitration where the neutral arbitrator adjudicates the dispute on a virtual platform, crowdsourced resolution where a question in dispute is decided by means of votes by anonymous users thus leveraging all their prudence and AI-powered resolution by which algorithms provide assistance to judges to decide disputes by means of predictive analysis of the infused data.

In the interest of embracing innovation, smart contracts which are constituted differently call for dispute resolution mechanisms that can comprehend and accommodate the extra-legal character and algorithmic attributes of the contract and utilize them in the manner that is most conducive to the administration of justice. Therefore, the appropriate forum for smart contract dispute resolution becomes a mediation software that is built into the programme of the smart contract. Either of the parties can pause the execution of the automated contract at any point, through a virtual button that is built into the code of the contract. The press of this button will stop the execution of the contract and trigger an online dispute resolution process.[8]

This is the part where mediation as a dispute resolution mechanism becomes primal to smart contracts. A mediation software is built into the contract code which will act as a facilitator of

[8] *Id.* at 123.

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the conflict between the parties to the contract. The mediator software would provide practical solutions that would be conducive to the settlement of the discrepancy that occurred in the performance of the contract. The parties to the smart contract will hence have a bunch of options from which they can choose the alternative that would best satisfy both of their needs and expectations from the contract.

Mediation thence becomes the procedure of choice for disputes arising out of smart contracts as well, because of the intricately technological and computerised nature of smart contracts. The self-executory advantage of smart contracts can make it highly sought after specifically in commercial matters where the automation of transactions would speed up the performance of the contract while also reaffirming trust between the contracting parties. This covetable edge of smart contracts coupled with the inability of lawyers and judges to decipher and comprehend the code, makes a mediating software the cream of the crop for the resolution of disputes between them.

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