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# FIELDS OF ADR

- Civil disputes
- Family disputes
- Commercial disputes
- Industrial disputes
- Banking disputes
- Disputes in respect of construction industry
- Property disputes including joint family disputes
- Disputes arising out of IPR
- Disputes arising out of Insurance
- Disputes arising out of real estates and securities
- Disputes arising out of International commercial arbitration etc



# **BASIC FEATURES OF ADR**

- **Flexible – free from rigorous rules of procedure**
- **Expeditious**
- **Cost Effective**
- **Party Autonomy**
- **Win-Win situation**
- **Confidentiality**
- **Informality**
- **Effective Participation of Parties**
- **Control over the findings**
- **Liberty to choose the third party**
- **Binding Settlement/Award**
- **Suitable for Cross-Border Disputes**




# ADR - METHODS

- **Arbitration** : The parties agree to refer their disputes to a neutral third party for **adjudication**, who passes an **award**, which is binding on the parties.
- **Conciliation**: An agency which enjoys the right granted under legislation or under the order of the court to assist the parties to agree upon their own solution to their problem. – **Proactive Role of the Conciliator.**
- **Mediation**: An impartial mediator (third party) assist the parties to agree upon their solution to the problem. **Facilitative Role of the Mediator.**
- **Negotiation**: It is a process initiated by the parties themselves resolving the disputes without any assistance.



# MEDIATION V. CONCILIATION

- Mediation and Conciliation both are voluntary processes
  - Neutral third person tries to bring about a settlement between the parties.
  - The Supreme Court in the *Afcons* case has also opined that, as per Black's Law Dictionary the term 'mediation' is a synonym of 'conciliation'.
  - In India, United Kingdom, and UNCITRAL Model Law, mediation is referred as facilitative process, whereas conciliator plays a pro-active, interventionist role. But, in USA mediator has a greater pro-active role and conciliator is a mere facilitator.
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# MEDIATION V. CONCILIATION

## MEDIATION IN INDIA

- ❑ Not governed by statute, court-referred Mediation is regulated by Mediation Rules framed by High Courts.
- ❑ Court can refer to mediation either with or without consent of parties.
- ❑ Facilitative Role:
  - ❑ Assists identifying issues,
  - ❑ reducing misunderstandings,
  - ❑ clarifying priorities,
  - ❑ exploring areas of compromise,
  - ❑ generating options to solve dispute
  - ❑ emphasizes that it is own responsibility of parties for making decisions which affect them, and shall not impose any terms of settlement on the parties.

## CONCILIATION IN INDIA

- ❑ Governed by Part-III of Arbitration and Conciliation Act, 1996.
- ❑ Court can refer a case to Conciliation only with mutual consent of the parties.
- ❑ Proactive Role:
  - ❑ Under Sections 67 and 73, tries to settle the dispute by making proposals and by formulating or reformulating the terms of possible settlement.



# STATUTORY RECOGNITION OF MEDIATION & CONCILIATION

All civil disputes which involve rights *in personam* can be conciliated or mediated but criminal offences and matters involving rights *in rem* like guardianship, declaration, divorce, testamentary matters etc., cannot be mediated or conciliated.

## **MEDIATION:**

- Section 30 of Arbitration and Conciliation Act, 1996
- Section 89 , O.X Rules 1-A to C of C.P.C.

## **CONCILIATION:**

- Section 12 of Industrial Disputes Act, 1947
- Section 34 of Special Marriage Act, 1954
- Section 23 of Hindu Marriage Act, 1955
- Section 89 , O.X Rules 1-A to C of C.P.C.
- Family Courts Act, 1984
- Legal Services Authorities Act, 1987
- Arbitration and Conciliation Act, 1996
- Section 10 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013



# APPROACH TO MEDIATION

## PRE-LITIGATION:

- **No law governing** private mediation in India
- Mediation before approaching the Court
- Mediation Settlement agreement is **enforceable as a contract**

## POST-LITIGATION:

- Parties go for mediation **on their own accord**
  - Parties may withdraw case after settlement
  - Report compromise and obtain a decree under Order XXIII Rule 3 of C.P.C. for a civil case or compound the offence under Sec.320 of Cr.P.C. for a criminal case
- **By reference from Court** under Section 89 , O.X Rules 1-A to C of C.P.C.





# APPROACH TO CONCILIATION

Governed by **Arbitration and Conciliation Act, 1996**

## **PRE-LITIGATION:**

- Without resorting to Court Litigation
- Settlement Agreement is **equivalent to arbitral award on agreed terms** and is like decree of court (S.30).

## **POST-LITIGATION:**

- Parties go for conciliation **on their own accord**
  - Parties may withdraw the case after settlement
- **By reference from Court** under Section 89, O.X Rules 1-A to C of C.P.C.



# COURT-REFERRED MEDIATION & CONCILIATION U/S. 89 CPC


- After filing of Plaint and Written Statement and before issues are framed
- Court should identify whether the case is fit for reference to ADR
- Case should not fall under any excluded category
- If unfit, Court should record a brief order as to the nature of the case, and why it is unfit for ADR and shall proceed with framing of issues
- If case can be referred to ADR, the court should explain the choice of arbitration, conciliation, *lok-adalat*, judicial settlement and mediation, to the parties to enable them to exercise their option

# COURT-REFERRED MEDIATION & CONCILIATION U/S. 89 CPC


- If **all parties agree**, case may be referred to conciliation
- If parties are not agreeable to conciliation, and if the court finds the case to be suitable for mediation, the court may refer it to mediation, **with or without the consent of the parties.**
- Mediation is governed by **ADR and Mediation Rules** lay down in the case of *Salem Advocates Bar Association v. Union of India* (AIR 2005 SC 3353) and also observations made in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.* (2010 (8) SCC 24)
- Parties may agree to appoint a sole mediator or each set of parties may nominate a mediator, who need not necessarily be from the panel of mediators available with the Court.

# COURT-REFERRED MEDIATION & CONCILIATION U/S. 89 CPC

## Disqualifications of Mediator:

- An insolvent person;
  - A person of unsound mind;
  - Any person convicted or being prosecuted by a criminal court;
  - Being tried in disciplinary proceeding for charges relating to moral turpitude;
  - Any person interested or connected with subject-matter of the dispute;
  - Related to the parties;
  - A legal practitioner who has appeared or is appearing for any of the parties
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- Mediator shall facilitate parties to arrive at a settlement
  - Shall not be bound by CPC or Indian Evidence Act.
  - Mediation shall stand terminated after 60 days of reference, unless, the same is extended by the court either *suo moto* or on application of the parties, but the same shall not be extended beyond a further period of 30 days.
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# COURT-REFERRED MEDIATION & CONCILIATION U/S. 89 CPC

- **Mediation fails** - Mediator shall report the same, and the court shall proceed with hearing of the suit.
  - **Settlement**
    - Mediator shall send the settlement agreement signed by the parties and their counsels
    - Covering letter about settlement,
    - Court shall make a decree in terms of settlement as per Order XXIII Rule 3 of CPC.
  - The mediator enjoys immunity, and shall not be held liable for anything done *bonafide* during the mediation proceedings, and cannot be summoned by any party to Court.
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# COURT-REFERRED MEDIATION & CONCILIATION U/S. 89 CPC

- Court can **refer** parties to Conciliation **only with the consent of all the parties**. Once the Case is referred to Conciliation, it falls outside the ambit of Court and is governed by **Arbitration and Conciliation Act, 1996**.
- **Conciliation fails** - Adjudication of the case continues from the same stage where it was referred to conciliation.
- **Conciliation is successful** - Conciliation Settlement Agreement will have to be placed before the court only for recording it and disposal of the case on its terms.



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