

MEDIATION



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FOUR PILLARS OF ADR

- **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.”
- **Mediation**: “An impartial mediator (third party) **assist** the parties to agree upon their solution to the problem.”
- **Negotiation**: “It is a process initiated by the parties **themselves resolving** the disputes without any assistance”



MEANING AND DEFINITION

– MEDIATION

- Voluntary process in which a neutral third party facilitates or assists the parties to a dispute to arrive at a settlement.
- “Assisted Negotiation” and dynamics of Negotiation also apply to Mediation.
- No statutory definition of Mediation.
- *“Mediation is a private informal dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement, but the mediator does not have power to impose a decision on the parties.”* – Black’s Law Dictionary
- The mediator is a trusted person, who enhances communication between the parties, by making them focus on their true interests and orients them to remedies and solutions.
- It is a confidential process, and any admissions, proposals or offers of settlement made during the process cannot be used as evidence in subsequent litigation or arbitration.



TYPES OF MEDIATION

Broad classification on conceptual basis:

- **Facilitative Mediation**

- Mediator facilitates communication between parties
- Helps each side to understand the other's perspective, position, interests and needs in relation to the dispute

- **Evaluative Mediation**

Apart from facilitating the parties;

- Mediator provides assessment or evaluation of the dispute
- Mediator plays a pro-active role
- Suggests the terms for settlement, which may be accepted or rejected by the parties.



DISPUTES SUITABLE TO MEDIATION

All civil disputes- Rights *in personum*

- Trade and commercial disputes
- Employment disputes
- Property disputes
- Housing disputes
- Company and share holders disputes
- Sports and media disputes
- Consumer disputes
- Matrimonial disputes
- Partition and division of property



DISPUTES NOT SUITABLE FOR MEDIATION

All disputes rights *in rem*:

- Election to public office
- Fabrication documents
- Forgery issues
- Claims of minors
- Claims of dieties
- Claims of mentally challenged persons
- Divorce and declaratory suits
- Testamentary matters



STATUTORY RECOGNITION OF MEDIATION

MEDIATION:

- Section 30 of Arbitration and Conciliation Act, 1996
- Section 89 , O.X Rules 1-A to C of C.P.C.
- Industrial disputes Act 1947
- Family Courts Act 1984
- Legal Services Authorities Act 1987
- Companies Act 2013(Sc 442 referral to Company tribunal)
- Real estate(Regulation and development) Act 2016
- Commercial Courts Act 2015
- Consumer Act 2019



MEDIATION INSTITUTIONS

- AICADR: ASSOCHAM International council for ADR, New Delhi
- ICADR- International center for Alternative Dispute Resolution, New Delhi
- CAMP: Center for Advanced Mediation practice, Bangalore
- CADRM: Center for Alternative Dispute Resolution, Mumbai
- IIAM- Indian Institute of Arbitration and Mediation, Kochi
- IIADRA- Indian International Alternative Dispute Resolution Association, Kochi
- MIC- Mediators India, Chennai
- FCDDR- Foundation for Comprehensive Dispute Resolution, Chennai



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.



COURT-REFERRED MEDIATION 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 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.

MODEL MEDIATION RULES 2003

- Report 1: Various grievances relating to amendment 1999/2002
- Report 2: Consideration of draft rules of ADR and mediation
- Report 3: Mediation rules of Case management.



MODEL MEDIATION RULES 2003

- Procedure to direct the parties to opt ADR
- Persons authorised to represent the Government
- Guidance to the parties
- Procedure to adopted by the Court
- Applicability of parties
- Training programs in mediation
- Referral to compoundable criminal cases(498 A)
- Appointment of mediator- Qualifications
- Panel of Arbitrators
- Venue of Mediation
- Disqualification and cancellation of Mediation
- Application of CPC and Evidence rules
- Settlement agreement et.




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.



COURT-REFERRED MEDIATION 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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ROLE OF MEDIATOR

- **Honesty and integrity**
- **Impartial and neutral** towards the parties
- **Unbiased, open-minded and logical** in thinking
- **Wise** and understand the situation correctly and decide the **right course of action**
- Maintain **confidentiality** and **transparency**
- Have **expertise** to understand technicalities of the dispute
- **Courteous** and shall **respect** the parties
- **Good listener**
- **Assess the interests and needs** of the parties
- **Patient** during conducting proceedings
- Have **sympathy** and **empathy** towards parties
- **Shift the focus from positions to interests**
- **Reduce the friction**, diffuse any heated arguments



ADVANTAGES OF MEDIATION

- **Voluntary, participative and confidential** process - parties get opportunity to present their case directly, and have liberty to opt out at any stage
- **Speedy, efficient and economical**
- **Fair process**
- **Simple and flexible** procedure
- Parties have **control** over the process
- Helps to maintain, improve and **restore relationships**
- **Focuses on interests** of parties and ignores inimical positions.
- **Mutually beneficial settlement.**
- **Creative solutions** to the disputes.
- **Promotes finality** and puts end to dispute
- In case of court referred mediation, the parties are entitled to **refund of court fees.**



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