

LL.B. VI Term



LB-602: Alternative Dispute Resolution

Reading Materials Prepared by

Usha Tandon
Sunanda Bharti
Ashish Kumar
Neelam Tyagi

Faculty of Law, University of Delhi
May 2022

For private use only in the course of instruction

LB-602 – Alternative Dispute Resolution

Objectives of the Course

With the introduction of Section 89, CPC and amendment in the Arbitration and Conciliation Act 1996 in 2015, alternative dispute resolution methods have been given a primary role in reducing arrears and promoting fast and affordable settlement of disputes. This course has two primary objectives. First is to provide the students with the theoretical understanding of the concepts and the legal provisions relating to ADR. Secondly, the course is geared to train the students in the practical skills required to effectively participate in the ADR processes. The course has been designed for a class of not more than 30 students. It is desirable that the course is delivered by a team of teachers together for individualized learning and supervision.

The teaching methods to be employed by teachers include lectures, use of multi-media, simulation exercises, role plays, field visits, feedback and other CLE methods of teaching and learning. The course focuses on instilling the following practical skills among the students: Communication including verbal, non-verbal, body language and para-linguistic; Case and Dispute Analyses and Strategy; Distinguishing interests from rights; Persuasion; Skills of mediators; Drawing agreements; Negotiation skills; Ethical dilemmas.

Learning Outcomes: At the end of the Semester, the students will be able to

- Describe, analyse and apply the substantive rules of ADR
- Choose appropriate ADR
- Communicate effectively
- Draw settlement agreements
- Choose appropriate negotiation strategy
- Practice Mediator's skills
- Solve the ethical dilemmas

Required Readings: (Material which has not been supplied but is nonetheless important for the course, and should be read)

1. The Draft Mediation Bill 2021
2. The Arbitration and Conciliation Act 1996 as amended in 2015
3. Section 89, Code of Civil Procedure
4. Legal Services Authorities Act, 1987
5. Mediation and Conciliation Rules 2004 of Delhi High Court
6. P.C. Markanda, LAW RELATING TO ARBITRATION AND CONCILIATION, pp.1-8, (8th Edn. 2013) LexisNexis
7. 222nd Report of the Law Commission of India on NEED FOR JUSTICE-DISPENSATION THROUGH ADR, etc. (2009)
8. 246th Report of the Law Commission of India on AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996 (2014)
9. Justice Manju Goel, 'Successful Mediation in Matrimonial Disputes' available at <http://www.delhimeritiationcentre.gov.in/articles.htm>

Suggested Readings: (Material which has not been supplied but will improve overall understanding of the course)

1. 'Concept & Techniques of Mediation', Mediation Training Module: Delhi Mediation Centre.
2. Thomas P Valenti and Tanima Tandon, Mediation in India-Practical Tips and Techniques, in Shashank Garg (ed.) Alternative Dispute Resolution, The Indian Perspective 187-248 (OUP 2018).
3. Relevant Excerpts from the Mediation Training Manual of India by Mediation and Conciliation Project Committee of Supreme Court of India. Full text available at:<http://supremecourtsofindia.nic.in/mediation>.
4. *Dayawati v. Yogesh Kumar Gosain*, 243 (2017) Delhi Law Times 117 (DB), Full text available at:http://lobis.nic.in/d_dir/dhc/GMI/judgement/17-10-2017/GMI17102017CRLRF12016.pdf
5. Vikramajit Sen and Satyajit Gupta, The Concept of Seat in International Arbitration- Developments in India, in Shashank Garg (ed.) Alternative Dispute Resolution, The Indian Perspective 187-248 (OUP 2018).
6. Sheila Ahuja, International Arbitration with an Indian Connection, in Shashank Garg (ed.) Alternative Dispute Resolution, The Indian Perspective 249-388 (OUP 2018).
7. Tameem Zainulbhai, Justice for All: Improving the Lok Adalat System in India, 35(1) Fordham International Law Journal (2016) pp. 248-278. Full text available at: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2422&context=ilj>

A) Introduction to Alternate Dispute Resolution: Differences between Litigation, Arbitration, Conciliation, Mediation and Negotiation (2 lectures)

Supplied Readings:

1. Need for Alternatives to the Formal Legal System (Special Address by Muralidhar S. in International Conference on ADR, Conciliation. Mediation and Case Management Organized By the Law Commission of India at New Delhi on May 3-4, 2003). 1
2. 'Comparison of Adjudication with ADR', Mediation Training Module of India Chapter 4 (2011) SC of India. 8
3. 'Development of Mediation in India', Mediation Training Module of India Chapter 1 (011) SC of India. 11
4. *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. P. Ltd.* (2010) 8 SCC 24.....19

B) Communication – Introduction, verbal, non-verbal communication, para linguistics (2 lectures)

Supplied Readings:

1. Creating Effective Communication in Your Life by Randy Fujishin, Creating Communications: Exploring and Expanding your Fundamental Communication Skills, 2nd Edn., Rowman Littlefield Publishers.2009, pp 1-17). 35
2. Body Language- non-verbal communication 44
3. One and Two-Way Communication

Simulation Exercises (2 classes)

C) Negotiation- Introduction, Style and Strategies (2 lectures)

Supplied Readings:

1. **Negotiation** 47
Exercise: The negotiating style profile
Predominant Negotiation Styles
Development of conflict
Negotiating techniques/Strategies
Eight critical mistakes
Being assertive in negotiation
Exercise: Questionnaire: opinions and attitudes
Negotiation: the art of negotiating
2. **The Seven Elements of Negotiation** 70

Simulation Exercises (6 Classes)

D) Conciliation/ Mediation: Difference between mediation/ conciliation and other ADRs, Mediator's Skills and Roles, Stages of Mediation: Mediator's Opening Statement; Parties' Opening Statement: Joint Session; Caucus or Separate Session; Final Negotiation/Deal-Making Round; Closure, Strategies and Techniques, Role of Silence/Apology, Handling Emotions/Impasse, Drafting Agreement, Ethical Dilemmas in Mediation (4 lectures)

Supplied Readings:

1. Concept & Techniques of Mediation', Mediation Training Module 72
2. Delhi Mediation Centre. Shriram Panchu, Mediation Practice Law - The Path to Successful Dispute Resolution Pages 90-111, 2nd Edition, LexisNexis 2015.(on the 'How to'of conducting Mediation and essentials of a mediation settlement agreement)
3. *Dayawati v. Yogesh Kumar Gosain*, 243 (2017) Delhi Law Times 117 (DB) ... 92
4. United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 (Singapore Convention on Mediation) 100
5. Points of Discussion on Mediation Bill 2021..... 105

Simulation Exercises (8 classes)

E) Arbitration

NOTE: The Arbitration Module is just for conceptual introduction/understanding of the process of Arbitration, drafting of arbitration clause, getting to know the recent changes in the Indian Arbitration Act, 1996 and knowing the differentiation of Arbitration with other form of ADR. The lecture formulation is indicative.

- (a) Overview of A & C Act, 1996 (4 lectures)
- (b) Overview of International Rules (2 lectures)
- (c) Drafting Arbitration Clause (2 lectures)

Supplied Readings:

1. Aman Hingorani, “Alternative Dispute Resolution, including Arbitration, Mediation and Conciliation”, All India Bar Examination Preparatory Materials 105
2. Duties of Arbitrator by P.C. Markanda, Naresh Markanda & Rajesh Markanda, Advocates, Supreme Court of India. 128
3. 2015 Amendment to the Arbitration and Conciliation Act, 1996. 135
4. 2019 Amendment to the Arbitration and Conciliation Act, 1996. 139
5. Excerpts from Drafting Dispute Resolution Clauses A Practical Guide, American Arbitration Association. 145

Simulation Exercise (4 classes)- Drafting Arbitration Clause

F) Visit to Delhi Mediation Centre/ Lok Adalat/ Arbitration Centre.

Discussion on Legal Services Authorities Act, 1987

The students shall have to prepare the reports according to the experience gained during field visit-whether it is to Mediation Centre/ Lok Adalat/ Arbitration Centre.

EXAMINATION

End-semester written examination--- 50 marks (2 Hours)

Oral/practical exercises- 50 marks

• Mediation (10 marks)	• Attendance 96 – 100%=10 marks 91 – 95% = 8 marks 86 - 90% = 6 marks 81- 85% = 4 marks 76 – 80 % = 2 marks 70%-75%= 1 marks
• Negotiation (10 marks)	
• Arbitration (10 marks)	
• Field Visit Report (10 marks)	

Need for Alternatives to the Formal Legal System

[Special Address by Dr. S.Muralidhar, Part-time Member, Law Commission of India in an International Conference on ADR, Conciliation, Mediation and Case Management Organised By the Law Commission of India at New Delhi on May 3-4, 2003.]

The need for alternatives to the formal legal system has engaged the attention of the legal fraternity, comprising judges, lawyers and law researchers for several decades now. This has for long been seen as integral to the process of judicial reform and as signifying the 'access-to justice' approach. In their monumental comparative work on civil justice systems, Mario Cappelletti and Bryant Garth point out that the emergence of the right of access to justice as "the most basic human right" was in recognition of the fact that possession of rights without effective mechanisms for their vindication would be meaningless.¹ It was not enough that the state proclaimed a *formal* right of equal access to justice. The state was required to guarantee, by affirmative action, *effective* access to justice. Beginning about 1965, in the U.S.A, the U.K. and certain European countries, there were three practical approaches to the notion of access to justice. The 'first wave' in this new movement was legal aid; the second concerned the reforms aimed at providing legal representation for 'diffuse' interests, especially in the areas of consumer and environmental protection; and the third, "the 'access-to-justice approach,' which includes, but goes much beyond, the earlier approaches, thus representing an attempt to attack access barriers in a more articulate and comprehensive manner."² The last mentioned approach "encourages the exploration of a wide variety of reforms, including changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private and informal dispute resolution mechanisms. This approach, in short, is not afraid of comprehensive, radical innovations, which go beyond the sphere of legal representation."³

In India too the need to evolve alternative mechanisms simultaneous with the revival and strengthening of traditional systems of dispute resolution have been reiterated in reports of expert bodies. Reference in this context may be made to the Report of the Committee on Legal Aid constituted by the State of Gujarat in 1971 and chaired by Justice P.N. Bhagwati (as he then was) which *inter alia* recommended

¹ M. Cappelletti and B. Garth, "Access to Justice - the worldwide movement to make rights effective: a general report" in M. Cappelletti and B. Garth (eds.), *Access to Justice—A World Survey*, Volume I, Sijthoff & Noordhoff – Alphenaaanderijan (1978), 5 at 8-9. This shift occurred, according to the authors, simultaneous with the emergence in the twentieth century of the "welfare state".

² *Id.* at 21. The authors explain (at 49): "We call it the 'access-to-justice' approach because of its overall scope; its method is not to abandon the techniques of the first two waves of reform, but rather to treat those reforms as but several of a number of possibilities for improving access."

³ *Id.* at 52

adaptation of the 'neighbourhood law network' then in vogue in the U.S.A; the *Report of the Expert Committee on Legal Aid: Processual Justice to the People*, Government of India, Ministry of Law, Justice and Company Affairs (1973) (*1973 Report*) which was authored primarily by its Chairman Justice V.R.Krishna Iyer (as he then was) which while urging ADR (*lok nyayalayas*) in identified groups of cases exhorted the preservation and strengthening of gram nyayalayas; and the Report of two-member Committee of Justices Bhagwati and Krishna Iyer appointed to examine the existing legal aid schemes and suggest a framework of a legal services programme that would help achieve social objectives [*Report on National Juridicare Equal Justice – Social Justice*, Ministry of Law, Justice and Company Affairs (1977) (*1977 Report*)]. The last mentioned report formulated a draft legislation institutionalising the delivery of legal services and identifying ADR, conciliation and mediation as a key activity of the legal services committees. Each of these reports saw the process of improving access to justice through legal aid mechanisms and ADR as a part of the systemic reform of the institution of the judiciary coupled with substantive reforms of laws and processes. The present have of legal reforms have only partly acknowledged and internalised the recommendations in these reports. Still, the implementation of the reforms pose other kinds of challenges. The attempt through the introduction of S.89 of the Code of Civil Procedure 1908 (CPC) is perhaps a major step in meeting this challenge.

The reasons for the need for a transformation are not much in dispute. The inability of the formal legal system to cope with the insurmountable challenge of arrears argues itself.

The Parliamentary Standing Committee on Home Affairs found that as of 2001, there were in 21 High Courts in the country, 35.4 lakh cases pending.⁴ Of the 618 posts of High Court judges there were 156 vacancies as on January 1, 2000.⁵ The position in the subordinate courts was even more alarming. There was a backlog of over 2 crore (20 million) cases for as long as 25 to 30 years.⁶ Of these, there were over 1.32 crore (13.2 million) criminal cases and around 70 lakhs (7 million) civil cases.⁷ The total

⁴ J. Venkatesan, "Panel concern over backlog in courts", *The Hindu*, New Delhi, March 10, 2002, 12: "The Committee was particularly disturbed by the fact that cases were pending for over 50, 40 and 30 years in the High Courts of Madhya Pradesh, Patna, Rajasthan and Calcutta. And more than 5 lakh cases were pending for over 10 years – 2 lakhs in Allahabad, 1,46,476 in Calcutta 28,404 in Bombay and 5,050 in Madras."

⁵ Indian Law Institute, *Judicial System and Reforms in Asian Countries: The Case of India*, Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO), (March 2001) 39.

⁶ *Ibid.*

⁷ *Id.* at 35.

number of subordinate judges⁸ in all the states and union territories in the country, as of September 1999 was 12,177.⁹

Despite this severe strain on resources, the performance of the subordinate judiciary has been remarkable. A joint study by the Indian Law Institute and the Institute of Developing Economies, Japan in March 2001, revealed that in a single year (1998) the number of cases disposed of by the district and subordinate courts was 1.36 crores (13.6 million).¹⁰ At the end of every year, however, the pendency of cases remains at the figure of around 20 million, which means the subordinate judiciary is running hard to remain at the same place.¹¹

In its 120th Report in 1988, the Law Commission of India had recommended that “the state should immediately increase the ratio from 10.5 judges per million of Indian

population to at least 50 judges per million within the period of next five years.”¹² In 2001, the ratio remains at 12 or 13 judges per million population.¹³ While it is debateable whether this relating of the number of judges should be to the population as a whole or to the number of cases in the various courts, there is no gainsaying that judicial officers are not paid very well and work in deplorable conditions where basic infrastructure is unsatisfactory or inadequate.¹⁴

All of the above should in fact persuade prospective and present litigants, as well as those engaging with the formal legal system as judges and lawyers, to reservedly embrace the notion of ADR, conciliation and mediation. However, it does appear there are many more factors that ail the formal legal system which, if not adequately

⁸ *Id.* at 6: This would include district and sessions judges, additional district and sessions judges, subordinate/assistant sessions judges, chief judicial magistrates, metropolitan magistrates and judicial magistrates.

⁹ *First National Judicial Pay Commission Report* (1999) 1229. The judge strength rose from 9232 in 1985 to 12771 in September 1995.

¹⁰ Indian Law Institute, *Judicial System and Reforms in Asian Countries: The Case of India*, Institute of Developing Economies, Japan External Trade Organisation (IDE-JETRO), (March 2001) 37.

¹¹ The same study (*id.* at 36) points out that at the end of 1998, there were 1.93 crore cases (19.3 million) which were pending in the subordinate courts for less than ten years.

¹² *120th Report of the Law Commission of India on Manpower Planning in the Judiciary: A Blueprint*, Ministry of Law, Justice and Company Affairs, Government of India (1987), 3.

¹³ Recently, the Chief Justice of India said: “The reason why we do not have more judges across the board is because the States are simply not willing to provide the finances that are required...The expenditure on the judiciary in terms of the GNP is only 0.2 per cent; and, of this, half is recovered by the states through court fees and fines. Given the attitude of the states, is it any wonder that the jails of our country are filled to the brim, largely with undertrials.?”: “Speech by Hon’ble Mr.S.P.Bharucha, Chief Justice of India on 26th November 2001 (Law Day) at the Supreme Court” (2001) 8 SCALE J-13 at J-14.

¹⁴ This led to a public interest litigation by the All India Judges Association in the Supreme Court claiming better conditions of work as well as an increased and uniform pay structure. See orders in *All India Judges Association v. Union of India* (1992) 1 SCC 119; (1993) 4 SCC 288; (2000) 1 SCALE 136 and (2002) 3 SCALE 291.

addressed in the proposed alternative system, may hinder the move for transformation. This assumes particular significance in the context of suggestions that the ADR, mediation or conciliation processes should be court-annexed and institutionalised. I propose to highlight here a few of these factors.

'Hidden' and other costs

One disincentive for a person to engage with the legal system is the problem of uncompensated costs that have to be incurred. Apart from court fees, cost of legal representation, obtaining certified copies and the like, the system fails to acknowledge, and therefore compensate, bribes paid to the court staff,¹⁵ the extra 'fees' to the legal aid lawyer,¹⁶ the cost of transport to the court, the bribes paid (in criminal cases) to the policemen for obtaining documents, copies of depositions and the like or to prison officials for small favours.¹⁷ In some instances, even legal aid beneficiaries may not get services for 'free' after all.¹⁸ It is important to acknowledge the existence of a general distrust of the legal system including its processes and institutions which are mystifying, alienating and intimidating; distaste of lawyers and courts as they seem imposing and authoritarian; seeing the whole legal process as of nuisance value resulting in irreversible consequences, an uninvited 'trouble' that has to be got rid of. Unless frontally addressed, a court annexed or an institutionalised ADR, mediation or conciliation system may soon be undermined by the same problems that afflict the formal legal system. The attraction of the alternative system would then lie in the promise of not only reduced costs and uncertainties but importantly a liberation from the stranglehold of the 'court annexed bureaucracy'.

¹⁵ For a study pointing to corruption prevalent in the district and subordinate courts in Delhi see, V.N.Rajan and M.Z.Khan, *Delay in Disposal of Criminal Cases in the Sessions and Lower Courts in Delhi*, Institute of Criminology and Forensic Science, (1982). The authors point out (at 42) "It was seen that those who greased the palm of the readers and peons were able to get adjournments readily while others waited outside the court helplessly. To those who were unwilling to part with money, these court officials were not prepared even to tell whether the presiding officer would come and the cases would be heard or not."

¹⁶ Siraj Sait, "Save the legal aid movement", *The Hindu*, June 29, 1997, V: "What is galling is that many sleazy lawyers who get legal aid cases tell the poor victims that if they want result they must pay them extra over what the Tamil Nadu Legal Aid Board pays them."

¹⁷ Chadha, *The Indian Jail: A Contemporary Document*, Vikas Publishing Pvt. Ltd., 31 where she talks of the system of a 'setting' for various tasks involving the prisoner having to depend on the jail official in Tihar Jail in Delhi: "A minimum 'setting' even for the official to *consider* the request is Rs.500."(emphasis in original) William Chambliss, "Epilogue- Notes on Law, Justice and Society", in William Chambliss (ed.), *Crime and the Legal Process*, McGraw Hill Book Co. (1969) points out (at 421): "When a police force or an entire legal system is found to be engaged in a symbiotic relationship with professional criminals, the cause of this unfortunate circumstance is seen as residing in the inherent corruptibility of the individuals involved."

¹⁸ An empirical study of the working of legal aid schemes in Punjab showed that beneficiaries of legal aid complained that "they were provided only the services of a counsel and nothing beyond" and that they "had to spend amounts varying between Rs.100 to 900 for their cases in lower courts": Sujjan Singh, *Legal Aid: Human right to Equality*, Deep and Deep, (1998), 272.

The Law and Poverty Dimension

There is an imperative need to acknowledge that those who are economically and socially disadvantaged see the entire legal system as irrelevant to them as a tool of empowerment and survival. The economically disadvantaged litigant is, notwithstanding the present concerted moves to reach legal aid through a geographically wide network of legal aid institutions,¹⁹ unable to effectively access the system as they encounter barriers in the form of expenses, lawyers and delays. The formal system, as presently ordered, tends to operate to the greater disadvantage of this class of society which then looks to devising ways of avoiding it rather than engaging with it. Without fundamental systemic changes, any alternative system, however promising the results may seem, is bound to be viewed with suspicion. The participatory nature of an ADR mechanism, which offers a level playing field that encourages a just result and where the control of the result is in the hands of the parties, and not the lawyers or the judges, would act as a definite incentive to get parties to embrace it.

The Parallel System

The noted economist Hernando de Soto, in a path-breaking study of encroachments in Lima in Peru, points out that although the parallel system began as a by-product of the formal system, it has for long been the only system with which the police, the lawyers, the judiciary and the litigant are prepared to readily engage.²⁰ A similar systematic study in several areas of disputes in India might well reveal the same position. For many a litigant, the engagement with the parallel system is not a matter of choice. For the others it becomes a source of additional means of livelihood. On the other hand, the formal legal system also appears to be in the stranglehold of those for whom the economic stakes in working the system to suit their ends is too high to permit any meaningful change that can threaten their source of living. The attitude towards maintaining the status quo therefore gets firmly entrenched. The resultant cynicism that has set into the system, coupled with a skepticism of all reform requires to be rooted out gradually but firmly if the reform agenda has to be implemented progressively. This would require building in deterrent disincentives for engaging with the parallel system that presently poses a serious threat to the legitimacy of the formal system. This may have to be coupled with an audit of the formal system, both financial and social, to pinpoint those areas that require immediate attention and correction. Since the legitimacy of the ADR mechanism is premised on parties consenting to the process, the costs of engaging with either the parallel system or benefiting from the ills

¹⁹ The Legal Services Authorities Act 1987 mandates the setting up of legal aid committees at the state, district and taluka levels. These are apart from committees annexed to each of the High Courts and the Supreme Court.

²⁰ Hernando de Soto, *The Other Path*, Harper & Row (1989). This seminal work could form a model for initiating a study of the working of the criminal justice system. This might reveal the actual costs involved in several stages of the system.

of the formal system have to be raised considerably high to drive the parties to consent to the ADR processes.

From an economic point of view, it should be possible to argue that those litigants who as a class or group burden the court system the most should either bear the proportionate 'carrying' costs of the litigation load or mandatorily be driven to an ADR process. For instance, if the government is the major litigant in the courts, it should not be open for the government to both avoid the costs of the litigation it generates and also resist attempts at being driven to ADR processes. On the other hand it might well take the lead in offering to participate in such processes in all prospective and current litigation which involves the government as a party.

Audit of Lok Adalat Mechanisms

It is a fact that a large number of civil disputes pending in the courts, and to a small extent petty criminal matters, have been 'disposed of' through the *lok adalats* that are a permanent 'embedded' feature of the functioning of legal services authorities. While one point of view sees this as a success, another questions whether the *lok adalat* as presently institutionalised is really a tool of 'case management' which essentially addresses the problems of an over-burdened judiciary and not so much as an instrument of justice delivery for the litigant. If the 'success' of the *lok adalat* stems from negative reasons attributable to the failures of the formal legal system, the utility of this mechanism may also be short-lived. In other words if the incentive for litigants to accept *lok adalat* decisions is that if they didn't they would be faced with the prospect of further delays, uncertainties and costs, it constitutes a confirmation for them that the formal legal system is unable to provide an acceptable quality of legal services or justice. This in turn would not augur well for the legitimacy of the system in the long run. What this then means is that there has to be a gradual but conscious effort to offering positive reasons, and not negative ones, for litigants to be willing consumers of the ADR processes. An audit of the existing ADR mechanisms from the point of view of 'customer satisfaction' would help shape the programmes for the future in order to maximise the 'success'.

An ADR system that is both transparent and accountable is in the circumstances imperative in order to make the crucial difference to those presently engaged in the formal legal system which is largely perceived as lacking in this area. As has been pointed out by several speakers, a successful implementation of ADR processes will have to be preceded by an identification of categories of cases or specific dispute areas that are most amenable to their introduction.

Despite the challenges that face the ADR processes today, the benefits in the long run that they are capable of generating appear to outweigh the factors that may in the short run deter their enforcement. We have listened to many positive experiences of ADR in the past two days and this should encourage us to move forward with the reform process. The diverse nature of the country's population defies any uniform approach or set pattern and this is perhaps the biggest strength of the ADR mechanisms. Their flexibility and informality, the scope they offer for innovation and

creativity, hold out the promise of a great degree of acceptability lending them the required legitimacy. Their utility as a case management tool cannot be overemphasised. ADR processes provide the bypasses to handle large chunks of disputes thus leaving the formal legal system to handle the more complex litigation. Even while they do not offer to be a panacea for all the ills of the formal legal system, ADR processes offer the best hope yet of complementing and helping to fortify the formal legal system.

* * * * *

Comparison Between Judicial Process and Various ADR Processes

[Material Extracted from Chapter IV, *Mediation Training Manual of India*, designed by Mediation and Conciliation Project Committee, Supreme Court of India]

JUDICIAL PROCESS	ARBITRATION	MEDIATION
Judicial process is an adjudicatory process where a third party (judge/ Other authority) decides the outcome.	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
The decision is binding on the parties.	The award in an arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.
A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.
Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.
No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.
Involves payment of court fees.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

MEDIATION	CONCILIATION	LOK-ADALAT
Mediation is a non-adjudicatory process.	Conciliation is a non-adjudicatory process.	Lok Adalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.
Voluntary process.	Voluntary process.	Voluntary process.
Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In Lok Adalat, the scope of negotiation is limited.
The function of the Mediator is mainly facilitative.	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is persuasive.
The consent of the parties is not mandatory for referring a case to mediation.	The consent of the parties is mandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to Lok Adalat.
The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.	In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.	The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.
Not appealable.	Decree/order not appealable.	Award not appealable.
The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in Lok Adalat is on the past and the present.
Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of Lok Adalat involves only discussion and persuasion.
In mediation, parties are actively and directly involved.	In conciliation, parties are actively and directly involved.	In Lok Adalat, parties are not actively and directly involved so much.
Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in Lok Adalat.

A Role Play to Demonstrate the Differences Between Adjudication and Mediation

“The Family Portrait”

FACTS: Their father died recently, leaving the family property to the two sons. Their mother died earlier, so both parties are the sole surviving heirs. Their father's will is clear regarding the family home and his other personal property - everything has been divided fifty-fifty. However, the will mentions that the family portrait, an original painting by a famous Indian Painter, of their parents and grandparents, and which is a cherished family possession is to go to the father's "favourite child". The will does not name his favourite child. The two brothers cannot agree on who the father's favourite child is.

Exercise: Resolve the dispute using (i) arbitration (adjudication) and (ii) mediation.

Exercise (i) Arbitration (Adjudication)

- The arbitrator has to first decide upon what the “issue” in dispute is : Which child fits the definition of the "favourite child"?
- Each party (child) presents reasons to the arbitrator as to why they believe that they were the favourite child.
- The arbitrator evaluates the evidence and decides who fits in the definition of "favourite child"
- the painting is awarded to that child.
- No compromise is permitted. The arbitrator must make a decision as to who is right and who is wrong depending on (i) the meaning of "favourite child" and (ii) an appraisal and comparison of each party's evidence as to why they were the "favourite child".

Exercise (ii) Mediation

Here, the mediator facilitates the negotiation of the same issue. The parties will try and work out a solution between themselves, rather than relinquishing control over the resolution of the dispute to an arbitrator or any other neutral. The parties are free to choose creative compromises - there is no right and wrong, and consequently, there need not be only one winner.

Mediator is to demonstrate

- Identifying need
- Creating options
- Controlling process
- Restoring relationship

Development of ADR / Mediation in India

[Material Extracted from Chapter I, Mediation Training Manual of India, designed by Mediation and Conciliation Project Committee, Supreme Court of India]

INTRODUCTION

Though documentation is scant, it is believed that nearly every community, country, and culture has a lengthy history of using various methods of informal dispute resolution. Many of these ancient methods shared procedural features with the process that has coalesced in the form of contemporary mediation. In India, as in other countries, the origin of mediation is obscured by the lack of a clear historical record. In addition, there is a lack of official records of indigenous processes of dispute resolution due to colonization in India over the past 250 years. There is scattered information, set forth below, that can be gathered by tracing mediation in a very elementary form back to ancient times in the post-Vedic period in India. Tribal communities practiced diverse kinds of dispute resolution techniques for centuries in different parts of the world, including India. In China government-sponsored mediation has been used on a widespread basis to resolve disputes based on aged societal principles of peaceful co-existence. Native Americans are known to have adopted their own dispute resolution procedures long before the American settlement.

HISTORICAL PERSPECTIVE

As recorded in Mulla's Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. and it is possible that some of the Vedic hymns were composed at a period earlier than 4000 B.C. The early Aryans were very vigorous and unsophisticated people full of joy for life and had behind them ages of civilized existence and thought. They primarily invoked the unwritten law of divine wisdom, reason and prudence, which according to them governed heaven and earth. This was one of the first originating philosophies of mediation - Wisdom, Reason and Prudence, which originating philosophy is even now practiced in western countries.

The scarcely available ancient Indian literature reflects the cultural co-existence of people for many centuries. This reality necessitated many of the collaborative dispute resolution methods adopted in the modern mediation process. Towards the end of the Vedic epoch, philosophical and legal debates were carried on for the purpose of eliciting truth, in assemblies and parishads, which are now described as conferences. India has one of the oldest cultural histories of over 5000 years and a recent history of about 1000 years during which it was invaded by the Iranian plateau, Central Asia, Arabia, Afghanistan and the West Indian culture has absorbed the changes and influences of these aggressions to produce remarkable racial and cultural synthesis. The 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras [code of conduct] followed the Vedic epoch, during which period scholastic jurists developed the philosophy of basic laws. Their learned discourses recognized existing usages and customs of different communities, which included resolution of disputes by non-adversarial indigenous methods. One example is the tribunal propounded and set up by a brilliant scholar Yagnavalkya, known as KULA, which dealt with the disputes between members of the family, community, tribes, castes or races. Another tribunal known as SHRENI, a corporation of artisans following the same business,

dealt with their internal disputes. PUGA was a similar association of traders in any branch of commerce. During the days of Yagnavalkya there was an unprecedented growth and progress of trade, industry and commerce and the Indian merchants are said to have sailed the seven seas, sowing the seeds of International Commerce. Another scholar Parashar opined that certain questions should be determined by the decisions of a parishad or association or an assembly of the learned. These associations were invested with the power to decide cases based on principles of justice, equity and good conscience. These different mechanisms of dispute resolution were given considerable autonomy in matters of local and village administration and in matters solely affecting traders' guilds, bankers and artisans. The modern legislative theory of arbitration by domestic forums for deciding cases of members of commercial bodies and associations of merchants finds its origin in ancient customary law in India. Cases were decided according to the usages and customs as were approved by the conscience of the virtuous and followed by the people in general. The parishad recognized the modern concept of participatory methods of dispute resolution with a strong element of voluntariness, which another founding principle of modern mediation. Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom". This Buddhist aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past. Ancient Indian Jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong". It is a recorded fact that complicated cases were resolved not in the King's courts but by King's mediator. Even during the Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The most famous case was when two women claimed motherhood of a child, the Mediator suggested cutting the child into two and dividing its body and giving one-half to each woman. The real mother gave up her claim to save the child's life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this was not a fully-developed example of modern mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying needs and concerns of the parties. It is widely accepted that a village panchayat, meaning five wise men, used to be recognized and accepted as a conciliatory and / or decision- making body. Like many of the ancient dispute resolution methods, the panchayat shared some of the characteristics of mediation and some of the characteristics of arbitration.

As societies grew in size and complexity, informal decision-making processes became more structured and they gradually took the shape of a formal justice delivery system. In fact, societies could not grow larger in size and complexity without first evolving a system of resolving disputes that could keep the peace and harmony in the society and keep trade and commerce growing efficiently.

Mediation in the United States has developed in several distinct directions. Community mediation emerged in the 1960's in response to racial tensions and integration issues. Neighbourhood Justice Centers were established to address those issues. Later, community mediation expanded in application to neighbourhood disputes, family disputes, and other disputes where the issues were predominantly interpersonal. This view held that mediation should be community-based and independent of the legal system, opining that

mediation could deliver a high rate of satisfying settlement results if it were separate from the legal bureaucracy. In the 1980's, private mediation caught on when insurance companies realized the cost benefits of resolving insurance claims informally and expeditiously. Private mediation took hold in a variety of ways, including the emergence of private/independent mediators, non-profit mediation programs and agencies, and for-profit mediation providers. Private mediation was applied to pre-litigation disputes, litigated disputes, and, more recently, commercial and international disputes. Court-annexed mediation, which was the subject of experimental usage in the 1970's and 1980's, began to expand significantly in the 1990's. This school of thought concluded that mediation should be an extension of the legal system, even seeing mediation as an effective means of narrowing issues for litigation in courts. Currently, court-annexed mediation is offered by most courts at the trial and appellate levels. All three forms of mediation, community mediation, private mediation, and court-annexed mediation continue to co-exist, thrive, and to meet the needs of disputing parties in the United States.

A turning point in the use of alternative dispute resolution in the United States occurred in 1976, at a nationwide conference of lawyers, jurists, and educators called the Pound Conference. The conference was convened to address the urgent problems of over-crowding in the jails, lengthy delays in the courts, and the lack of access to justice due to the prohibitive costs of litigation. The need for alternatives to litigation generated in the new concept of a "Multi-door Court-house," and reinforced the importance of "Neighbourhood Justice Centers". The Multi-door Court-house concept, originated by Harvard professor Frank Sander, envisioned a scenario in which an aggrieved party could simply go to a kiosk at the entrance of a courthouse where a facilitative attendant would direct the disputant to one of the doors providing alternative or traditional dispute resolution processes. Prof. Sander described it as fitting the forum to the fuss. In this manner, the legal system could help the litigants achieve the most satisfactory result, in effect placing responsibility for providing alternative processes, including mediation, in the hands of the judicial system. The idea of a neutral assisting the disputants in arriving at their own solution instead of imposing his solution was introduced. Professors Ury, Brett and Goldberg opined that reconciling interests was less costly and probing for deep-seated concerns, devising creative solutions and making trade-offs was more satisfying to the disputants than the adjudicatory process.

MEDIATION IN INDIA

Mediation, Conciliation and Arbitration, in their earlier forms are historically more ancient than the present day Anglo-Saxon adversarial system of law. Various forms of mediation and arbitration gained a great popularity amongst businessmen during pre-British Rule in India. The Mahajans were respected, impartial and prudent businessmen who used to resolve the disputes between merchants through mediation. They were readily available at business centres to mediate the disputes between the members of a business association. The rule in the constitution of the Association made a provision to dismember a merchant if he resorted to court before referring the case to mediation. This was a unifying business sanction. This informal procedure in vogue in Gujarat, the western province of India, was a combination of Mediation and Arbitration, now known in the western world, as Med-Arb. This type of mediation had no legal sanction in spite of its wide common acceptance in the business world. The

East India Company from England gained control over the divided Indian Rulers and developed its apparent commercial motives into political aggression. By 1753 India was converted into a British Colony and the British style courts were established in India by 1775. The British ignored local indigenous adjudication procedures and modeled the process in the courts on that of British law courts of the period. However, there was a conflict between British values, which required a clear-cut decision, and Indian values, which encouraged the parties to work out their differences through some form of compromise.

The British system of justice gradually became the primary justice delivery system in India during the British regime of about 250 years. Even in England it was formed during a feudal era when an agrarian economy was dominant. While India remained a colony, the system thrived, prospered and deepened its roots as the prestigious and only justice symbol. Indigenous local customs and community-based mediation and conciliation procedures successfully adopted by business associations in western India were held to be discriminatory, depriving the litigants of their right to go to courts.

The British Courts gradually came to be recognized for its integrity and gained peoples' confidence. Even after India's independence in 1947, the Indian Judiciary has been proclaimed world over as the pride of the nation.

Until commerce, trade and industry started expanding dramatically in the 21st century, the British system delivered justice quicker, while maintaining respect and dignity. Independence brought with it the Constitution, awareness for fundamental and individual rights, governmental participation in growth of the nation's business, commerce and industry, establishment of the Parliament and State legislatures, government corporations, financial institutions, fast growing international commerce and public sector participation in business. The Government became a major litigant. Tremendous employment opportunities were created. An explosion in litigation resulted from multiparty complex civil litigation, expansion of business opportunities beyond local limits, increase in population, numerous new enactments creating new rights and new remedies and increasing popular reliance on the only judicial forum of the courts. The inadequate infrastructure facilities to meet with the challenge exposed the inability of the system to handle the sheer volume of caseloads efficiently and effectively. Instead of waiting in queues for years and passing on litigation by inheritance, people are often inclined either to avoid litigation or to start resorting to extra-judicial remedies.

Almost all the democratic countries of the world have faced similar problems with court congestion and access to justice. The United States was the first to introduce drastic law reforms about 30 years back and Australia followed suit. The United Kingdom has also adopted alternative dispute resolution as part of its legal system. The European Union also endorses mediation for the resolution of commercial disputes between member states.

LEGAL RECOGNITION OF MEDIATION IN INDIA

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of Industrial disputes."

Detailed procedures were prescribed for conciliation proceedings under the Act.

Arbitration, as a dispute resolution process was recognized as early as 1879 and also found a place in the Civil Procedure Code of 1908. When the Arbitration Act was enacted in 1940 the provision for arbitration originally contained in Section 89 of the Civil Procedure Code was repealed. The Indian Legislature made headway by enacting The Legal Services Authorities Act, 1987 by constituting the National Legal Services Authority as a Central Authority with the Chief Justice of India as its Patron-in-Chief. The Central Authority has been vested with duties to perform, inter alia, the following functions: -

- To encourage the settlement of disputes by way of negotiations, arbitration and conciliation.
- To lay down policies and principles for making legal services available in the conduct of any case before the court, any authority or tribunal.
- To frame most effective and economical schemes for the purpose.
- To utilize funds at its disposal and allocate them to the State and District Authorities appointed under the Act.
- To undertake research in the field of legal services.
- To recommend to the Government grant-in-aid for specific schemes to voluntary institutions for implementation of legal services schemes.
- To develop legal training and educational programmes with the Bar Councils and establish legal services clinics in universities, Law Colleges and other institutions.
- To act in co-ordination with governmental and non-governmental agencies engaged in the work of promoting legal services.

The Indian parliament enacted the Arbitration and Conciliation Act in 1996, making elaborate provisions for conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto. The Act provided for the commencement of conciliation proceedings, appointment of conciliators and assistance of suitable institution for the purpose of recommending the names of the conciliators or even appointment of the conciliators by such institution, submission of statements to the conciliator and the role of conciliator in assisting the parties in negotiating settlement of disputes between the parties.

In 1999, the Indian Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

Since the inception of the economic liberalization policies in India and the acceptance of law reforms the world over, the legal opinion leaders have concluded that mediation should be a critical part of the solution to the profound problem of arrears of cases in the civil courts. In 1995-96 the Supreme Court of India under the leadership of the then Chief Justice, Mr. A. M.

Ahmadi, undertook an Indo-U.S. joint study for finding solutions to the problem of delays in the Indian Civil Justice System and every High Court was asked to appoint a study team which worked with the delegates of The Institute for Study and Development of Legal Systems [ISDLS], a San Francisco based institution. After gathering information from every State, a central study team analyzed the information gathered and made some further concrete suggestions and presented a proposal for introducing amendments relating to case management to the Civil Procedure Code with special reference to the Indian scenario.

EVOLUTION OF MEDIATION IN INDIA

The first elaborate training for mediators was conducted in Ahmedabad in the year 2000 by American trainers sent by Institute for the Study and Development of Legal Systems (ISDLS). It was followed by a few repeated advance training workshops conducted by Institute for Arbitration Mediation Legal Education and Development (AMLEAD) a Public Charitable Trust settled by two senior lawyers of Ahmedabad. On 27th July 2002, the Chief Justice of India, formally inaugurated the Ahmedabad Mediation Centre, reportedly the first lawyer-managed mediation centre in India. The Chief Justice of India called a meeting of the Chief Justices of all the High Courts of the Indian States in November, 2002 at New Delhi to impress upon them the importance of mediation and the need to implement Sec. 89 of Civil Procedure Code. Institute for Arbitration Mediation Legal Education and Development (AMLEAD) and the Gujarat Law Society introduced, in January 2003, a thirty-two hours Certificate Course for "Intensive training in Theory and Practice of Mediation". The U.S. Educational Foundation in India (USEFI) organized training workshops at Jodhpur, Hyderabad and Bombay in June 2003. The Chennai Mediation Centre was inaugurated on 9th April, 2005 and it started functioning in the premises of the Madras High Court. This became the first Court-Annexed Mediation centre in India. The Delhi Judicial Academy organized a series of mediation training workshops and opened a mediation centre in the Academy's campus appointing its Deputy Director as the mediator. Delhi High Court Mediation and Conciliation Centre has been regularly organizing mediation awareness workshops and Advanced Mediation Training workshops.

The Mediation and Conciliation Project Committee (MCPC) was constituted by the then Chief Justice of India Hon'ble Mr. Justice R.C. Lahoti by order dt. 9th April, 2005. Hon'ble Mr. Justice N. Santosh Hegde was its first Chairman. It consisted of other judges of the Supreme Court and High Court, Senior Advocates and Member Secretary of NALSA. The Committee in its meeting held on 11th July, 2005 decided to initiate a pilot project of judicial mediation in Tis Hazari Courts. The success of it led to the setting up of a mediation centre at Karkardooma in 2006, and another in Rohini in 2009. Four regional Conferences were held by the MCPC in 2008 at Banglore, Ranchi, Indore and Chandigarh.

MCPC has been taking the lead in evolving policy matters relating to the mediation. The committee has decided that 40 hours training and 10 actual mediation was essential for a mediator. The committee was sanctioned a grant-in-aid by the department of Legal Affairs for undertaking mediation training programme, referral judges training programme, awareness programme and training of trainers programme. With the above grant-in-aid, the committee has conducted till March, 2010, 52 awareness programmes/ referral judges training programmes and 52

Mediation training programmes in various parts of country. About 869 persons have undergone 40 hours training. The committee is in the process of finalizing a National Mediation Programme. Efforts are also made to institutionalize its functions and to convert it as the apex body of all the training programmes in the country.

The Supreme Court of India upheld the constitutional validity of the new law reforms in the case filed by Salem Bar Association and appointed a committee chaired by Justice Mr. Jagannadha Rao, the chairman of the Law Commission of India, to suggest and frame rules for ironing out the creases, if any, in the new law and for implementation of mediation procedures in civil courts. The Law Commission prepared consultation papers on Mediation and Case Management and framed and circulated model Rules. The Supreme Court approved the model rules and directed every High Court to frame them. The Law Commission of India organized an International conference on Case Management, Conciliation and Mediation at New Delhi on 3rd and 4th May 2003, which was a great success. Delhi District Courts invited ISDLS to train their Judges as mediators and help in establishing court annexed mediation centre. Delhi High Court started its own lawyers managed mediation and conciliation centre. Karnataka High Court also started a court-annexed mediation and conciliation centre and trained their mediators with the help of ISDLS. Now court-annexed mediation centres have been started in trial courts at Allahabad, Lucknow, Chandigarh, Ahmedabad, Rajkot, Jamnagar, Surat and many more Districts in India.

Mandatory mediation through courts has now a legal sanction. Court-Annexed Mediation and Conciliation Centres are now established at several courts in India and the courts have started referring cases to such centres. In Court-Annexed Mediation the mediation services are provided by the court as a part and parcel of the same judicial system as against Court-Referred Mediation, wherein the court merely refers the matter to a mediator. One feature of court-annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors in the justice delivery system. When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The Judge refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants are given an opportunity to play their own participatory role in the resolution of disputes. This also creates public acceptance for the process as the same time-tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service. In court-annexed mediation, the court is the central institution for resolution of disputes. Where ADR procedures are overseen by the court, at least in those cases which are referred through courts, the effort of dispensing justice can become well-coordinated.

ADR services, under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complementary and not competitive with the court system. The system will get a positive and willing support from the judges who will accept mediators as an integral part of the system. If reference to mediation is made by the judge to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the

movement of the case between the court and the mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus provide an additional tool by the same system providing continuity to the process, and above all, the court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that the court works hand-in-hand with mediation facility will produce satisfactory and faster settlements.

* * * * *

Legal Framework

Civil Procedure Mediation Rules formulated by *Supreme Court in Salem Advocate Bar Association v Union of India* : (2005) 6 SCC 344.

Rule 11: Procedure of Mediation

(iv) Each party shall, ten days before a session, provide to the mediator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator to understand the issue; such memoranda shall also be mutually exchanged between the parties.

(v) Each party shall furnish to the mediator, copies of the pleadings or documents or such other information as may be required by him in connection with the issues to be resolved...

(vi) Each party shall furnish to the mediator such information as may be required by him in connection with the issues to be resolved.

Arbitration and Conciliation Act 1996

Section 65: Submission of statements to conciliator.

(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(2) The Conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

***Afcons Infrastructure Ltd. v. Cherian Varkey
Construction Company Pvt. Ltd.***

(2010) 8 SCC 24

(Process of referral to different modes of ADR under Section 89 of CPC, 1908)

R.V.RAVEENDRAN, J. Leave granted. The general scope of Section 89 of the Code of Civil Procedure ('Code' for short) and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties, arise for consideration in this appeal.

2. The second respondent (Cochin Port Trust) entrusted the work of construction of certain bridges and roads to the appellants under an agreement dated 20.4.2001. The appellants sub-contracted a part of the said work to the first respondent under an agreement dated 1.8.2001. It is not in dispute that the agreement between the appellants and the first respondent did not contain any provision for reference of the disputes to arbitration.

3. The first respondent filed a suit against the appellants for recovery of Rs.210,70,881 from the appellants and their assets and/or the amounts due to the appellants from the employer, with interest at 18% per annum. In the said suit an order of attachment was made on 15.9.2004 in regard to a sum of Rs.2.25 crores. Thereafter in March 2005, the first respondent filed an application under section 89 of the Code before the trial court praying that the court may formulate the terms of settlement and refer the matter to arbitration. The appellants filed a counter dated 24.10.2005 to the application submitting that they were not agreeable for referring the matter to arbitration or any of the other ADR processes under section 89 of the Code. In the meanwhile, the High Court of Kerala by order dated 8.9.2005, allowed the appeal filed by the appellants against the order of attachment and raised the attachment granted by the trial court subject to certain conditions. While doing so, the High Court also directed the trial court to consider and dispose of the application filed by the first respondent under section 89 of the Code.

4. The trial court heard the said application under section 89. It recorded the fact that first respondent (plaintiff) was agreeable for arbitration and appellants (defendants 1 and 2) were not agreeable for arbitration. The trial court allowed the said application under section 89 by a reasoned order dated 26.10.2005 and held that as the claim of the plaintiff in the suit related to a work contract, it was appropriate that the dispute should be settled by arbitration. It formulated sixteen issues and referred the matter to arbitration. The appellants filed a revision against the order of the trial court. The High Court by the impugned order dated 11.10.2006 dismissed the revision petition holding that the apparent tenor of section 89 of the Code permitted the court, in appropriate cases, to refer even unwilling parties to arbitration. The High Court also held that the concept of pre existing arbitration agreement which was necessary for reference to arbitration under the provisions of the Arbitration & Conciliation Act, 1996 ('AC Act' for short) was inapplicable to references under section 89 of the Code, having regard to the decision in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr.* [2003 (5) SCC 531]. The said order is challenged in this appeal.

5. On the contentions urged, two questions arise for consideration :

- What is the procedure to be followed by a court in implementing section 89 and Order 10 Rule 1A of the Code?

- Whether consent of all parties to the suit is necessary for reference to arbitration under section 89 of the Code?

6. To find answers to the said questions, we have to analyse the object, purpose, scope and tenor of the said provisions. The said provisions are extracted below :

"89. Settlement of disputes outside the court. –

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for -

- a. arbitration;
- b. conciliation;
- c. judicial settlement including settlement through Lok Adalat; or
- d. mediation.

(2) Where a dispute has been referred –

- a. for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

- b. to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

- c. for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

- d. for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

Other relevant provisions under CPC may be extracted as follows:

Order 10 Rule 1A. Direction of the Court to opt for any one mode of alternative dispute resolution.--After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

Order 10 Rule 1B. Appearance before the conciliatory forum or authority.--Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

Order 10 Rule 1C. Appearance before the Court consequent to the failure of efforts of conciliation.--Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it."

7. If section 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2). In spite of these defects, the object behind section 89 is laudable and sound. Resort to alternative disputes resolution (for short 'ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce Section 89 and Rules 1-A to 1-C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits. In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in Salem Advocate Bar Association v. Union of India reported in [2003 (1) SCC 49 - for short, Salem Bar - (I)] but referred to a Committee, as it was hoped that section 89 could be implemented by ironing the creases. In Salem Advocate Bar Association v. Union of India [2005 (6) SCC 344 - for short, Salem Bar-(II)], this Court applied the principle of purposive construction in an attempt to make it workable.

What is wrong with section 89 of the Code?

8. The first anomaly is the mixing up of the definitions of 'mediation' and 'judicial settlement' under clauses (c) and (d) of sub-section (2) of section 89 of the Code. Clause (c) says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in clause (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as "judicial settlement", as is done in clause (c). "Judicial settlement" is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute. "Mediation" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term 'conciliation'. (See : Black's Law Dictionary, 7th Edition, Pages 1377 and 996). When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in section 89 with interchanged meanings has led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms "judicial settlement" and "mediation" in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word "mediation" in clause (d) and the words "judicial settlement" in clause (c) are interchanged, we find that the said clauses make perfect sense.

9. The second anomaly is that sub-section (1) of section 89 imports the final stage of conciliation referred to in section 73(1) of the AC Act into the pre-ADR reference stage under section 89 of the Code. Sub-section (1) of section 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms of a possible settlement and then refer the same for any one of the ADR processes. If sub-section (1) of Section 89 is to be literally followed, every Trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.

10. Section 73 of AC Act shows that formulation and reformulation of terms of settlement is a process carried out at the final stage of a conciliation process, when the settlement is being arrived at. What is required to be done at the final stage of conciliation by a conciliator is borrowed lock, stock and barrel into section 89 and the court is wrongly required to formulate the terms of settlement and reformulate them at a stage prior to reference to an ADR process. This becomes evident by a comparison of the wording of the two provisions.

Section 73(1) of A&C Act, 1996: When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

Section 89 (1) CPC: (1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may re-formulate the terms of a possible settlement and refer the same for- (a) arbitration; (b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or (d) mediation.

Formulation and re-formulation of terms of settlement by the court is therefore wholly out of place at the stage of pre ADR reference. It is not possible for courts to perform these acts at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process.

11. If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award. If the reference is to conciliation/mediation/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok

Adalat, after going through the entire process of conciliation/ mediation. Thus, the terms of settlement drawn up by the court will be totally useless in any subsequent ADR process. Why then the courts should be burdened with the onerous and virtually impossible, but redundant, task of formulating terms of settlement at pre-reference stage?

12. It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing section 89 of the Code. This Court therefore diluted this anomaly in Salem Bar (II) by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a 'summary of disputes' and not 'terms of settlement'. How should section 89 be interpreted?

13. The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation will pose a great risk as the changes may not be what the Legislature intended or desired. Legislative wisdom cannot be replaced by the Judge's views. As observed by this Court in somewhat different context : "When a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, the Judges cannot afford to be wiser." (See : *Shri Mandir Sita Ramji v. Lt. Governor of Delhi* - (1975) 4 SCC 298). There is however an exception to this general rule. Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provisions, the courts may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the Legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible, or absurd or so impractical as to defeat the very object of the provision. We may also mention purposive interpretation to avoid absurdity and irrationality is more readily and easily employed in relation to procedural provisions than with reference to substantive provisions.

13 (6) Justice G.P. Singh extracts four conditions that should be present to justify departure from the plain words of the Statute, in his treatise "Principles of Statutory Interpretation" (12th Edn. - 2010, Lexis Nexis - page 144) from the decision of the House of Lords in *Stock v. Frank Jones (Tipton) Ltd.*, [1978 (1) All ER 948] :

".....a court would only be justified in departing from the plain words of the statute when it is satisfied that (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the

anomaly can be obviated without detriment to such a legislative objective; and (4) the language of the statute is susceptible of the modification required to obviate the anomaly."

14. All the aforesaid four conditions justifying departure from the literal rule, exist with reference to section 89 of the Code. Therefore, in *Salem Bar-II*, by judicial interpretation the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-section (1) of section 89, is excluded or done away with by stating that the said provision merely requires formulating a summary of disputes. Further, this Court in *Salem Bar-II*, adopted the following definition of 'mediation' suggested in the model mediation rules, in spite of a different definition in section 89(2)(d) :

"Settlement by 'mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them."

All over the country the courts have been referring cases under section 89 to mediation by assuming and understanding 'mediation' to mean a dispute resolution process by negotiated settlement with the assistance of a neutral third party. Judicial settlement is understood as referring to a compromise entered by the parties with the assistance of the court adjudicating the matter, or another Judge to whom the court had referred the dispute.

15. Section 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

16. In view of the foregoing, it has to be concluded that proper interpretation of section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of 'judicial settlement' and 'mediation' in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of section 89(2) of the Code will read as under when the two terms are interchanged:

(c) for "mediation", the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for "judicial settlement", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that section 89 is not rendered meaningless and infructuous.

Whether the reference to ADR Process is mandatory?

17. Section 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred under section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.

18. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences.

19. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

(i) All cases relating to trade, commerce and contracts, including - disputes arising out of contracts (including all money claims);

- disputes relating to specific performance;
- disputes between suppliers and customers;
- disputes between bankers and customers;
- disputes between developers/builders and customers;
- disputes between landlords and tenants/licensor and licensees;
- disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including

- disputes relating to matrimonial causes, maintenance, custody of children;
- disputes relating to partition/division among family members/co-parceners/co-owners; and

- disputes relating to partnership among partners.

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);

- disputes between employers and employees;

- disputes among members of societies/associations/Apartment owners Associations;

(iv) All cases relating to tortious liability including

- claims for compensation in motor accidents/other accidents; and

- All consumer disputes including

- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

The above enumeration of `suitable' and `unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

How to decide the appropriate ADR process under section 89?

20. Section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes - conciliation, mediation, judicial settlement and Lok Adalat settlement. The object of section 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither section 89 nor Rule 1A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987. On the other hand, section 89 of the Code makes it clear that

two of the ADR processes - Arbitration and Conciliation, will be governed by the provisions of the AC Act and two other ADR Processes - Lok Adalat Settlement and Mediation (See : amended definition in para 18 above), will be governed by the Legal Services Authorities Act. As for the last of the ADR processes - judicial settlement (See : amended definition in para 18 above), section 89 makes it clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed (by appropriate rules).

21. Rule 1A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but a joint option or consensus about the choice of the ADR process. On the other hand, section 89 vests the choice of reference to the court. There is of course no inconsistency. Section 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1A to 1C of Order 10 lay down the manner in which the said jurisdiction is to be exercised. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.

22. Let us next consider which of the ADR processes require mutual consent of the parties and which of them do not require the consent of parties.

Arbitration

23. Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the AC Act. The said Act makes it clear that there can be reference to arbitration only if there is an 'arbitration agreement' between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10 of the Code, the matter would have stood referred to arbitration either by invoking section 8 or section 11 of the AC Act, and there would be no need to have recourse to arbitration under section 89 of the Code. Section 89 therefore presupposes that there is no pre-existing arbitration agreement. Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under section 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the ordersheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under section 89 of the Code; and on such reference, the provisions of AC Act will apply to the arbitration, and as noticed in *Salem Bar-I*, the case will go outside the stream of the court permanently and will not come back to the court.

24. If there is no agreement between the parties for reference to arbitration, the court cannot refer the matter to arbitration under section 89 of the Code. This is evident from the provisions of AC Act. A court has no power, authority or jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement. This Court has consistently held that though section 89 of the Code mandates reference to ADR processes, reference to arbitration under section 89 of the Code could only be with the consent of both sides and not otherwise.

24.1) In *Salem Bar (I)* [*Salem Advocate Bar Association v. Union of India*, (2003) 1 SCC 49], this Court held :

"It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the law's delays and the limited number of Judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date. The alternative dispute resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial."

In *Salem Bar - (II)* [*Salem Advocate Bar Association v. Union of India*, (2005) 6 SCC 344], this Court held :

"Some doubt as to a possible conflict has been expressed in view of use of the word "may" in Section 89 when it stipulates that "the court may reformulate the terms of a possible settlement and refer the same for" and use of the word "shall" in Order 10 Rule 1-A when it states that "the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of Section 89".

The intention of the legislature behind enacting Section 89 is that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section and if the parties do not agree, the court shall refer them to one or the other of the said modes. Section 89 uses both the words "shall" and "may" whereas Order 10 Rule 1-A uses the word "shall" but on harmonious reading of these provisions it becomes clear that the use of the word "may" in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of Section 89.

One of the modes to which the dispute can be referred is "arbitration". Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is arbitration agreement. As held in *P. Anand Gajapathi Raju v. P.V.G. Raju* [2000 (4) SCC 539] the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option. Of course, the parties have to agree for arbitration."

The position was reiterated by this Court in *Jagdish Chander v. Ramesh Chander* [2007 (5) SCC 719] thus :

"It should not also be overlooked that even though Section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there cannot be a reference to arbitration even under Section 89 CPC, unless there is a mutual consent of all parties, for such reference."

Therefore, where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject matter of the suit to arbitration under section 89 of the Code.

Conciliation

25. Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of AC Act. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in section 62 of AC Act followed by appointment of conciliator/s as provided in section 64 of AC Act. If both parties do not agree for conciliation, there can be no 'conciliation'. As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial. The other three ADR Processes

26. If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. If the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution. The court has used its discretion in choosing the ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution.

Whether the settlement in an ADR process is binding in itself ?

27. When the court refers the matter to arbitration under Section 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/enforceable as if a decree of a court, having regard to Section 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral

Tribunal on such settlement, will also be binding and executable/enforceable as if a decree of a court, under Section 30 of the AC Act.

28. The other four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non- adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings. As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms. Where the reference is to a neutral third party ('mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it. Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by Section 74 of AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator). Only then such settlements will be effective.

Summation

29. Having regard to the provisions of Section 89 and Rule 1-A of Order 10, the stage at which the court should explore whether the matter should be referred to ADR processes, is after the pleadings are complete, and before framing the issues, when the matter is taken up for preliminary hearing for examination of parties under Order 10 of the Code. However, if for any reason, the court had missed the opportunity to consider and refer the matter to ADR processes under Section 89 before framing issues, nothing prevents the court from resorting to Section 89 even after framing issues. But once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial.

30. Though in civil suits, the appropriate stage for considering reference to ADR processes is after the completion of pleadings, in family disputes or matrimonial cases, the position can be slightly different. In those cases, the relationship becomes hostile on account

of the various allegations in the petition against the spouse. The hostility will be further aggravated by the counter-allegations made by the respondent in his or her written statement or objections. Therefore, as far as Family Courts are concerned, the ideal stage for mediation will be immediately after service of respondent and before the respondent files objections/written statements. Be that as it may.

31. We may summarize the procedure to be adopted by a court under section 89 of the Code as under :

(a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

(b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

(c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

(d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

(e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.

(f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes : (i) Lok Adalat; (ii) mediation by a neutral third party facilitator or mediator; and (iii) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is *ex facie* illegal or unenforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

32. The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code :

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

33. The procedure and consequential aspects referred to in the earlier two paragraphs are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of a case. We have referred to the procedure and process rather elaborately as we find that section 89 has been a non-starter with many courts. Though the process under Section 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude 'unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge assisted settlement only in exceptional or special cases. Conclusion

34. Coming back to this case, we may refer to the decision in Sukanya Holdings relied upon by the respondents, to contend that for a reference to arbitration under section 89 of the Code, consent of parties is not required. The High Court assumed that Sukanya Holdings has held that section 89 enables the civil court to refer a case to arbitration even in the absence of an arbitration agreement. Sukanya Holdings does not lay down any such proposition. In that decision, this Court was considering the question as to whether an application under section 8 of the AC Act could be maintained even where a part of the subject matter of the suit was not covered by an arbitration agreement. The only observations in the decision relating to Section 89 are as under:

"Reliance was placed on Section 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section."

The observations only mean that even when there is no existing arbitration agreement enabling filing of an application under section 8 of the Act, there can be a reference under section 89 to arbitration if parties agree to arbitration. The observations in Sukanya Holdings do not assist the first respondent as they were made in the context of considering a question as to whether section 89 of the Code could be invoked for seeking a reference under section 8 of the AC Act in a suit, where only a part of the subject- matter of the suit was covered by arbitration agreement and other parts were not covered by arbitration agreement. The first respondent next contended that the effect of the decision in Sukanya Holdings is that "section 89 of CPC would be applicable even in cases where there is no arbitration agreement for referring the dispute to arbitration." There can be no dispute in regard to the said proposition as Section 89 deals, not only with arbitration but also four other modes of non-adjudicatory resolution processes and existence of an arbitration agreement is not a condition precedent for exercising power under Section 89 of the Code in regard to the said four ADR processes.

35. In the light of the above discussion, we answer the questions as follows :

(i) The trial court did not adopt the proper procedure while enforcing Section 89 of the Code. Failure to invoke Section 89 *suo moto* after completion of pleadings and considering it only after an application under Section 89 was filed, is erroneous.

(ii) A civil court exercising power under Section 89 of the Code cannot refer a suit to arbitration unless all the parties to the suit agree for such reference.

36. Consequently, this appeal is allowed and the order of the trial court referring the matter to arbitration and the order of the High Court affirming the said reference are set aside. The Trial Court will now consider and decide upon a non-adjudicatory ADR process.

* * * * *

Creating Effective Communication in Your Life

*Randy Fujishin**

(*Creating Communications: Exploring and Expanding your Fundamental Communication Skills, 2nd Edn., Rowman Littlefield Publishers.2009, pp 1-17)

Portion Relevant for LB-602 Retained

THE PROCESS OF COMMUNICATION

Let's begin with an examination of communication itself, for it is communication that enables us to experience our lives and share experiences with others. The late-night talks, the laughter, the gentle touches, the tears, the encouragement, and the thousands upon thousands of other communication acts all combine to create what you experience as life. Our communication with others is not a little thing. It is life itself. The importance of communication cannot be overstated. It is often suggested that "Once a human being has arrived on this earth, communication is the single most important factor determining what kinds of relationships he makes and what happens to him in the world." In other terms, it is stated that "How he manages his survival, how he develops intimacy, and how he makes sense of his world are largely dependent upon his communication skills."

So, what exactly is communication? Let's define communication in a way that emphasizes your creative involvement in the communication process. Communication is the process whereby we create and exchange messages.

A Process

Any activity can be viewed as a thing or a process. A thing is static, time bound, and unchanging. A process is moving, continually changing, with no beginning or end. In our definition, communication is a process—something that is continually changing. Individual words, sentences, and gestures have no meaning in isolation. They make sense only when viewed as parts of an ongoing, dynamic process.

To fully understand the process of communication, we must notice how what we say and do influences and affects what the other person says and does. We must pay attention to the changes we experience and how these changes influence and affect our perception, interpretation, and interactions with others, from moment to moment, year to year, and decade to decade.

Similarly, we also need to be sensitive to the ongoing changes in those we communicate with because they are changing too. Communication is alive, and to fully appreciate it requires that we view it as a dynamic, fluid, and continually changing process.

Creating Messages

Language in any culture contains thousands if not hundreds of thousands of words to select from and arrange in endless combinations to form the basic structures of verbal communication. There are even more subtle and not-so-subtle nonverbal (or nonlanguage) communication behaviours that can be added to the mix.

It is our ability to create messages from the verbal and nonverbal dimensions of communication that truly distinguishes us from all other forms of life. Our ability to create communication not only is the most significant way humans differ from animals and plants, but it also may be one of the deepest and strongest drives within us—to express and share who we are. What more powerful and significant way to express who and what we are than by communicating our thoughts and feelings with others?

Exchanging Messages

After selecting the words, sentences, and nonverbal cues to form the thought or feeling we are attempting to communicate, we send the message to the recipient, who processes the message and gives a response in the form of feedback. The recipient's role in the communication process is also a creative process, because what he or she selectively perceives and interprets from the original message will determine the meaning of the message for him or her. The message recipient then creates a response from all the words and nonverbal behaviours available. Receiving and creating a response is just as important as creating and sending the original message.

VERBAL AND NONVERBAL COMMUNICATION

The communication process has two forms—verbal and nonverbal. Both forms usually operate together in the majority of messages you send and receive.

Verbal communication is all spoken and written communication. A mother whispering reassuring words to a child, a speaker addressing an audience of five thousand, or a sunbather reading a book on the beach is utilizing verbal communication.

Nonverbal communication is all communication that is not spoken or writ-ten. It is your body type, voice, facial expressions, gestures, movement, clothing, and touch. It is your use of distance, use of time, and the environment you create. It is your laughter, your tears, your gentle touch, your relaxed breathing, the car you drive, and the colour of your pen. All these things and countless others make up your nonverbal communication.

Verbal communication and nonverbal communication enable you and me to communicate. They provide all that is necessary for the process of connecting, and it is our privilege to use them creatively, effectively, and meaningfully.

COMPONENTS OF COMMUNICATION

Even though the following seven components of communication operate almost instantaneously, we will examine them separately to more clearly understand their specific

function. The seven components are source, message, receiver, encoding, channel, decoding, and context.

Source: The source is the originator of the message. It is the person or persons who want to communicate a message to another person or a group of people. The source of a message can be an individual speaker addressing a group, a child asking for candy, a couple sending out invitations to a family reunion, or a person writing a letter.

Message: The message is the idea, thought, or feeling that the source wants to communicate. This message is encoded or converted into verbal and nonverbal symbols that will most likely be understood by the receiver.

Receiver: The receiver is the recipient of the message. The receiver can be an individual or a group of people. Once the receiver hears the words and receives the nonverbal cues from the sender, she must interpret or decode them if communication is to occur.

Encoding: Once the source has decided on a message to communicate, he must encode or convert that idea, thought, or feeling into verbal and nonverbal symbols that will be most effectively understood by the receiver. This encoding process can be extremely creative because there are unlimited ways for the source to convert the idea or feeling into words and behaviours.

Consider a simple message such as “I want to see you again.” The source can simply say, “I want to see you again,” and smile as he says the words. He can also say, “Let’s get together again,” and cast a humorous glance, or he can murmur, “I need to see you again,” with direct eye contact and outstretched arms. He could simply scribble a note on a napkin saying, “We need an encore,” and place it gently in front of the other person. There are countless ways to encode this simple message and each one would be received and interpreted by the recipient in a slightly different way.

The important thing to remember is that you can open yourself up to the end-less possibilities of selecting, arranging, and delivering messages you want to communicate. Your willingness to put greater creativity into the encoding process will enhance and deepen your communication with others.

Channel: A **channel** is the medium by which the message is communicated. The source can utilize the channels of sight, sound, touch, smell, and taste. For instance, if you want to communicate affection for another person, you can utilize a variety of channels or combination of channels. You can say, “I like you” (sound). You can give a hug (touch). You can wink an eye (sight). You can send cookies that you baked (taste). Or you can deliver a dozen roses (smell). You can creatively select the channels of communication to productively communicate your message.

Decoding: Decoding is the process of making sense out of the message received. The receiver must decipher the language and behaviours sent by the source so they will have meaning. After the receiver decodes the message, the receiver (now the source) can encode a return message and send it back to the other person.

Context: All communication occurs within a certain context. The context is made up of the physical surroundings, the occasion in which the communication occurs, the time, the number of people present, noise level, and many other variables that can influence and affect the encoding and decoding of messages. The context plays an important role in the communication process.

As you consider the effects that the context can have on communication, you might want to put your creativity to good use. Think of ways you can create a serene, healthy, and productive communication environment. Simple things like choosing a time when you both have an opportunity to meet. Making the actual physical surroundings clean, uncluttered, and peaceful. Maybe straightening up the house, buying some flowers to cheer the place up, and even putting on some soothing background music. Perhaps a drive in the country or a walk in a park will create a more relaxed context in which you can communicate more effectively. Whatever you do, remember that you can have some influence over the context in which communication occurs within your life.

PERCEPTION

To more fully understand communication, we must recognize the importance of perception. **Perception** is the process by which we assign meaning to a stimulus. Or put another way, perception is giving meaning to the things we see and experience.

Selection

The process of perception involves our five senses. We see, hear, touch, smell, and taste. From these five senses we take in the stimuli of the world. It's from these five senses that we receive information to make sense of our lives. Because we are exposed to much more stimuli than we could ever manage, the first step in perception is to select which stimuli to attend to. In other words, we don't attend to every stimulus that is present at any given moment.

Even in the location where you're reading this book, if you were to count each stimulus in your field of vision, the number would be in the thousands, perhaps the tens of thousands. To pay attention to each stimulus at the same moment would be impossible. So you have to decide—do you select the words in this sentence or gaze at your left foot? Each selection changes your focus of vision. You can't select all the things, so you must select a few.

Interpretation

Once we have selected our perceptions, the second step is to interpret them in a

way that makes sense to us. Interpretation is the act of assigning meaning to a

stimulus. It plays a role in every communication act we encounter. Is a friend's humorous remark intended to express fondness or irritation? Does your supervisor's request for an

immediate meeting with you communicate trouble or a pay raise? When an acquaintance says, “Let’s do lunch,” is the invitation serious or not? Almost every communication act we encounter involves some level of interpretation on our part. Let’s examine some factors that influence our perception.

Physical factors.

The most obvious factors that influence our interpretation are physical. What is the condition of our five senses? Can we see accurately or do we need glasses? Can we hear sufficiently or is our hearing diminished by age? Can we smell and taste sharply or are allergies causing difficulties? Can you touch and feel with adequate sensitivity or do clothing and gloves make it hard?

The time of day affects how we physically process the sensory input. Are you more awake in the morning or late at night? Some people are most alert and attentive in the morning, while others come alive late at night.

Your general state of health can influence interpretation. When you are ill, hungry, or depressed, you see and experience a very different world than when you are healthy, well fed, and cheerful.

Age also can affect your interpretation. Older people view the world and events with a great deal more experience than do younger people. By simply having lived longer, older people have generally been through more of life’s developmental stages—early adulthood, parenthood, grandparenthood, retirement. Younger people, on the other hand, usually have much more physical energy and time to play, explore, and investigate the world around them. With fewer life experiences, younger people interpret life differently.

Other physical factors are fatigue, hunger, stress, monthly biological cycles, diet, and exercise. Our bodies play an important role in our interpretation of the world.

Psychological factors. The second category of factors that influence interpretation is psychological or mental. For example, education and knowledge affect how we see the world around us. An individual who never went beyond the seventh grade sees a much different world than an individual who has completed law school. A trained botanist sees a forest far differently than does a first-grader.

Past experiences also affect how we interpret perceptions. Someone who grew up happily on a farm may view rural environments very differently than someone who grew up in New York City. A victim of robbery may be more fearful of a darkened street than someone who has never experienced a crime. An individual who grew up in a loving, stable family may have a more positive view of raising children than a person who grew up in a cold, unstable family.

Assumptions about people and the world in general influence interpretations also. A belief that people are basically good and honest, or basically untrustworthy and self-serving, will affect how we view the actions of others.

Finally, moods will influence how we interpret the things we see and experience. When we are feeling successful and competent, we see a very different world than when we are feeling sad, lonely, and depressed.

Cultural factors. A person's cultural background can affect and influence his or her interpretation of the world. Chapter 5 is devoted to intercultural communication and the role culture plays in how we communicate with those who are different from us. For now, we'll just briefly mention some cultural factors that influence perception.

Every culture has its own worldview, language, customs, rituals, artefacts, traditions, and habits. These factors not only affect how people perceive and interact with one another within a given culture, but also, they influence how they interact with people of different cultures. Culture can shape and determine how an individual sees the world. Americans interpret direct eye contact as a sign of confidence, honesty, and politeness, whereas Japanese interpret the same direct eye contact as rude and confrontational. People from Middle Eastern countries often converse within a few inches of each other's face, whereas Americans would find such closeness violation of personal space. For Americans, the "okay" sign made with the thumb and the forefinger is a sign that everything is fine, but in many cultures, it is an obscene gesture.

Position in space. The final factor that influences perception is position in space. Where we are determines how we see things. For instance, if you sit at the back of a classroom, you will perceive a very different environment than if you sit in the front row, right under the nose of the lecturer. The same holds true for adult interaction with children. You will perceive children differently if you kneel down to their eye level rather than stand over them. You even pay higher prices for better viewing positions. Think of the last concert, sporting event, or resort you attended or visited. The closer seats or the rooms with a view generally cost more.

Perception Checking

Because so many factors influence perception, what can we do to create more effective communication? Perception checking is a method for inviting feedback on our interpretations. Perception checking involves three steps:

1. An observation of a particular behaviour.
2. Two possible interpretations of that behaviour.
3. A request for clarification about how to interpret that behaviour.

Many times people observe and interpret the behaviour, and that's the end of it. Often their interpretations can be easily and readily corrected with a simple perception check. Here are two examples of how perception checking works:

"I noticed you haven't been in class for the past two weeks. (observed behaviour) I wasn't sure whether you've been sick (first interpretation) or were dropping the class. (second interpretation) What's up?" (request for clarification)

“You walked right past me without saying hello. (observed behaviour) It makes me curious if you’re mad at me (first interpretation) or just in a hurry. (second interpretation) How are you feeling?” (request for clarification)

Often, perception checking is more to the point. You may not want to use all three steps:

“I see you rolling your eyes at me. (observed behaviour) What’s the matter?” (invitation for clarification)

“Are you certain you want to go to the movies? (request for clarification) You don’t act like you’re too enthusiastic.” (observed behaviour)

Perception checking can be a simple technique for clarifying communication behaviour in a way that is not threatening or confrontational. It simply asks for clarification.

PRINCIPLES OF COMMUNICATION

The portion has been edited to suit the requirements of the course. LB-602

Certain generally accepted truths or principles of communication are important to consider when communicating with others. These principles hold true for all people in every culture. By understanding these principles, you will experience greater communication effectiveness.

Communication Is Constant

You cannot *not* communicate. In other words, you are always communicating. Too often we think that if we are not talking, we are not communicating. You may not be communicating verbally, but your nonverbal communication is constantly displaying signs and cues that reflect what you are thinking and feeling internally. Your posture, gestures, facial expressions, clothing, use of time, and even the car you drive are just a few of the nonverbal messages that others perceive and interpret.

Even when you are speaking, your tone of voice, rate of speech, pitch, volume, pauses or lack of pauses, and vocal fillers such as “ah” and “um” are some of the nonverbal behaviours that can convey what you’re thinking and feeling beneath the level of language. You’re always communicating.

Communication Is Irreversible

“Forget I said that.” “I’m sorry I did that. Let’s pretend it never happened.” We have all issued statements like these in an attempt to erase or diminish the impact of an angry word or action. Even though the other person agreed to forget or dis-miss the statement or behaviour, the memory of a careless word or deed can last a lifetime. I’m sure you can recall a stinging criticism or hurtful act you experienced during childhood. The memory of the criticism or act can linger and haunt you many years later. Likewise, uplifting, positive, and healing words and deeds can also be carried in the hearts and minds of others forever.

Your every word and deed can leave an indelible imprint on the minds and hearts of others. Be conscious of your choices as you create messages to others.

Communication Is Creative

The last principle of communication is that it is creative. This creativity is much broader than the creativity associated with art, music, and poetry. It is the creativity expressed in your daily communication, in the unique and special ways you communicate: When you choose to be silent. The way you listen. The

times you choose to speak. The words you select from your vocabulary palette and the sentences you create. The combinations of facial expressions, gestures, movements, and postures you choose to express your thoughts and feelings. The letters you send. The telephone calls you make. The clothes you wear. The car you drive. The room you decorate. The home you live in. These are just some of the ways you create communication in your life.

Your communication and the impact it has on others does not just happen. You make it happen. You decide whether or not to return a phone call. You decide whether or not to respond to a lunch invitation. You decide whether to respond in kindness or in anger to a criticism levelled your way. You create by choosing one behaviour and not another. You are always creating something in your communication life.

DO YOU ENLARGE OR DIMINISH OTHERS?

I believe that we enlarge or diminish others with our communication. We heal or hurt others with our words. People go away from our interactions feeling a little better or a little worse than before.

You are free to create the words and behaviours that will ultimately enlarge or diminish the recipient of your message. No one is writing your script or coaching your movements and gestures. You are ultimately the scriptwriter, the dialogue coach, the director, and the speaker who will deliver the lines. You are given a great deal of creative latitude for how you create your messages during your life. What will you create? Will you enlarge or diminish others with your communication?

Inside you there is an artist you might not know just yet. But relax, continue reading, and gently welcome the artist within you. The highest art you will ever create lies ahead—the art of communication.

Exercises below are intended to help you explore and experiment with new ways of communicating in a variety of settings and to expand your thoughts about who you are and the communication possibilities available to you.

Exploring Creative Tasks

1. Listen for thirty seconds or more without verbally interrupting a friend during a conversation. What changes did that create? What was your friend’s response? How did you feel not interrupting as much?
2. Use perception checking in situations when another person’s communication or behaviour is confusing, ambiguous, or unclear. What were the results of your perception check? What changes did it create in the conversation?
3. List ten positive characteristics or traits a friend possesses. Share the list with your friend. In your opinion, was the experience enlarging or diminishing for your friend? What makes you think so? Has this conversation changed your relationship?
4. Keep a daily journal of specific instances when you were consciously aware of attempting to create more positive messages to others. What does it feel like to keep this journal? What are you learning about yourself? About others?

Expanding your creative thinking

1. What are some of your current creative activities or hobbies? What art forms or creative activities would you like to do in the future? What benefits do you think you would derive from them? When would you like to begin these artful activities?
2. In what specific ways could you be more positive and enlarging in your communication with loved ones and friends? With co-workers and casual acquaintances? How do you think more positive communication behaviours would change your relationships with these people?
3. What factors influence your perception and communication during a given day? When are you the most alert, positive, and energetic? Are there any specific ways you modify or improve your “view” of others? What are they? Can you think of any other ways to “see” the best in others?
4. List five specific changes that you could undertake that would make you more self-accepting, calm, and loving. Tape this list to your bedroom mirror or your car dashboard to remind yourself of your goals.

Body Language (Non-verbal Communication)

Observing yourself and others is non-verbal communication - the way we express ourselves, not by what we say, but by what we do.

Stop for a moment and examine yourself as you read this. If someone were observing you now, what non-verbal clues would they get about how you are feeling? Are you sitting forward or reclining back? Is your posture tense or relaxed? Are your eyes wide open, or do they keep closing? What does your facial expression communicate? Can you make your face expressionless? Don't people with expressionless faces communicate something to you?

Of course, we do not always intend to send non-verbal messages. Consider, for instance, behaviors like blushing, frowning, sweating, or stammering. We rarely try to act in these ways, and often we are not aware when we are doing so. Nonetheless, others recognize signs like these and make interpretations about us based on their observations.

Understanding that you, and everyone around you, are constantly, sending off non-verbal cues is important because it means that you have a constant source of information available about yourself and others. If you can tune into these signals, you will be more aware of how those around you are feeling and thinking, and you will be better able to respond to their behavior

Non-verbal Communication Transmits Feelings

Although feelings are communicated quite well non-verbally, thoughts do not lend themselves to non-verbal channels. Without being able to use words, peoples' bodies generally express how they feel - nervous, embarrassed, playful, friendly, etc. What they think has to be gathered through some verbal medium.

Here is a list that contains both thoughts and feelings. Try to express each item non-verbally, and see which ones come most easily:

You are tired.

You are in favor of capital punishment.

You are attracted to another person in the group. You think marijuana should be legalized.

You are angry with someone in the group.

Non-verbal Communication Serves Many Functions

Verbal and non-verbal communications are interconnected elements in every act of communication. Non-verbal behaviors can operate in several relationships to verbal messages.

a. First, non-verbal behaviors can repeat what is said verbally. If someone asked you for directions to the nearest drugstore, you could say, "North of here about two blocks," and then repeat your instructions non-verbally by pointing north.

b. Non-verbal messages may also substitute for verbal ones. When you see a familiar friend wearing a certain facial expression, you do not need to ask, "How's it going?" In the same way, experience has probably shown you that other kinds of looks, gestures, and other cues say, "I'm angry at you" or "I feel great" far better than words.

* * * * *

Perceptions of the Two-Way Communicator

The "two way communicator" is someone who:

- Seeks, encourages feedback from receivers on how a message was understood;
- Asks many questions to assure understanding of another's message;
- Establishes a climate for routine give and take;
- Does not punish honesty or negative messages;
- Shows nonverbal comfort with dialogue;

Common Perceptions

The two way communicator:

1. Likes people
2. Is receptive to new information
3. Is fair
4. Wants full information before making important decisions
5. Is well liked by others
6. Dislikes extreme formality and control
7. Enjoys helping people feel comfortable
8. Feels good when communication is successful
9. Is a good listener
10. Believes that "perceptions" are very important and legitimate
11. Likes to learn from others
12. Is a good interpersonal communicator

Lessons of the One-Way/Two-Way Exercise

One-Way—little or no verbal feedback from receiver; no chance to check perceptions

Two-Way—relatively free interaction between sender and receiver

1. One-way is usually faster; two-way is usually more accurate.
2. Two-way is expensive (time, money, energy); one-way may be more expensive in the long run if misunderstanding causes errors, problems, conflict.
3. One-way gives control to the sender; two-way gives some control to the receivers.
4. In one-way, receivers may seek out unreliable information sources; in two-way, receivers have access to the reliable source—the sender.
5. Two-way includes risk by both the receiver and sender, one-way is perceived as less risky.
6. The one-way/two-way choice is a function of rewards, senders evaluate the relative payoffs of both options.

To Improve One-Way Communication:

- Prepare a message carefully, if message is to be spoken, practice
- Use previews, summaries, repetition; supplement with examples, specifics
- Evaluate intended receivers; adapt to specific individuals or groups
- Use visual support

To Improve Two-Way Communication:

- Seek out feedback.....don't wait for it
- Avoid defensive reactions to questions, challenges
- Reinforce people who ask questions(remember most of us have been punished for this behaviour in the past)
- Use past feedback as a guide to future communication with the same or similar people

NEGOTIATION- INTRODUCTION, STYLE AND STRATEGIES

- (a) Negotiation
- (b) Exercise: The negotiating style profile
- (c) Definitions of negotiation
- (d) Development of conflict
- (e) Negotiating techniques
- (f) Eight critical mistakes
- (g) Being assertive in negotiation
- (h) Exercise: Questionnaire: opinions and attitudes
- (i) Negotiation: the art of negotiating

NEGOTIATION- INTRODUCTION, STYLE AND STRATEGIES

NEGOTIATION

- I. In the space below, write what the word "negotiation" means to you.

Negotiation - Whenever we attempt to influence another person through an exchange of ideas, or something of material value, we are negotiating. Negotiation is the process we use to satisfy our needs when some else controls what we want.

(EXERCISE)

THE NEGOTIATING STYLE PROFILE

The following instrument is designed to help you gain a deeper understanding of your negotiating style. There is no right or wrong answers. The data provided by this instrument will only be valid if you respond candidly to each of the statements.

Directions: There are 30 statements in this instrument. Please respond to each statement by circling the number corresponding to the response that most accurately reflects the extent to which the statement is descriptive of your thinking.

Strongly disagree	1
Disagree	2
Slightly disagree	3
Neither agree or disagree	4
Slightly agree	5
Agree	6
Strongly agree	7

Example:

I often feel I lack the power to produce a successful outcome.	SD	D	SD	?	SA	A	SA
	1	2	3	4	5	6	7

Directions: For each statement, circle the number that most accurately reflects the extent to which that statement is descriptive of you or your thinking. Remember to be called in your responses.

- Strongly disagree** **1**
Disagree **2**
Slightly disagree **3**
Neither agree or disagree **4**
Slightly agree **5**
Agree **6**
Strongly agree **7**

Please turn the page and complete the instrument

		SD	D	SD	?	SA	A	SA
1.	When I negotiate, my interest must prevail.	1	2	3	4	5	6	7
2.	I try to identify common interests to use as a basis for satisfying both parties needs.	1	2	3	4	5	6	7
3.	I put aside unpleasant confrontations in favour of a friendly approach.	1	2	3	4	5	6	7
4.	Negotiators are adversaries.	1	2	3	4	5	6	7
5.	I am unable and weak to take care of myself.	1	2	3	4	5	6	7
6.	I often feel I lack the power to produce a successful outcome.	1	2	3	4	5	6	7
7.	I enjoy the reputation of tough battler.	1	2	3	4	5	6	7
8.	Negotiation may be said to be effective when both Parties get their needs satisfied.	1	2	3	4	5	6	7
9.	Half a loaf is better than none.	1	2	3	4	5	6	7
10.	Negotiation is a contest of wills.	1	2	3	4	5	6	7
11.	You have to make concessions to the other party to build the relationship.	1	2	3	4	5	6	7
12.	I acknowledge that my co. has made a mistake.	1	2	3	4	5	6	7
13.	You should do unto others before they do it to you.	1	2	3	4	5	6	7
14.	Affable relationships produce the best results.	1	2	3	4	5	6	7
15.	Compromise is the essence of effective negotiation.	1	2	3	4	5	6	7
16.	An effective negotiator employs threats, bluffs, surprises.	1	2	3	4	5	6	7
17.	I keep a low profile during a negotiating discussion.	1	2	3	4	5	6	7
18.	Split the difference is my motto.	1	2	3	4	5	6	7
19.	I am unable to stand up for my rights	1	2	3	4	5	6	7
20.	A soft word can win a hard heart.	1	2	3	4	5	6	7
21.	Though the outcome is not fair to me, it will maintain relationship	1	2	3	4	5	6	7

22.	When negotiating, I attempt to work through our differences.	1	2	3	4	5	6	7
23.	I search for a solution the other party will accept.	1	2	3	4	5	6	7
24.	My approach is always to meet the other party halfway	1	2	3	4	5	6	7
25.	The most successful negotiation makes everyone a winner.	1	2	3	4	5	6	7
26.	I often let others take responsibility for solving the problem.	1	2	3	4	5	6	7
27.	When I negotiate, I put a lot of effort into looking for trade-offs so each party gets something out of the deal.	1	2	3	4	5	6	7
28.	You choose; any thing is fine with me	1	2	3	4	5	6	7
29.	I put aside decisions until conflicts have quieted down.	1	2	3	4	5	6	7
30.	In a successful negotiation everyone gives something but everyone also gains something.	1	2	3	4	5	6	7

Please do not turn the page until you have completed your responses.

Part I: Securing Key

Directions: The 30 statements in the instrument have been set up in five columns in the chart below. Transfer the number corresponding to your answer to each statement to the appropriate space in the chart. Then add up the total number of points in each columns and enter the total in the space provided

Question Number

	1_	3_	9_	2_	5_
	4_	11_	15_	8_	6_
	7_	12_	18_	14_	17_
	10_	20_	24_	22_	19_
	13_	21_	27_	25_	26_
	16_	23_	30_	29_	28_
Total	a_____	b_____	c_____	d_____	e_____
	Defeat	Accommodate	Compromise	Collaborate	Withdraw

Part II: Negotiating Profile

Directions: In each of the style columns, circle the number representing the total points given for that style in Part 1. Then connect the circled numbers to produce a plot line.

Defeat	Accommodate	Compromise	Collaborate	Withdraw
38	38	38	38	38
36	36	36	36	36
34	34	34	34	34
32	32	32	32	32
30	30	30	30	30
28	28	28	28	28
26	26	26	26	26
24	24	24	24	24

20	20	20	20	20
18	18	18	18	18
16	16	16	16	16
14	14	14	14	14
12	12	12	12	12
10	10	10	10	10
8	8	8	8	8
6	6	6	6	6
4	4	4	4	4
2	2	2	2	2
0	0	0	0	0

Part III Interpretation

The style with the highest number represents your preferred negotiating style. If two or more styles have the same total, you probably use both styles and use them equally or alternatively. Perhaps you use one as a primary or “first approach” style and switch to the second style as a back-up.

The profile indicates the relative strength of our subscription to a particular style, as you perceive it. To the extent that your responses were honest, the data will be representative of our general philosophy of negotiating if, in fact, this philosophy is acted on, then the data represents your negotiating behaviour style.

All styles have usefulness in selected situations. However, the most satisfying and rewarding negotiations in the long term are achieved by consistent use of a Collaborative style. This approach produces a win/ win outcome for both parties.

PREDOMINANT NEGOTIATION STYLES

Defeat – This pattern is characterized by win-lose competition, pressure, intimidation, adversarial relationships and the negotiator attempting to get as much possible for him/herself. Defeat the other party at any cost.

Collaborative – This pattern is characterised by searching for common interests with the other party, problem solving behaviour, recognising that both parties must get their needs satisfied for the outcome to be entirely successful. Collaborative behaviour and synergistic solutions result. Working to build a win-win outcome is the main purpose of the negotiator.

Accommodate – This pattern is characterised by efforts to promote harmony, avoidance of substantive differences, yielding to pressure to preserve the relationship, placing interpersonal relationships above the fairness of the outcome. Accommodate the other party’s needs becomes the negotiator’s style.

Withdraw – This pattern is characterised by feelings powerlessness, indifference to the bargaining result, resignation, surrender, taking whatever the other party is willing to concede. Withdraw and remove oneself becomes the behaviour of the negotiator.

Compromise – This pattern is characterised by compromise, meeting the other party half way, looking for trade-offs, spitting the difference and half-way measures. Conflict reduction is valued over synergistic problem solving. Finding an acceptable agreement is the objective of this style.

Discussion Questions

The value of your results from your negotiating profile will be greatly enhanced through discussion of the following questions with others in your training groups:

1. Do you think that your scores for the five negotiation styles actually represents your usual behavior when faced with negotiation situations at work? Why or why not?
2. What could you do specifically to increase your negotiating effectiveness?

Negotiation – Some Practical Definitions

Following are some accepted definitions of negotiation:

1. Whenever we attempt to influence another person through an exchange of ideas, or something of material value, we are negotiating. **Negotiation is the process we use to satisfy our needs when someone else controls what we want.** Every wish we would like to fulfill, every need we feel compelled to satisfy, are potential situations for negotiation. Other terms are often applied to this process such as: bargaining, haggling, bickering, mediating or bartering.
2. Negotiation between companies, groups or individuals normally occurs **because one has something the other wants and is willing to bargain to get it.**
3. Most of us are constantly involved in negotiations to one degree or another. Examples include: When people meet to draw up contracts, buy or sell anything; resolve differences; make mutual decisions; or agree on work plans. Even deciding where to have lunch makes use of the negotiation process.

DEVELOPMENT OF CONFLICT

Whatever the type, whomsoever the conflict affects, it always arises out of a four stage process as follows.

Frustration

Conflict situations originate where an individual or group feels frustrated or about to be frustrated in pursuit of important goals. The cause can be:

- Performance goals;
- Promotion;
- Pay rises;
- Power;
- Scarce economic resources;

- Rules;
- Values;
- In short, anything the individual or group cares about.

Thus, failing to achieve a target or goal may cause the start of the conflict cycle. At the second state, parties to the potential conflict attempt?

- To understand the nature of the problem;
- What they themselves want as a resolution;
- The various strategies they may employ to achieve that resolution.

This is the stage where conflict most often be turned to good use or avoided if careful negotiation are employed. It is the moment of self or behaviour analysis. Effective analysis will determine the right behaviour pattern for the future to correct the frustration felt as a result of goal failure. False analysis will lead to behaviour that is doomed to increase the frustration.

Behaviour

As a result of the conceptualisation process, parties to the conflict attempt to implement their resolution by behaving in the pattern they have selected as most likely to achieve the desired result.

Instant conceptualisation, when the party to the conflict is still feeling frustrated, usually leads to worse behavioral patterns and further conflict.

Outcome

If the outcome results in one party feeling dissatisfied, the seeds will be sown for further conflict. Whatever the result, the outcome will be part of the patterning and conditioning that set the possible patterns of behaviour in future conflict.

Conflict can become an ever-decreasing; circle; the frustration leads to instant and false conceptualisation, which in its turn causes further wrong behaviour, the outcome of which is further frustration and even more false conceptualisation. The only way out of such a situation is to break the conflict at the conceptualisation stage.

How we respond to conflicts/Handling conflict

It is only at the conceptualisation stage of conflict development that the most effective solutions can be found, so part of handling conflict must be watching for the process of conflict development to begin. Once the pattern of the developing conflict has been established, help or self-help can be administered. Beware of starting too early and catching the remaining frustration, which can easily turn to anger. Trying to solve a conflict with an angry person is almost impossible and can result in the permanent rejection of the most sound and sensible idea.

Competing

Competing is handling conflict head on. It is standing firm and rejecting the views and beliefs of the other party or standing between the warring factions and demanding that the war cease.

Use it where:

- A quick decision is vital;

- Unpopular ideas on important issues must be implemented;
- Issues are vital to the organisation and you know you are right;
- Opponents take advantage of non-competitive behaviour.

Collaborating

Collaborating is less than the art of total compromise. It will in all probability be the chosen method for dealing with cognitive conflict to ensure that no one good idea is needlessly sacrificed to the solution of conflict. To collaborate, take the ideas that come from both parties to the conflict and try to find a way of developing them all, without detracting from the overall goal. Use it where:

- both sets of concerns are too important to be compromised;
- your objective is to learn;
- your wish to merge insights from different people;
- you need commitment;
- you need a dispel feelings that have interfered with a relationship.

Compromising

Compromise is the art of win-win negotiation. Both parties to the conflict should feel that they have won but neither should feel any sense of loss. You will achieve it by using negotiation tactics as described in Chapter 13. Use it where:

- goals are important but not worth the disruption of mere assertive behaviour;
- opponents with equal power are committed to mutually exclusive goals;
- you wish to achieve temporary settlements to complex issues;
- time pressure is great;
- you need a back-up to failed collaboration or competition.

Avoiding

Avoiding means deciding not to get involved in the conflict and asking that it be shelved elsewhere. Use it where:

- the issue is trivial;
- more important issues are pressing;
- there is no chance of satisfying your concerns;
- the potential disruption outweighs the benefits of resolution;
- people need to cool down;
- gathering information might help;
- others can resolve the conflict more effectively;
- issues seem intangible.

Accommodation

Accommodating is the art of accepting the situation and agreeing to back down in conflict.

Use it where:

- you are wrong;
- issues are more important to others than yourself;
- you can build social credits for future issues;
- you need to minimise loss, as you are outmatched and losing harmony and stability are especially important;

- subordinates need to learn by mistakes made.

Conflicts can be constructive

Don't forget that conflict can be constructive. Without conflict an organisation cannot grow and develop. Conflict is an essential part of change and creativity. Use it for:

- problem solving;
- engendering new ideas;
- personality development;
- training and educating;
- role playing to establish potential problem areas.

Conflict and anxiety

As a result of conflict, individuals often experience considerable anxiety but can find no easy way to reduce it. This is particularly the case where a solution to the conflict seems unobtainable or long term. As a result, the suffering individuals apply defence mechanisms. Three group types of defence mechanism may be employed:

Aggressive defence mechanisms

- Fixation won't budge from a point of view;
- Displacement - redirecting pent up emotions towards hate objects or individuals.
- Negativism-active or passive resistance, no cooperation.

Compromise defence mechanisms

- Compensation- individual works harder to make up for feeling inadequate.
- *Identification*- individual enhances self-esteem by copying the behaviour of someone he admires.
- *Projection*-individual pretends that his own undesirable traits are in fact attributable to others.
- *Rationalisation*- individual justifies behaviour and beliefs by providing explanations for them.
- *Reaction formation*- urges not acceptable to consciousness are repressed and the opposite attitudes displayed in their place by the individual.

Withdrawal defence mechanisms

- *Conversion* – emotional conflicts are expressed in muscular, sensory or bodily symptoms of disability, malfunctioning or pain.
- *Fantasy* – day-dreaming provides an escape from reality.
- *Regression* – individual returns to an earlier and less mature level of adjustment in the face of frustration .
- *Repression* – impulses, experiences and feelings that are psychologically disturbing, because they arouse a sense of guilt or anxiety, are completely excluded from consciousness.
- *Resignation* – apathy and boredom - switching off.
- *Withdrawal of flight* – leaving the area of frustration either physically or mentally.

The anxiety feelings caused by conflict show in the conceptualisation and the eventual behaviour outcome. Part of the resolution of conflict must be the treatment of the anxiety based reactions. This is particularly important when trying to resolve one's own conflicts.

Awareness of the normal reaction to anxiety should help to select the right approach at conceptualization.

NEGOTIATING TECHNIQUES/STRATEGIES

SALAMI:

Salami is a technique used to achieve an objective a little bit at a time rather than in one giant step. This strategy is said to have been named by Matyas Rakosis, General Secretary of the Hungarian Communist Party who explained it this way:

“When you want to get hold of a salami which your opponents are strenuously defending, you must not grab at it. You must start by carving yourself a very thin slice. The owner of the salami will hardly notice it, or at least he will not mind very much. The next day you will carve another slice, then still another. And so, little by little, the salami will pass into your possession.

You want to buy 5 acres of land from an elderly gentleman, who for sentimental reasons does not want to sell more than 1 acre now. You are in no hurry to acquire all 5. How would you approach the old gentleman?

Check Your Response with the One on the Next Page

From no to yes

1. Listen Actively

Show them you understand

- they feel strongly
- what they feel strongly about
- why they feel strongly about it

2. Win yourself a hearing

Explain your own feelings (backed up by fact)

- refer back to their points
- make your points firmly but stay friendly

3. Working to a joint solution

- seek their ideas
- build on their ideas (don't knock them down)
- offer your ideas (don't try to impose them)
- construct the solution from everyone's needs

APPLYING THE SALAMI STRATEGY

Offer to buy one acre now with an option to buy the other four, one acre at a time, over the next four years.

FAIT ACCOMPLI:

Residents of a community called Hillview woke up one morning to discover a local developer removing the top of a peak, which was an appealing part of their view. The developer did not have a legally required permit, but once removed the hill top could not be restored. The strategy he used is called Fait Accompli. He took action to accomplish his objective risking acceptance because he did not wish to spend the necessary time, effort or expense to follow the established guidelines. In effect the developer said, "I did what I wanted to, so now what are you going to do?". This can be risky. Those who employ it must understand and accept the consequences if the strategy fails. For example, the same developer later put up a fence in violation of local ordinances. This time the citizens protested and he was required to tear down the fence and move it to a legal boundary at considerable expense.

Some examples of Fait Accompli are given below. Please indicate how you would respond to them.

FAIT ACCOMPLI	RESPONSE
A contract was sent to you containing a provision you did not agree to and find unacceptable.	
You took your old vehicle to a garage to obtain a cost estimate on repairs. When you returned you found they already repaired it and presented you with a bill for \$750.00	

POSSIBLE RESPONSES TO FAIT ACCOMPLI

1. Use Fait Accompli yourself. Delete the unacceptable clauses from the contract and send it back.
2. Several options including the following are possible:
 - Refuse payment.
 - Appeal to higher authority. Take it to the owner.
 - File, or threaten to file a lawsuit. If local laws or ordinances have been violated, appeal to enforcing agencies for assistance.
 - Tell others what happened to you. Document your case and let the public and others know of the unethical practices.

STANDARD PRACTICE:

"Standard Practice" is a strategy used to convince others to do or not to do something because of so called "standard practices". It often work very well because it infers it is the best way to do whatever needs to be done, and is probably a safe approach. Standard contracts are an example of this strategy. The party suggesting a standard contract assumes no one would want to change it, because it reflects what others routinely agree to under the circumstances. Often the other party will accept this fact of life, however, those who wish to test it can have good results.

A plumber who was contracted to install plumbing in a new home told his customer the payment terms were 30% when he started the job, 60% when it was half completed and 100% on completion. When the customer refused to accept the agreement, the contractor said the terms were industry standards and showed him the standard contract to prove it. The customer refused to sign. Finally, the contractor agreed to 30% at the start, 30% at the half-way point and 40% upon completion. This assured the customer that the plumbing would be finished before the contractor could take his profit, but provided adequate funds for the plumber to carry out the project.

DEADLINES:

Time is critical to people and organisations. Consequently deadlines can be an effective negotiation strategy. All too often we are aware of time pressures upon ourselves. But assume the other party has plenty of time. A better assumption would be that if we have deadlines, the other party probably has them too. The more we learn about the other party's deadlines the better we can plan our strategies. When others attempt to force us to their deadlines, we should not hesitate to test them. Most sales in retail stores that "start" on Tuesday and "end" on Friday, can be negotiated so that a buyer can take advantage of them on a Monday or Saturday as well. Most hotels will extend their check out time beyond 12 noon if you are willing to negotiate for a later time. Proposals requested by the 1st of the month are often just as acceptable on the 2nd. Deadlines are usually as demanding as we are willing to think they are. The more we know about the person or organisation that set them, the better we can evaluate what they really mean.

Before entering a negotiation, ask yourself these questions:

1. What actual deadlines and time constraints am I under? Are these self imposed or controlled by someone else?
2. Are these deadlines realistic? Can I change them?
3. What deadlines might be controlling the other side? Can I use these to my advantage?

Here is a dialogue between Dick Thomas a purchasing agent and Rick Forest, an office equipment sales manager.

Mr. Thomas: The supersonic typewriters you are suggesting will meet our requirements. Can you provide 3 by next Monday for \$4,500?

Mr. Forest : I am not sure we can. Because you also want the output energizer that puts the price for 3 over \$5,000

Mr. Thomas: That's more than our budget allows for this purchase.

Mr. Forest : Well, I am sorry about that. To meet your price, I would have to talk to my District Manager and he is hard to reach.

What might Mr. Thomas say to get Mr. Forest to agree to supply the typewriters for \$4,500, or at least to make some price concession with minimum delay?

When you have completed your response, compare it with the possibilities suggested on the next page.

Possible Response by Mr. Thomas

Well I'm sorry we can't make a deal. I have an appointment this afternoon with High Speed and Quickline. Both have indicated they can provide comparable equipment at a cost within our budget. The department head who wants these machines is leaving tomorrow for 2 weeks vacation. He will make his choice before he leaves today.

FEINTING:

Feinting gives the impression one thing is desired when the primary objective is really something else. An employee, for example, may negotiate with the boss for a promotion when the real objective is a good increase in salary. If the promotion is forthcoming so is the raise. If the promotion is not possible, a nice raise may be the consolation prize. Politicians use a variation of this strategy to test receptivity by the public to something they plan to do. Their planned action is "leaked" by a "reliable source" to test acceptability before final decision is made. The public's response is then evaluated. If there is little opposition it is probably safe to proceed. If there is an adverse reaction, another approach can be explored.

APPARENT WITHDRAWAL:

Apparent withdrawal may include some deception as well as deferring and feinting. It attempts to make the other negotiator believe you have withdrawn from consideration of an issue when you really have not. Its purpose may be to ultimately get a concession or change in position. For example, the prospective buyer of a painting finds the seller unwilling to meet the price the buyer is prepared to pay. The buyer might say, "I'm sorry but can't meet your price. You know my price so unless there is some movement on your part we can't do business." The buyer then leaves. If the buyer has made a realistic offer, the seller may decide to make a concession. If not, the buyer can always go back with a slightly higher offer. In the meantime, of course, the buyer can consider other options.

GOOD GUY/BAD GUY:

The good guy/bad guy ploy is an internationally used strategy. One member of a negotiating team takes a hard line approach while another member is friendly and easy to deal with. When the bad guy steps out for a few minutes, the good guy offers a deal that under the circumstances may seem too good to refuse. There are many versions of "bad guys". They may be lawyers, spouses, personnel representatives, accountants, tax experts, sales managers, or economists.

One danger in using this strategy is that it will be recognized for what it is. Here are some ways to deal with it if you feel it is being used on you.

- Walk out.
- Use your own bad guy.
- Tell them to drop the act and get down to business.

LIMITED AUTHORITY:

Limited authority is an attempt to force acceptance of a position by claiming anything else would require higher approval. Individuals who claim to have limited authority are difficult to negotiate with, because the reason they use to not meet your demands is due to someone else, or some policy or practice over which they have no control. A salesperson who cannot give more than a 5% cash discount; influence the delivery date; or accept a trade will not make concessions in those areas. Some negotiators will concede under these circumstances, while others will insist their offer be taken wherever necessary for approval or rejection. There is some risk this will terminate the negotiation, but it does give the other party a chance to gracefully re-evaluate their position.

Can You Recognise and Define the following?

	YES	NO
SALAMI	—	—
FAIT ACCOMPLI	—	—
STANDARD PRACTICE	—	—
DEADLINES	—	—
FEINTING	—	—
APPARENT WITHDRAWAL	—	—
GOOD GUY/BAD GUY	—	—
LIMITED AUTHORITY	—	—

NEGOTIATION: EIGHT CRITICAL MISTAKES

Tick those you intend to avoid:

- **Inadequate Preparation**

Preparation provides a good picture of your options and allows for planned flexibility at the crunch points.

- **Ignoring the give/get principle**

Each party needs to conclude the negotiation feeling something has been gained.

- **Use of intimidating behaviour**

Research shows the tougher the tactics, the tougher the resistance. Persuasiveness not dominance makes for a more effective outcome.

- **Impatience**

Give ideas and proposals time to work. Don't rush things, patience pays.

- **Loss of temper**

Strong negative emotions are a deterrent to developing a cooperative environment, and creating solutions.

- **Talking too much and listening too little**
“If you love to listen, you will gain knowledge, and if you incline your ear, you will become wise.”
- **Arguing instead of influencing**
Your position can be best explained by education, not stubbornness.
- **Ignoring conflict**
Conflict is the substance of negotiation. Learn to accept and resolve it, not avoid it.

BEING ASSERTIVE IN NEGOTIATION

What is assertiveness?

Your definition:

What it is?

Assertiveness based on a philosophy of personal responsibility and an awareness of the rights of other people. Being Assertive means be honest with yourself and others. It means having the ability to say directly what it is you want, you need or you feel, but not at the expense of other people.

It means having confidence in yourself and being positive, while at the same time understanding other people’s points of view. It means being able to behave in a rational and adult way. Being assertive means being able to negotiate and reach at workable compromises. Above all, being assertive means having self-respect and respect for other people.

Basically – **I AM OK – YOU ARE OK**
HONESTY

CONFIDENCE

I’M OK – YOU’RE OK

Assertive Body Language

- Use eye to eye contact (sometimes culturally inappropriate)
- Hold your body proud but not overbearing.
- I may be appropriate to balance your stance – et. Sit if the other person is sitting, stand if they’re standing.
- If you feel “frozen” and don’t know what to do, it may help to walk around, move your body.

	ASSERTIVE	AGGRESSIVE	PASSIVE
Posture	Upright/ Straight	Leaning Forward	Shrinking
Head	Firm not Rigid	Chin Jutting Out	Head Down
Eyes	Direct not starting. Good and regular eye	Strongly focused starting often piercing or glaring	Glancing away. Little eye contact.

	contact	eye.	
Face	Expression fits the words	Set/ Firm	Smiling even when upset.
Voice	Well modulated to fit content	Loud/ Emphatic	Hesitant/ Soft, trailing off at ends of words/sentences
Arms Hands	Relaxed/ Moving easily	Controlled Extreme/ Sharp gestures/ Fingers pointing, Jabbing	Aimless/ Still
Movement Walking	Measured pace suitable to action	Slow and heavy or fast deliberate, hard	Slow and hesitant or fast and jerky

Becoming Assertive-Work out Your Bottomline

- Set a goal - know which things are not negotiable and be clear about them.
- Stay firm- don't let yourself be distracted or "hooked in" by manipulation, anger, tears, etc.
- Be aware of someone else's feelings and be clear that is how they feel, not a signal that you are wrong.
- Sometimes it may be most important to make your statement.

Be prepared to let both of you come out winners if that is possible

- Look for compromise where possible (sometimes it is not).
- Winner-Winner is usually better for all than Winner-Loser or Loser-Winner.

MAKE DECISION AND CHOICES ABOUT WHATS HAPPENING

- Look at the process
- You can choose to initiate, maintain or terminate the conversation.

Be Persistent - Broken Record

- Repeat yourself if you need to - if the message doesn't get through the first time or if you are being manipulated.

Children are experts in the use of the Broken Record technique and use it very effectively. It is useful to help make sure that you are listened to and that your message is received. Sometimes when people are actively involved in their own concern or needs they pay little attention to what you have to say or to your situation. Broken Record makes sure that your message does get through without nagging, or whining.

With the Broken Record technique it is important to keep on repeating the message until it can no longer be ignored or dismissed. It is also important to use some of the same words over and over again in different sentences. This reinforces the main part of your message and prevents others raising red herrings or diverting you from your central message.

Example

To insistent customer –

'We won't be able to complete by the 15th. I understand it causes you problems, but the hard facts are *it won't be possible to complete all the work by the fifteenth.* However, we can

promise to finish key areas if you tell us your needs, and we will reschedule the rest. What *we can't do is complete everything by the 15th.*

Your Examples

(EXERCISE)

QUESTIONNAIRE: OPINIONS AND ATTITUDES

Read through the sentences below, and then put a circle around the number which most closely coincides with your opinion. Before, starting look at the key.

Key

1. I agree entirely
2. I agree on the whole
3. I can't make up my mind
4. I disagree on the whole
5. I disagree entirely

There is no life after death.	1 2 3 4 5
Wars never solve anything.	1 2 3 4 5
We should try to cure criminals, not punish them.	1 2 3 4 5
People suffering from incurable diseases should be painlessly put to death if they request it.	1 2 3 4 5
Men and women can never be equal.	1 2 3 4 5
It is wrong to pay people so much money for playing sport.	1 2 3 4 5
People should wait until they are at least 24 before getting married.	1 2 3 4 5
People were a lot happier 'in the old days'	1 2 3 4 5
There is too much fuss made about nuclear power these days.	1 2 3 4 5
Divorce is wrong.	1 2 3 4 5
Most people keep pets because they are lonely or have difficulty in making relationships with other people.	1 2 3 4 5
The United Nations is a waste of time and money	1 2 3 4 5

When you have finished, discuss your answers with another participant, remember to give reasons for your opinion and even to argue with your partner if you disagree with him or her.

NEGOTIATION: THE ART OF NEGOTIATING

Negotiation is the use of knowledge, time and power to influence the behaviour of other people so that you can achieve your goals. The steps are as follows:

- *Define needs:* what do you and the parties you represent need to get from this negotiation?
- *Check resources:* What resources do you have to help you with the negotiation? Who can you use? What are the facts?
- *Know limitations:* At what stage will you have to hand a negotiation over to someone else? How far is your side prepared to go in conceding to the other side?
- *Understand options:* List the possible options that could come out of the negotiation. How many of them are possible for your side to accept?
- *Formulate goals:* Decide what you hope to achieve and the elements of the goal that cannot be compromised.
- *Prepare for the encounter:* Prepare both mentally and physically.

Preparation

For the other party

- *Recognise the need:* What does he want from the negotiation?
- *Understand and define that need:* How strongly are those needs likely to be felt?
- *Check alternatives:* What possible alternatives are there? Will he have thought of them all?
- *Understand the options:* Realise the areas where your opponent cannot afford to compromise? And the options that can remain open for him.
- *Know the power of choice:* Understand that he is able to choose.

For yourself

- *Recognise your own need:* What do you hope to prove by this negotiation?
- *Check alternative resources:* Are there alternatives that you have rejected because of your assumptions or attitude?
- *Define options:* Write down your options; keep them all open.
- *Set goals:* Write down your goal and stick to it.
- *Set limits to goals:* How far they can be compromised? Make a careful list of areas that can be compromised.
- *Consider the effect of the passage of time:* Remember, what was important yesterday may change in the light of the negotiation.
- *Consider the time pressures:* Set time criteria.
- *Set cost limits:* What are the costs that are acceptable? Do not go above them.
- *Establish gain to be achieved:* Write down what are the anticipated achievements are to be.

Confrontation or collaboration?

The opposite parties in a negotiation are counterparts. Some negotiators think of their counterparts as the enemy. To negotiate, the two parties will have to come together, therefore life is much easier if you think of your counterpart as a friend: *attitude determines outcome.*

Negative Orientation: The enemy

- Opposition
- Opposition leads to suspicion

- Suspicion leads to aggression
- Aggression leads to deadlock

The confrontational mindset:

Counterpart = adversary

Difference = conflict

Resources = weapons

Positive orientation: The friend

- Opposition
- Opposition leads to cooperation
- Cooperation leads to partnership
- Partnership leads to settlement

The collaborative mindset

Counterpart = partner \

Difference = opportunities

Resources = incentives to co-operate

How to conduct collaborative negotiation:

The collaborative negotiator must show the following character traits if he has to succeed:

- Interest in the needs of the counterpart.
- Understanding of the counterpart's needs.
- Willingness to co-operate and compromise.
- Mind focused on settlement not obstacles.
- Mutual gain = win-win.

As a collaborative negotiator, you will achieve the following gains:

- Difference leads to opportunities.
- Co-operation leads to trust.
- Preparation leads to understanding.
- Counterpart becomes partner.
- Mutual problem solving brings settlement.

The stages of collaborative negotiation are:

- Analyse the needs of the counterpart.
- Demonstrate the desire for cooperation.
- Emphasise mutual interest.
- Demonstrate understanding of counterpart's needs.
- Understand the relationship between counterpart's needs and own resources and goals.

Power in negotiation

- Bargaining power is measured relative to that of the counterpart.
- Bargaining power is determined by external economic and political factors.
- It is preferable to negotiate from a powerful position.
- The balance of power in a negotiation is determined by the urgency of each side's needs and assets.

The power of persuasion

- Persuasion gives the negotiator power.

- Persuasion is a personal form of power.
- Persuasion can be learned and improved.
- Persuasion depends on selling ability.
- Persuasion depends on positive tone.
- Persuasion plays both to economic reasoning and to personal factors.

Assessing the balance of power

- How badly do you need what the counterpart has?
- How soon must your needs be fulfilled?
- What are the consequences should your negotiation break down?
- How badly does the counterpart need what you bring to the table?
- What are your counterpart's time restraints?
- Are there alternatives to dealing with this counterpart?
- Who is in the position of most immediate and greatest need?
- Who has the superior position with respect to resources?

How to win

Set sensible expectations

- Set high goals.
- Use realistic assumptions.
- Decide areas open for significant compromise.
- Decide areas not open for compromise.
- Be clear about what you hope to achieve.

Use the right level you hope to achieve.

- Know your limits.
- Find out the counterpart's limits.
- Don't let someone with limited authority wear you down.
- Try to bypass negotiators with limited authority.
- Share responsibility with those on whose behalf you negotiate.

Go for win-win

- Win-win brings together different needs and creates opportunities for mutual gain.
- Win-lose make enemies who fight harder next time.
- Focus on the goal.
- Confine disagreement to ideas.
- Avoid personal issues.

Use time with care

- Haste makes waste; the best negotiations take time.
- Be prepared; negotiate before the crisis.
- Over a barrel; urgency may force concessions.
- Sleep on it; avoid marathon sessions.

Use questions

- Ask them even if you know the answers.
- Ask for help.
- Listen.
- Question what is negotiable; don't be thrown by 'company policy'.

Personalise the negotiation

- Form bonds of respect and trust.
- Remember people as well as things are involved.
- Make personal contact, relax, and smile.
- Make it matter; show your concern.
- Relate to the organisation.

Use time

- Allow time for frequent recesses.
- Move the bargaining at a deliberate pace.
- Use recesses to calm down or research further.
- Maintain self-control at all times.

Watch for unspoken needs

- Remember your counterpart may have a hidden agenda.
- Watch the body language.
- Stay awake.
- Meet your counterpart's needs.
- Remember personal and social needs can often be met at minimum expense.

Finally:

- Aim to control the situation.
- Believe in yourself.
- Keep written records for the future.

Trouble -shooting

The likely needs or wants of your counterpart

- To feel good about himself.
- To avoid further trouble and risk.
- To be recognised as a man of good judgement.
- Knowledge.
- An easy life.
- To be listened to.
- To keep his job.
- Promotion.
- To save time.
- To be liked.
- Power.

How to break an impasse

Sometimes you hit a situation when nothing seems possible. No one is willing to give way. The only way out is changing.

Change:

- The shape of the package;
- A member of the team;
- The Time limits on the part of negotiation;
- The risk mix;
- The time scale of performance;
- The bargaining emphasis;

- The type of contract;
- The base for a percentage.
- Call a mediator.
- Arrange summit meeting.
- Add options.
- Setup a joint study committee.
- Tell a joke.

How to make concessions

- Leave you self room to negotiate.
- Encourage the counterpart to open up first.
- Let the counterpart make the first concession.
- Make him work for his gains.
- Conserve Concessions.
- Don't give tit-for-tat concessions.
- A promise is a concession at a discount rate.
- Don't be afraid to say 'no'.
- Keep track of your concessions.
- Retreat from a concession if you have made a mistake.
- Don't give in too much too quickly.

Difficult counterparts

The majority of counterparts are polite and friendly and easy to deal with; it is only the occasional one that is difficult. Sometimes he has justification, while at other times he is someone who seems to enjoy being difficult.

To deal with the difficult, you need to hold on to the following - facts:

- People demonstrate their frustration in many ways; most of the difficult behaviour you hear is a direct result of frustration. They are all nice people underneath.
- Anxiety can have a strange effect on personality.
- Whatever the person says, it is not a personal insult or intended as such. Do not take personal offence.
- One temper lost is bad enough, to lose yours as well is will not improve matters.
- Only the facts matter at the end of the day; hold out for the facts.
- Taking a deep breath before you speak or react, gives you time to think. Thinking before you speak or react saves a lot of talking time later.

Complainers

Complaints fall into two categories: the just and unjust. Until you know the facts, you will not know which sort of complaint you are dealing with.

The technique

- Take a deep breath.
- Keep your voice up and friendly.
- Listen to what is being said and take notes.
- Do not interrupt; let the speaker get it all off his chest.

- Check the validity of complaints about the past.
- Sympathise without being disloyal.
- If the company is at fault, apologise.
- Never give excuse, it always seems lame.
- If you promise to do something, do it.

Never say:

- I'm not the person to talk to about... (Even if it is true, it won't solve any problems.)
- It's not my fault. (It probably isn't, but just saying so won't help anyone.)
- I didn't handle this. (See above.)
- We are having lots of problems with... (It doesn't help your caller, but it does harm the organisation.)

Never:

- interrupt the complainer, he will only start all over again;
- automatically accept responsibility or liability, as that may not be the case.
- jump to conclusions before gathering all the facts.
- talk down to your complainer, or accuse him of misuse – it may be true, but it will not smooth ruffled feathers;
- lose your temper;
- appeal for sympathy by trying to Justify your position – It will sound like a lame exercise.

Aggression

Aggression is a symptom of both anxiety and frustration. It is the by-product of someone who has failed at a talk or feels insecure. Do not confuse it with assertion.

The technique

- Take a deep breath.
- Speak calmly and evenly on a middle pitch.
- Keep your temper.
- Do not respond with aggression.
- Ask for the facts and check your understanding of them.
- Say something like 'I'm sorry this is causing you a problem, but I can only help if you let me' (empathetic assertion).
- Encourage your counterpart to talk out his feelings of aggression. (The longer he goes on talking, the less aggressive he will become.)
- Be assertive and point out politely the consequences of continued aggressive reactions.
- If you cannot calm your counterpart, arrange a break.

Vagueness

Negotiating with a vague counterpart is very difficult. He will go on for a long time and say very little. You must be patient at all times and try to steer him back to the point.

The technique

- Maintain your patience.
- Write down all the facts as you hear them.
- Use the facts to guide your counterpart back to the point from time to time.
- Keep a smile in your voice.
- Be businesslike.
- Don't allow yourself to be dragged down red herring-strewn by ways.
- Keep to the point yourself.
- Keep your temper.
- Don't be abrupt.
- Summarise regularly.

Unfriendly

Some individuals are not particularly fond of people in general. They are not likely to be very friendly when negotiating. Other people confuse being businesslike with unfriendliness. An apparent unfriendly attitude may be a symptom of anxiety or frustration. Either way, do not take it personally; it is not intended personally.

The technique

- Smile as you speak.
- Take nothing personally.
- Keep your voice up and pleasant.
- Deal with the points as quickly as possible.
- Don't make personal remarks.
- Get the facts and stick to them.
- Once the negotiation is over and the matter dealt with, forget your counterpart.

The Seven Elements of Negotiation

1. **ALTERNATIVES.** These are the walk away alternatives which each party has if agreement is not reached. These are things that one party or another can do by self-help, without requiring the agreement of the other. In general, neither party should agree to something that is worse for that party than its “BATNA” – its Best Alternative Agreement.
2. **INTERESTS.** This is the word we use for what it is that somebody wants. Underlying the positions of the parties are their needs, their concern, their desires, their hopes and their fears. Other things being equal, an agreement is better to the extent that it meets the interests of the parties.
3. **OPTIONS.** We use this word to identify the full range of possibilities on which the parties might conceivably reach agreement. We refer to options “on the table” or which might be put on the table. “We might decide that you get the orange, that I get it, that we cut it in half, or we might decide that I can have the peel for baking and that you can have the fruit to eat. They are all options. We have not yet decided.” Generally speaking, an agreement is better if it is the best of many options:- if it could not be better for one party without being worse for another.
4. **LEGITIMACY.** Other things being equal, an agreement is better to the extent that each party considers it to be fair as measured by some external benchmark; some criterion or principle beyond the simple will of either party. Such external standards of fairness include international law, precedent, practice, or some principle such as reciprocity and most-favoured- nation treatment.
5. **RELATIONSHIP.** A negotiation has produced a better outcome to the extent that the parties have improved their ability to work together rather than damaged it. Most important negotiations are with people or institutions with whom we have negotiated before and will be negotiating again. Whatever else a relationship may involve, one crucial aspect is an ability to deal well with differences. One dimension of the quality of a negotiated outcome is the quality of the resulting working relationship: Are the parties better or worse able to deal with future differences? (Each element represents something desirable in a good outcome. There are likely to be trade-offs among them. Doing better on one may mean doing worse on another.)
6. **COMMUNICATION.** Other things being equal, an outcome will be better if it is reached efficiently without waste of time or effort. Efficient negotiation requires effective two-way communication.
7. **COMMITMENTS.** Commitments are oral or written statements about what a party will or won’t do. They may be made during the course of a negotiation or may be embodied in an agreement reached at the end of the negotiation. In general, an agreement will be better to the extent that the promises made have been well planned and well-crafted so that they will be practical, durable,, easily understood by those who are to carry them out, and verifiable if that is important.

The 7 Elements as a Checklist for Preparation

Alternatives

- ✓ What's our BATNA? What's theirs?
- ✓ Can we improve ours? Worsen theirs?

Interests

- ✓ What are ours? What are theirs?
- ✓ Are there other parties to consider?
- ✓ Which interests are shared, which are just different, and which conflict?

Options

- ✓ What are some possible agreements that might creatively satisfy both our interests?

Criteria (Legitimacy)

- ✓ What standards might international law suggest?
- ✓ What "ought" to govern an agreement?
- ✓ How can they justify the outcome to their constituents?

Commitments

- ✓ What is our authority? Theirs?
- ✓ What kind of commitment do we want at each stage of the negotiation process?
- ✓ Process agreement?
- ✓ Framework? Tentative? Final?
- ✓ What might a framework for an agreement look like?

Relationship

- ✓ What kind would we like to have?
- ✓ How can we improve the relationship without conceding on the substance?

Communication

- ✓ What information do we want to listen for?
- ✓ How can we show them they have been heard?
- ✓ What messages do we want left in their heads?
- ✓ What is our process strategy? What might we say to start off?

Concept & Techniques of Mediation

*Course Material Designed by
Delhi Mediation Centre for Training Programme in Mediation*

“.....both were happy with the result, and both rose in public estimation.... I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing out private compromises of hundreds of cases. I lost nothing thereby - not even money; certainly not my soul.”

Mahatma Gandhi

Why Mediation?

The concept of mediation is ancient and deep rooted in our country. In olden days, disputes used to be resolved in a panchayat at the community level. Panches used to be called Panch Parmeshwar. Now we have grown into a country of 125 crore people. With liberalization, globalization and tremendous economic growth there is an explosion of litigation in our country. Though our judicial system is one of the best in the world and is highly respected, but there is still a lot of criticism on account of long delays in the resolution of disputes in the courts of law. A point has now been reached when even an honest litigant is wary of approaching the court for a decision of his dispute. Hence, we have turned to alternative forms of dispute resolution.

We tried the system of Lok Adalats and gave statutory recognition to it through the Legal Services Authority Act, 1987. But, it is only a miniscule amount of litigation that has gone to the Lok Adalats, and even those cases are mainly compensation cases, house tax matters or small recovery disputes of big companies where only arithmetic calculations are to be made and there is hardly any dispute about the question of liability. The Arbitration & Conciliation Act, 1996 replaced the Arbitration Act, 1940 but even that has been unable to contain litigation. This is because disputes can go to arbitration only if there is an arbitration agreement between the parties; and experience has shown that in a very large percentage of cases, the aggrieved party files objections to the award, and that sometimes takes several years for disposal.

The legislature, by the Code of Civil Procedure (Amendment) Act, 1999, amended Section 89 of the CPC with effect from 1.7.2002 whereby mediation and judicial settlement were envisaged as modes of settlement of disputes. The amendment in Section 89 was made on the recommendation of the Law Commission of India and the Malimath Committee. It was suggested by the Law Commission that the court may require a party to a suit or proceeding to appear in person with a view to arrive at an amicable settlement of the dispute between the parties and make an attempt to amicably settle the dispute between them. It is now obligatory for the court after framing the issues to refer the dispute for settlement either by way of

arbitration, conciliation, mediation or judicial settlement. It is only when the parties fail to get their dispute settled through any of the alternative dispute resolution methods that a suit could proceed further. Thus, Section 89 has been introduced to promote alternative methods of dispute resolution.

In fact mediation is widely used as an alternative to litigation for quick resolution of disputes in USA, European countries and in Australia, particularly in commercial and matrimonial disputes.

Mediation started in USA in the late 1970's. Labour relations mediation began much earlier, which was limited to collective bargaining. Mediation became very popular in USA and European countries in 1990's. In our neighbouring countries like Pakistan, Bangladesh and Sri Lanka, mediation started earlier than in India. In Ahmedabad, a trust called Amlead was formed and registered by lawyers who opened a Mediation Centre on 27.7.2002. A Mediation Centre was established in Madras High Court in April, 2005. In Delhi, we started mediation only in August, 2005. Hon'ble Mr. Justice Y.K. Sabharwal, then Judge of the Supreme Court (former Hon'ble Chief Justice of India) formally inaugurated the Mediation Centre at Tis Hazari Court, Delhi on 24.10.2005. Since then, our results have been so very encouraging that another Mediation Centre was formally inaugurated on 5.5.2006 in Karkardooma Courts complex. As on 05.12.2007 as many as 5009 cases have been referred to the Mediation Centre at Tis Hazari and 2602 cases have been referred to the Mediation Centre at Karkardooma. The number of settled cases (including connected cases) is about 5782.

What is Mediation?

In the adversarial system, a litigant becomes insignificant, almost a non-entity. He is a mute spectator to the legal battle fought on his or her behalf, sometimes on grounds that are too technical.

Mediation is a negotiation process in which a neutral third party assists the disputing parties in resolving their disputes. A Mediator uses special negotiation and communication techniques to help the parties to come to a settlement. The parties can appoint a Mediator with their mutual consent or the Court, in a pending litigation, can appoint a Mediator. Mediation always leaves the decision making power with the parties. The Mediator does not decide what is fair or right, does not apportion blame, nor renders any opinion on the merits or chances of success if the case is litigated. Rather the Mediator acts as a catalyst to bring the two disputing parties together by defining issues and limiting obstacles to communication and settlement.

Why Do We Need Mediation?

We need mediation because it is a good method of resolving certain kinds of disputes especially those involving relationships. Relationships can be personal, business, contractual or social. These disputes are not easily resolved with the litigation process.

What are the Problems with Litigation?

It is expensive, has huge delays, aggravates the tension and fighting between parties, workable solutions are not arrived at and the dispute does not end with the verdict.

Is Mediation Used? Is it Working?

- (a) Mediation is extensively used abroad especially in the United States of America, England, Europe, Australia, Singapore and Hong Kong amongst other countries.
- (b) It is applied in a range of disputes from small causes and community disputes to business and contractual matters, from family matters to complex high value commercial disputes.
- (c) The Success rate of mediation is high – the estimates of the percentage of cases in which it has worked ranges from 50% to 80%. Considering that a successful mediation is one where both parties are satisfied with the result that is surely a high figure.
- (d) It is now becoming standard procedure for a mediation clause to be inserted in the dispute resolution section of agreements as a first try method before arbitration or litigation.

What are the Risks of Mediation?

- (a) One of the risks is that it can be used to find out confidential information from the other side. For this reason the requirements of confidentiality must be strongly stressed and protected. Parties must be cautioned against revealing confidential information in joint sessions. As regards communication with the mediator, wherever the confidential nature of information needs to be maintained, the mediator must be clearly told so.
- (b) When there is severe imbalance in the negotiating strength between the parties that may be reflected in the agreement. For this reason, there is a caution against mediating cases where such imbalance is present.
- (c) An unethical mediator could abuse the position of trust and collude with one party to deprive the other. Just like any other office of trust, this too can be abused. However, in the case of mediation, a party can withdraw from it any time without adverse consequences. That is not possible in the case of a Judge or arbitrator. Secondly, parties are advised to attend the mediation with their lawyers who can protect their interests.

In some jurisdictions (notably in US), Codes of conduct and ethics have been drawn up for mediators, as also a certification procedure. This will provide for disciplinary action like withdrawal of certification. Fourthly, a mediator who is suspect on integrity will not get much business. The most important aspect here is that mediators should be drawn from those who possess integrity and credibility.

How Mediation is Different from Litigation and Arbitration

- a) In litigation, the Judge decides the issue and parties are bound by the decision subject to the right of appeal/revision etc. In mediation, the parties themselves take the decision to find a solution to end the dispute.
- b) In litigation the focus is usually on the past and on determining liability. In mediation the focus is on the future and improving the situation to the extent possible.
- c) Litigative proceedings tend to be contentious and procedural and do not yield quick results. Mediation stresses co-operation and is solution oriented.
- d) Arbitration proceedings are also adversarial in nature, like litigation. The difference is that parties can choose their arbitrators and the setting can be less formal. Arbitrators also give awards in favour of one party and against the other.
- e) Mediation avoids the win-lose equation and instead tries to achieve a win-win solution,

which puts an end to the dispute.

Comparison of Mediation and Lok Adalat

1. Forum [where it takes place]

Mediation takes place in a private conference room. Only the parties, their advocates or other persons helping them or accompanying them or involved in the mediation process are present. Lok Adalat usually takes place in court premises when numerous cases referred to Lok Adalat are listed before different conciliators. Often more than 25 cases are placed before each group of conciliators. Lok Adalat proceedings are held in public, in the presence of all persons assembled to attempt to settle their cases.

2. Morphology [Structure] of the process.

Mediation is a structured process featuring introductory comments by the mediator, [a] detailed exchange of information in a joint session, a series of separate and private meetings with the parties and an agreement stage.

In Lok Adalat, it is customary for the conciliators to talk with the parties, with their advocates present, to help persuade the parties to settle their case. The exchange of information is limited. The discussion of possible terms, likewise, is limited. If conciliators talk with any party privately, it is generally only once, due to time constraints.

3. Who controls the Process?

In mediation the mediator controls the process by following the stages of mediation process and deciding the order or presentation, the length of presentation, setting the agenda, etc. In Lok Adalat, the conciliators determine how the process will be handled, which party speaks and when.

4. Who selects the neutral third party?

In mediation, generally the parties decide who will serve as the mediator.

In Lok Adalat, the parties do not have any role in deciding who the conciliators will be. The parties appear before those conciliators to whom their case is assigned. The parties do not have the freedom to select conciliators of their own choice.

5. Time spent in the process.

In mediation, parties are afforded reasonable time to negotiate the agreement. This may involve a number of hours or days. Mediation may take place over a course of time to accommodate the parties and the complexities of a dispute.

In Lok Adalat, there are usually strict time constraints. The agreement has to be reached in fixed amount of time as the tenure of the conciliators is only for the given day. If there is no settlement on that day, the case proceeds to trial. There is no continuity and follow up by the conciliators.

6. Who controls the outcome?

In mediation, the parties control the outcome and work together in arriving at a settlement with the assistance of the mediator.

In Lok Adalat, the parties may usually agree to disagree with a settlement proposed by

conciliators. However, experience reveals that, in practice, conciliators and advocates of the parties try to persuade the parties to settle.

7. How is a dispute referred to mediation? Who pays for the expenses?

In mediation, reference to mediation is made by court order, by consent of the parties, or pursuant to a contract clause, etc. The parties pay for mediation or the court pays for mediation, if the programme provides funds.

In Lok Adalat, reference is made mostly by consent of the parties or their advocates. Sometimes, a case placed before Lok Adalat by a court order. Parties may opt to appear or not to appear. Parties do not pay for Lok Adalat expenses. Conciliators are free volunteers. Arrangements or organisational expenses are mostly made and funded by Legal Service Authorities.

8. Confidentiality

Mediation is a private process. Without consent of the parties, neither the parties nor the mediator can disclose the statements made during mediation, or documents prepared for mediation, such as mediation work.

In Lok Adalat, the process is generally not private. It takes place openly and in presence of all others who have assembled for their respective cases.

9. Depth of Analysis.

In mediation, the factual and legal analysis is detailed and in depth.

Due to time constraints, conciliators in Lok Adalat are rarely able to engage in an extensive discussion of a claim [e.g., the precise nature of the claim, the factual background and damages and possible settlement terms]

10. Types of disputes resolved.

In Mediation, all types of disputes, including commercial disputes, contract disputes personal injury claims, real estate, probate etc., can be negotiated and resolved.

In Lok Adalat, mainly motor accident claims and insurance claims are tackled. Commercial and other disputes which require creative solutions are rarely referred to Lok Adalat.

11. Role of a neutral.

In mediation, the neutral persons works in partnership with the parties to assist them in finding a solution that meets with their needs, interests, priorities, future relationship, etc.

In Lok Adalat, conciliators attempt to persuade the parties to settle their case. There is no attempt to work together with the parties solutions that meet with the parties' individual needs, interests, priorities, future relationship etc.

12. Role of the parties.

In Mediation, parties play an active role in presenting factual background, discussing positions, developing offers and counter offers, making decisions , etc.

Parties play no active role in Lok Adalat. They play no active role in presenting information, identifying interests, making offers of settlement, responding to offers of settlement and

shaping the terms of settlement.

13. Role of Advocates.

In mediation, advocates play an active role, presenting the case, discussing positions, developing offers and counter offers, and advising clients regarding terms of settlement.

In Lok Adalat, advocates play a part in advising their clients to settle if they consider it advisable to settle.

14. Range of Possible Outcomes.

In mediation, parties are not bound by traditional legal remedies. Highly creative, innovative and nontraditional solutions are possible. In addition, it is possible to build future relationship by re-writing contracts, re-structuring relationship, etc.

Usually, in Lok Adalat the case is reduce to monetary damages. Imaginative solutions involving non-monetary or non-traditional remedies are not usually considered.

Stages of Mediation

1. INTRODUCTION

A Mediator introduces himself and the parties and explains the process of mediation. For instance where an Advocate is assisting a party and he/she has also brought some of his/her relations for the negotiation, the Mediator has to explain the role, which can be played by the Advocate and the relation/friend who has been brought in by the party. The Mediator must dispel the doubts in the mind of any of the party that a lawyer or a relation cannot participate in the mediation.

(i) **Establish Neutrality:** It is very important for the Mediator to exhibit his neutrality to the parties and the dispute. This can be done by very carefully using appropriate words, body language and making appropriate eye contact that shows equal treatment to the parties. A Mediator should sit squarely and by his conduct should not show any preference to one or the other side of the table undue eye contact to be avoided. A Mediator should avoid wishing the disputing parties or their Advocates in the waiting area before the first meeting, even if either of the parties is known to him or her because this may give a wrong signal to the opposite party. Of course, the Mediator must disclose any previous contact with any particular party but that can be done while explaining the process of mediation. A Mediator must always avoid calling a party by the first name because the opposite party may misconstrue it.

A Mediator should prefer to use neutral terms. For example, in a suit for breach of contract for supply of certain goods, the Mediator can describe it as a dispute with regard to a contract for supply of said goods instead of a case of breach of contract. Similarly, a suit for damages can be better described as a suit for compensation.

A Mediator should also show neutrality with regard to the date, venue and timing of mediation. If a Mediator asks for the convenient date from one of the parties, the other party may misconstrue it. Therefore, a Mediator can fix a date either as per his own diary, subject to the convenience of the parties, or can ask both the parties simultaneously to suggest a date and time which may be convenient to both of them.

(ii) **Describe the Role of a Mediator:** A Mediator must tell the parties that his role is simply

to assist them to come to a settlement which may be acceptable to all of them. Thus, his role is only facilitative and is not to decide the dispute between the parties. He should avoid early evaluation of the dispute even if requested by either of the parties by telling them that he is yet to get the complete information.

(iii) **Address Confidentiality:** A Mediator must explain to the parties/participants that the mediation proceedings are confidential so that they may feel more comfortable in giving their options towards resolution of dispute. A Mediator can draw the attention of the parties to the statute or the rules or the agreement whereby the proceedings are confidential. A Mediator should also tell the parties that they can disclose any confidential information during a caucus (private meeting) to be kept secret by the Mediator from the opposite party for coming to a settlement which may be acceptable to all the parties.

(iv) **Establish a Conducive Environment and Control over the Process:** A Mediator should be calm and relaxed during the mediation. He should be in complete control of the proceedings and should diplomatically handle any interruption without giving an indication to any party that he/she is not being given adequate attention.

While a Mediator is delivering the introduction or if one of the parties is presenting his or her point of view and the other party interrupts, a Mediator can request the said party to make a note of the point and that he (the Mediator) would be getting back to him in just a short while.

(v) **Generate a Momentum Towards an Agreement:** A Mediator should develop a positive frame of mind in the parties by expressing hope that if we work on the dispute, we may be able to come to a settlement which we would normally come to through hard work.

(vi) **Ground Rules:** Take an assurance that each and every party has to respect each other during the proceedings. One party shall not interrupt the other in the proceedings.

(vii) **Determine whether the Mediation Process has been Understood:** Enquire from the parties if they have any question or any doubt about the mediation process.

2. JOINT SESSION

Mediator's Goals

- Gather information about factual background.
- Learn about parties' claims, defence, arguments and positions.
- Gather information about parties' underlying interests.
- Manage interaction between parties.
- Maintain environment that is conducive to constructive negotiations.
- Elicit information by k each party if he / she has got any other point.
- Allow parties to give full information of facts
- Joint session to be done coolly and not to rush through - because both the parties will come to know of the stand of the respective parties in full view and this will enable the Mediator during negotiation in a separate session.
- Remain neutral - Do not give any idea to any party about the merits and demerits of a case.

Mediator's Dos & Donts

- Active listening - A good Mediator is a very active listener.
- Ask questions that bring out desired information (open-ended, clarifying closed questions that bring out underlying interests, fact-based questions, etc.)
- Manage outbursts and interruptions with acknowledgment. Acknowledge the point of feeling.
- Don't jump to conclusion.
- Don't rush to find a solution.
- Understand that, for most people, their perceptions equal their reality. To them, their perception is a fact.

- Understand that two people can perceive a situation differently and they can both be right.
- Let go of your desire to talk.
- Be careful in note taking.
- Be mindful of your body language and the speaker's body language.
- Minimize interruptions.

3. CAUCUS or SEPARATE SESSION

Purpose: In caucus parties get the chance to vent out their charged up feelings and emotions. A Mediator should not talk negative about any party. It often happens that a novice mediator starts taking sides and has sympathy with the parties, which is not conducive to the mediation process and ultimately embarrasses the Mediator.

- A Mediator explains confidentiality to the extent requested. Parties may discuss confidential information and issues.
- Gather information by asking more questions – Number of separate sessions will depend from case to case.
- Parties are encouraged to invent settlement options.
- Possibility to settle the case to be enquired from the parties.
- Strong on facts, soft on parties. (For example in a compensation case, a Mediator can ask the question “Do you have the medical bills?” (Defendant has raised the question of an exaggerated bill)“Do you have any other document” (Never tell a party that he cannot be believed and that if he had received the treatment he must be in possession of the bills or documents)

Agreement:

- Orally confirm a settlement in a separate session with the parties.
- Write down the terms of the settlement.
- Confirm the settlement in a joint session with both the parties.
- Who can draft agreement, parties, their Advocates or the Mediators?
- To be signed by the parties.
- Terms of Agreement - Clear, complete, concise, specific (give date) preferably in active voice.

Closing Comments:

It has been noticed that whenever the parties take an adjournment to draft the agreement as

per the terms settled during mediation, there has been a rethinking on the part of one or the other party to gain some more advantage. Experience has also shown that in some cases the agreement has failed. Even if an adjournment has to be granted, it should be preferably scheduled on the next day or in a couple of days – try to draft the agreement yourself but at the same time make sure about the provisions of law.

Approaches to Negotiations

There are two types of approaches to negotiations, that is, competitive and cooperative. A competitive negotiator may be aggressive, hostile, uncompromising while a cooperative negotiator may be accommodating, straightforward and courteous. A good negotiator mixes these approaches according to the circumstances of the negotiations. If a negotiator is too docile, he may not get a good bargain.

Types of Bargaining Used in Mediation

(i) **Rights-based Bargaining:** It is a customary and traditional form of bargaining in which the parties' primary focus is on right and wrong (for example, who violated the statute, who breached the contract, who was negligent). It is blame-oriented analysis.

(ii) **Positional Bargaining:** It is also a customary and traditional form of bargaining, in which the parties focus on their legal positions and offer to settle. It is often combined with right based bargaining (for example my client's claim is worth Rs.1 lakh as your client was 100% at fault for injuries).

(iii) **Distributive Bargaining:** This type of bargaining focuses on the allocation of fixed or limited resources between the parties. It is often referred to as "dividing the pie", where the "pie" represents a fixed amount of money, property, assets, etc. (For example, the assets of an estate). Distributive bargaining is also referred to as "zero sum" bargaining, because for each amount of resources received by one party, the other party loses the same amount. (Suit for partition, petition for grant of probate of Will, suit for dissolution of partnership and rendition of accounts etc. would come under distributive bargaining).

(iv) **Integrative Bargaining:** In this type of bargaining, a Mediator expands the resources that are the subject of negotiations by introducing the possibility of traditional additional resources that are outside the framework of initial negotiations. (For example, 18th camel, that is 1/2, 1/3rd and 1/9th of the camels).

(v) **Interest-based Bargaining:** In interest based bargaining, the focus shifts from law to the facts and underlying interests of the parties to develop terms of settlement that produce mutual gains (for example division of orange). It is a three-step process in which a Mediator (a) identifies the underlying interests of the parties, (b) prioritizes their interests (using information generated from the parties), and (c) develops settlement terms that promote the most important interests of the parties.

Interest based versus Right based Bargaining

A commercial mediation or even compensation mediation normally starts on the basis of right-based mediation. Like the plaintiff may have filed a suit for recovery of damages amounting to Rs. 1 lakh but he may be ready to accept Rs. 50,000/- as a settlement. The right-based bargainer may sometimes bring the mediation to an impasse and the Mediator must cleverly move towards interest based bargaining in order to save mediation.

Communication Technique Used in Mediation

Restatement: Restatement is a communication tool used frequently by the mediators to ensure that the mediator has accurately heard their statements. As the name suggests, restatement consists of mediators repeating of a party's point(s), at times using same or similar words as the party. This technique gives the party confidence that the mediator has accurately heard the party and noted the party's point. Restatement usually focuses on statement made by a party about facts, law and position.

Example :

Party : "I am not at fault because I delivered the product on time on June 16, 2006"

Mediator : Your position is that you are not liable because you carried out the terms of agreement by delivering the product on June 16, 2006.

Reflection: Reflection is a communication technique that is similar to restatement, except that reflection involves a mediator repeating of a party's statement about thoughts, feeling and emotions.

Example

Party : "I am frustrated because the other party delayed payment of the money I gave to him."

Mediator: "If I am hearing you correctly, you are frustrated about the timing of payment."

Summarizing: "Summarizing" is a technique used by a Mediator to briefly, clearly, and accurately re-state the essence of statements by a party or advocate regarding issues, positions, or proposed terms of settlement.

- In summarizing, a Mediator must be careful to:
- Be accurate
- Be brief
- Re-state the issues, positions, or terms in words that are neutral
- Be complete

Neutral Re-Framing: Neutral re-framing is the restatement by a Mediator, in neutral words, of a comment or position expressed by a party or his or her advocate. Using neutral re-framing, a Mediator attempts to extract the essential content of a statement, leaving out inflammatory or highly charged words. The Mediator's restatement is usually made for the purpose of re-phrasing the comment in terms that are clear and inoffensive. Neutral re-framing also may be used to focus the parties' attention on a particular aspect of the statement or position offered by a party.

Neutral re-framing may be used in a variety of situations:

- When a party or advocate makes a statement that is highly adversarial
- When a party or advocate uses words that are inflammatory
- When a party or advocate engages in a personal attack on another person

For instance, in a suit for recovery of Rs. 10 lakhs, the defendant may say in a caucus that he shall not pay a penny over and above Rs. 5 lakhs and he can see the plaintiff in Court. A Mediator can reframe the offer by removing the word "not a penny" and "over and above" and that "he can see the plaintiff in Court".

Re-Directing: “Re-directing is a communication technique used by a Mediator to shift the focus of a party from one subject to another. Re-directing may be used to:

- Focus on details.
- Re-focus on general issues, party expectations or goals.
- Respond to a hostile, inflammatory, or highly adversarial statement by a party or attorney.

Setting an Agenda: “Setting an agenda” is a communication technique used by a mediator to establish the order in which issues, positions, claims, defences, or proposed settlement terms will be addressed. Setting an agenda may be used to :

- Organize information.
- Determine the priority and relative importance of issues to a party.

Deferring: “Deferring” is a communication technique used by a Mediator to postpone a response to a question or statement by a party. It may be used in the following situations:

- Where a party or his or her advocate requests a premature evaluation. (It is too early, yet to get full facts).
- To follow an agenda established by the Mediator.
- To gather additional information.
- To de-fuse hostile, inflammatory, or highly adversarial statement.
- To break an impasse.

Acknowledgment: “Acknowledgment” is a communication technique used by a Mediator to reflect back a person’s statement or position, in a manner that recognizes the perspective of the party who expressed the statement or position. One purpose of acknowledgment is to convey that the Mediator has accurately heard and understood the statement/position. Another purpose of acknowledgment is to convey that the Mediator understands the importance of the statement/position of the party.

Empathy without Reinforcement: Often, it is a Mediator's responsibility to express understanding and empathy, without expressing agreement or disagreement with a party. Words and phrases that express empathy without reinforcement include;

- I understand your position.
- I see what you are saying.
- I hear your point.

Words and phrases that, if used improperly or over-used, may lead a party to believe a Mediator agrees with him / her include:

- Yes
- Okay
- Uh-huh
- Silence (for example, after a party says, “Anybody would do the same thing under the circumstances”)

In addition, certain gestures and body movements may convey agreement, including nodding the head up and down.

Finally, passive information gathering by a Mediator may convey the impression to the

speaker that the Mediator agrees with the party's comments (for example, allowing another person to have complete control of the agenda, scope, and degree of detail when relating factual background and positions).

Use of Apology in Mediation

Sometimes apology plays a very important role in resolution of a dispute between two warring parties. A plaintiff may be hurt on account of an unreasonable conduct of the defendant taking the matter to the Court. The Mediator, therefore, has to use his/her intuition to find out if it would be helpful if one or both sides make an apology. The timing and sincerity of apology is crucial.

For instance, in a suit for damages in a motor vehicle accident or in a criminal case under Section 279/338 IPC, the plaintiff may be having a grievance that the defendant had fled the spot after the accident and had not even cared to take him to the hospital. The apology in addition to some compensation may prove very vital in settlement of the dispute.

An insincere apology, however, is worse than none at all. As a practical matter a mediator should never suggest an apology to the plaintiff without having already confirmed with the defendant that one is available and would be made if the plaintiff is happy.

Disputes where Mediation is Appropriate

- Parties desire a negotiated outcome
- Parties have an on-going relationship (family, business, other)
- Merits of case make a favourable judgment unlikely
- Litigant does not want to appear as a witness
- Costs of trial exceeds projected value of the case
- Parties want prompt resolution
- Parties want control over the outcome
- Opportunity to develop creative non-traditional remedies.
- Confidentiality/Privacy is desired by the parties.

Disputes where Mediation is not Appropriate

- Parties refuse to negotiate
- Parties want a judicial determination
- Parties want public airing of the dispute
- Parties want to establish legal precedent
- Delay in resolution benefits party
- Parties do not have sufficient information.
- Where an order of Court is necessary to enforce a right.
- Serious criminal offences.
- Cases which are prohibited from being settled through ADR, such as tax disputes.

Types of Disputes which can be Referred for Mediation

- Family Disputes (divorce, custody, visitation)
- Commercial disputes
- Dispute between neighbors (boundary disputes, noise, animal control)

- MACT/Insurance claim
- Copyright, Trademark disputes
- Billing disputes with public sector companies

Why Should Business Community Consider Mediation?

Mediation is very effective when there is a question of reputation of a big company involved in any dispute. For instance, there may be presence of some foreign substance in a bottle of soft drink. The soft drink company in order to avoid any adverse publicity would never like the dispute to go to the court and would try to settle the dispute to control rumors about the product.

A dispute between the employees and a business house and between a contractor and the business house are also best settled in mediation in order to avoid disruption in the work/business and in order to maintain the continuing relationship.

Stage at which Mediation can be Tried

Mediation can be tried before trial, during trial or even during pendency of the appeal.

Mediation *viz-a-viz* Traditional Litigation

There is no conflict between mediation and court trial. Some cases need to be litigated whereas other needs to be mediated. Thus, mediation is complimentary to the court proceedings and is not opposite to the Court proceedings. That is why Section 89 gives mediation as one of the methods for the resolution of a dispute in cases instituted in the Court.

Choice of Mediator

As per Mediation and Conciliation Rules framed by the Delhi High Court, retired Judges of the Supreme Court of India, retired Judges of Delhi Court, retired Judges of Delhi Higher Judicial Service, Serving officers of Delhi Higher Judicial Service, a Legal Practitioner with at least 10 years service at the bar, experts or professional with at least 15 years of standing are eligible to be empaneled as Mediators in a court annexed mediation. Otherwise, the parties can decide and choose any person to mediate any dispute between them which has not gone to the court.

Brainstorming: “Brainstorming” in mediation process involves the following:

- Inventing / Generating Options for an agreement.
- Evaluating Options for an agreement.
- Identifying the issues for resolution
- Focusing party on their long term interest.
- Getting parties to be realistic about their case especially its weakness
- Making them examine their alternatives to settlements.
- Giving them freedom to create options for settlement.
- Refining their suggestions and reaching agreement.

Lateral Thinking: “Lateral thinking” is a type of thinking that is creative, innovative, and

intuitive. Lateral thinking is non-linear and non-traditional. Mediators use lateral thinking during the brainstorming process to develop terms of agreement that further the interests of the parties. Lateral thinking is often contrasted with logical thinking, which also plays an important role in mediation. Logical thinking is linear, traditional, rational, and fact-based. Mediators use logical thinking to analyze facts, to assess liability, and to understand the positions of the parties.

Impasse or Dead Lock: This occurs due to following reasons:

- Ultimate acknowledgment of failure
 - Failure of participants to reach an Agreement.
- Steps which can be taken by Mediator
- Alert the participants
 - Inform parties/Lawyers in caucus meetings
 - Solicit any 'last ditch' efforts.
 - Talk with lawyers apart from their clients
 - Brainstorm on final settlement offers
 - Before declaring an impasse, bring parties and lawyers in general session and seek final offers.

Origins of Impasse

- Emotional
 - Personal animosity / mistrust
 - Vengeance
 - Pride/ego/fear of losing face.
 - Fear of change.
- Substantive
 - Lack of knowledge of facts and law.
 - Limited resources.
 - Lack of Bargaining Power.
 - Incompetence.
 - Third parties.
 - Fear of being taken advantage of
 - Standing on principles
- Procedural
 - Lack of authority.
 - Power imbalance
 - Mistrust of Mediator

Ten Effective Ways to Settle a Dispute

- Split the difference
- Conditional offers (“what if” offers)
- Use reactive devaluation.

- Convert to arbitration.
- Integrative bargaining
- Shift focus to finality, control, risk management, and other intangibles.
- Reality testing.
- Compare alternatives (BATNA, WATNA, MLATNA)
- Generate momentum toward settlement with multiple claimants by settling easy claims first.
- Re-visit issues.

Effective Mediator

- 1) Listens and respondents courteously and with understanding.
- 2) Acknowledge points made and the significance to the parties of problems and issues.
- 3) Encourages Parties to make their own decisions.
- 4) Subtly analysis Parties' presentations.
- 5) Asks relevant and insightful questions.
- 6) Probes, for clarification.
- 7) Keeps track of new information and changing positions.
- 8) Appears relaxed, alert and engaged with the process.
- 9) Demonstrates skill and confidence throughout in verbal communication.
- 10) Presents information, analysis and explanations in ways that influence the Parties positively.

Ineffective Mediator

- 1) Allow Interruption
- 2) Give attention to the person who interrupts
- 3) Fail to handle interruption appropriately.
- 4) Allow parties to cross talk.
- 5) Fail to hold caucus at appropriate time.
- 6) Cut off parties attorney / friends.
- 7) Rushing process.
- 8) Fail to follow four stages of mediation.
- 9) Reconvene joint session at wrong time.
- 10) Mediator fixing problem for the party.

Qualities of a Good Mediator

- 1) **Trust:** This is the most important characteristic. If the parties do not respect the Mediator, the chances of success are small. Mediation often involves private discussions between a party and the Mediator. If the party does not trust the Mediator to keep confidences disclosed at such a session, there will exist little chance of success. Similarly, if the parties cannot trust the Mediator to evaluate their positions impartially, the mediation is doomed.
- 2) **Patience:** Parties frequently come to the mediation with set positions that take a long time to modify. A Mediator must have the patience to work with the parties to bring them to the point where agreement is possible.
- 3) **Knowledge:** The chances of success are greater if the Mediator has some knowledge or expertise in the area of dispute. Because mediation does not result in a decision by the neutral, knowledge of the subject matter is not as crucial in mediation as it is in arbitration. However,

the parties in a complicated dispute over software, for example, will have more confidence in a Mediator who knows something about software technology than they would in a Mediator who knew nothing about the subject. Furthermore, such expertise will enable the Mediator to better assist the parties in identifying nontraditional solutions to their dispute.

- 4) **Intelligence:** A Mediator must be resourceful and attentive to understand not only the nature of the dispute, but also the motivations of the parties. Through an understanding of what is important to each of the parties, the Mediator can bring them into agreement much more quickly. The requirements are thus not only an ability to understand the subject matter, but an ability to understand people and their motivations as well.
- 5) **Impartiality:** This characteristic is closely related to trust. A Mediator must be impartial. Some Mediators will express their opinions about the position of a party, or will use their powers of persuasion in order to bring the parties to agreement. Other Mediators will not analyze or evaluate the merits of a dispute, but will cause the parties to realize on their own where the settlement potential lies. In either case, the parties must be satisfied that the Mediator is neutral. In the former situation, if the Mediator is not viewed as neutral, any opinions will carry no weight; in the latter situation, the parties will refuse to follow a biased leader.
- 6) **Good Communication skills:** An arbitrator needs only to listen to the evidence and render a decision based upon knowledge of the law and good judgment. Although these talents are extremely valuable ones, an arbitrator need not have the ability to communicate with the parties. A Mediator needs good judgment and good communication skills; it is the Mediator's job to evaluate and understand the motivations of the parties, foresee potential solutions, and then bring the parties to an agreement. Without good communication skills, this task is impossible.

Barriers to Resolution of Dispute

1) Strategic Barriers:

Negotiation is compared to making a pie and dividing the pie. Conflict resolution affects the size of the pie. And who gets what size? Litigation can shrink the pie – that is costs, time, relationship, priorities, needs etc. Negotiation can create values and enlarge the pie. On the other side, distributive aspects can create deadlocks. For example, A has 10 apples and B has 10 oranges. [Assume that no other apples and oranges are available in the market]. A hates apples but loves oranges. B loves both equally. If A tells B about it and asks oranges for exchange, B will do strategic bargaining and would say he also likes oranges, though it is not true. B will offer one orange for say 5 apples. But if A tells his interest in oranges to a Mediator in a private caucus and asks him not to disclose it to B, favourable solution can be reached faster and beneficial to both. Thus a mediator helps in overcoming strategic barriers by inducing the parties to reveal information about their underlying interests, needs, priorities and expectations.

2) Principal and Agent Barriers:

Incentives for an agent negotiating for the principal may induce behaviour that fail to serve the interests of the principal. A Mediator involves the parties directly and tackles this barrier. A mediator helps in overcoming Principal-Agent barriers by bringing real decision maker

[Principal] to the table and help him understanding his own interests.

3) *Cognitive or Perceptive Barriers:*

Each party has its own perception or feelings over an issue. Parties fight [gamble a litigation] to avoid loss. They settle to receive a gain. For example, there are two gates in this hall, and the organizers declare that those who exit from North Gate will get Rs. 1,000/- each and out of these who exit from South Gate randomly selected few, say two, will get Rs. 5,000/- each. Which gate will most of the people select? Usually people do not gamble for a gain. This is called Risk Aversion.

Now let us change the game. Organizers announce that those who go out of the North Exit will each pay Rs. 1,000/- and out of those who exit out of the southern Gate, randomly selected few, say two, will pay Rs. 5,000/- each. Which gate most people will select for exiting?

- Usually people gamble to avoid loss.
- Sure loss [No]
- Possibility to avoid loss [Yes]

Mediator takes parties from loss aversion to risk aversion. Thus a mediator helps in overcoming cognitive barriers by emphasizing potential gains and de-emphasizing or dampening the losses.

4) *Psychological Barriers (Reactionary Devaluation):* “If only we could settle for Rs. 10 lakhs, I would put an end to it”. Next day the other side offers Rs. 10 lakh. “No, no! They must know something we do not know”. Or “If it is a good settlement for them, it cannot be good settlement for us.” Concessions offered are rated lower than concessions that are withheld. A mediator helps in overcoming psychological barriers or reactive devaluation by owning the source of the proposal. [Changing the messenger.

Place of Lawyer in Mediation

It has been found that wherever the lawyers are assisting their parties during the course of mediation, the settlements have been easy to come. (Barring a few case where the lawyers have stalled the settlement which was just going to be arrived.). Always give recognition to the presence of the lawyer and tell them their importance of being present with the parties and that it would be easier for the parties to settle the dispute if they are assisted by their lawyers. Give credits to the lawyers for reaching the settlement. The lawyers want their clients to feel that without them they would have paid more or get less.

Are there Benefits in Mediation for Lawyers?

- a) Mediation helps lawyers as for lawyers
- b) It is another avenue of professional practice and income.
- c) Appearing for a client is a professional service for which lawyers charge their fees. When cases come up faster for resolution instead of decades later, the income is earned now.
- d) Studies have shown that clients are far more willing to pay fees for mediations in which they participate and can understand than for litigation in which they feel excluded and do not see progress.

- e) Mediation invariably means a satisfied clients who participate and sees results, and satisfied clients come back to their lawyers with more business.
- f) There is satisfaction in helping to bring about beneficial solutions.

Lawyers as Mediators

Lawyers make good mediators and are sought after. Becoming a mediator is a new field which lawyers, especially senior ones, may like to try. It has elements of the resolver and peacemaker, and can also be professionally rewarding. So whether the lawyer refers clients' cases to mediation, or appears in mediations for clients, or becomes a mediator part or whole time, several opportunities have opened up for members of the legal profession. Abroad, it is now common to find leading lawyers and retired Judges of distinction focusing on mediation.

What is the Role of Lawyers in Mediation?

In Mediation the lawyer's role of arguing, demolishing or cutting down the other side's arguments does not help very much since there is no presiding officer to give a verdict for one or the other. Instead the lawyer's role is use his legal skills and practical knowledge to see if a solution is possible, and if so, to help evolve one. A primary role is to protect the client's legal interests. The lawyer must also ensure that the client is made aware of the implications of the decision he is taking. If the mediation is proceeding in a manner which is disturbing or not serving the interests of the party, the lawyer may advise terminating it.

Benefits of Mediation

- A. ***It is Fast:*** As the amount of time necessary for the parties and the Mediator to prepare for the mediation is significantly less than that needed for trial or arbitration, a mediation can occur relatively early in the dispute. Moreover, once mediation begins, the Mediator can concentrate on those issues he or she perceives as important to bring the parties to agreement; time consuming evidence-taking can be avoided, thereby making the best use of the parties' time and resources. Even if the entire evidence gathering has already occurred, it almost invariably takes less time to mediate a dispute than to try it in a court.
- B. ***It is Flexible:*** There exists no set formula for mediation. Different Mediators employ different styles. Procedures can be modified to meet the needs of a particular case. Mediation can occur late in the process - even during trial- or before any formal legal proceedings begin. The mediation process can be limited to certain issues, or expanded as the Mediator or the parties begin to recognize during the course of the mediation problems they had not anticipated.
- C. ***It is Cost Efficient:*** Because mediation generally requires less preparation, is less formal than trial or arbitration, and can occur at an early stage of the dispute, it is always less expensive than other forms of dispute resolution. If the mediation does not appear to be headed in a successful direction, it can be terminated to avoid unnecessary costs; the parties maintain control over the proceedings.
- D. ***Brings Parties Together:*** Parties can save and sometimes rebuild their relationship like in a family dispute or commercial dispute.
- E. ***It is Convenient:*** The parties can control the time, location, and duration of the proceedings to a significant extent. Scheduling is not subject to the convenience of courts.
- F. ***It is Creative:*** Resolutions that are not possible through arbitration or judicial determination may be achieved. For example, two parties locked in a dispute that will be resolved by an

arbitrator or a judge may be limited to recovery of money or narrow injunctive relief. A good Mediator makes the parties recognize solutions that would not be apparent – and not available - during the traditional dispute resolution process. Two companies may find it more advantageous to work out a continuing business relationship rather than force one firm simply to pay another money damages. The limit on creative solutions is set only by the variety of disputes a Mediator may encounter.

- G. ***It is Confidential:*** What is said during a mediation can be kept confidential. Parties wishing to avoid the glare of publicity can use mediation to keep their disputes low-key and private. Statements can be made to the Mediator that cannot be used for any purpose other than to assist the Mediator in working out a resolution to the dispute. Confidentiality encourages candour, and candour is more likely to result in resolution.
- H. ***Control:*** The parties control the outcome of the mediation and either party has the advantage of terminating the mediation, if it is felt that it is not in the interest of the said party.
- I. ***Direct Communication:*** In a mediation, there is party to party direct communication. At least the parties have the feeling of being heard by the Mediators if the parties or either of them is being represented by an advocate.

BATNA, WATNA & MLATNA

BATNA: Best Alternative To Negotiated Agreement

WATNA: Worst Alternative To Negotiated Agreement

MLATNA: Most Likely Alternative To Negotiating Agreement also termed as **EATNA** (Estimated Alternative To Negotiated Agreement)

In assessing the value of a settlement offer, it is important to compare the pending offer to any alternatives to settlement that may exist. In the context of litigation, for example, negotiations often compare settlement offers to the predicted outcome at trial, factoring in the additional expenses of going to trial, the risk of losing, and the delay in reaching a judgment or verdict. In this manner, the negotiator can use the projected trial outcome as a point of reference in determining whether a pending offer is favorable.

One method of comparison used by negotiators is to compare a pending settlement offer to the best outcome at trial, also known as the BATNA (best alternative to a negotiated agreement). Using this point of reference, the negotiator will determine whether the settlement offer is close to, equals, or exceeds the best outcome at trial, after adjusting for the litigation expenses of trial, the risk of losing, and the delay in resolving a dispute.

Another valuable method of comparison is for the negotiator to compare the pending settlement offer to the worst projected outcome at trial, which is the WATNA (worst alternative to a negotiated agreement). This point of reference is valuable to a negotiator in determining whether a settlement offer exceeds a party's worst possible outcome at trial.

Using the BATNA and the WATNA will help a negotiator determine whether a settlement offer falls within the range of projected trial outcomes by establishing the high and low alternatives to settlement.

Perhaps one of the most important points of reference for a negotiator is the MLATNA (most

likely alternative to a negotiated agreement), which reflects the most probable outcome at trial. Litigators are familiar with the possibility of a judge or jury rendering an award that falls within a reasonably predictable range (the BATNA and WATNA). Litigators are also familiar with the fact that it is often possible to narrow the range of possible trial outcomes further by using their experience as trial advocates and their knowledge of the community norms for valuing a particular type of case. Thus, as part of the negotiation process, a negotiator generally will predict the high, low, and most probable trial outcomes in order to develop a strong point of reference when deciding the relative value of a settlement offer.

Mediators can use the BATNA, WATNA, and MLATNA as part of the reality testing process in private caucus, to assist the parties and their advocates in evaluating the strength of a pending settlement offer in relation to the possible outcomes at trial. Systematically exploring the BATNA, WATNA and MLATNA with parties and advocates will also provide the mediator with valuable insight into the factual, legal, and analytical basis for their positions.

Another use of the BATNA, WATNA, and MALTNA by mediators is to employ this type of analysis for the purpose of overcoming negotiating impasses. It is often useful for a mediator to remind parties of their BATNA, WATNA, and MLATNA when they lose sight of their strategic objectives, when they react strongly to an interim offer by another party, or when they believe they would like to terminate the negotiating process.

By focusing on the BATNA, WATNA, and MALTNA, a mediator can assist parties in making a balanced and systematic evaluation of their alternatives to settlement. This type of analysis will often bring clarity establishing alternatives and enabling the parties to develop a concrete measuring stick by which they can evaluate settlement offers.

The ‘How to’ of Conducting Meditation

*“A peace is of the nature of a conquest; For then both parties nobly are subdued,
And neither party loser.”*

-- Shakespeare¹

Telling people what to do is different from suggesting options and broadening their perspective to consider lines of thought or actions (for example, in a dispute over sale of land: ‘Maybe you can think of a division of land or jointly developing the property.’). Mediators can open up possibilities for parties to reflect on. It is preferable to cast it in general terms, and to give two or more options so that mediator preference is not indicated. Even this is best done a little later in the process. Avoid doing this in the beginning.

In closing, mediators may keep in mind the following tips about communications:

- The focus should be on the other person, thereby foresting proper listening and understanding, and indicating that one is trying to appreciate the feelings of the other.
- One should show interest in what the other person is saying. Irrespective of status, all persons deserve and consideration.
- A word of appreciation goes a long way.
- Expressions carelessly used can hurt or belittle.
- Matter can be stated carefully instead of bluntly.
- One should aim for clarity in communication. This stems from clarity of thought; such clarity should be maintained in speech.
- Words should be well chosen, and enunciated clearly.
- Precision should be sought and ambiguity avoided. Language ought to be easy to read and listed to. Being concise and relevant are the hallmarks of a good communicator; verbosity and repetition are displayed by the ineffective one.
- Using specific facts and figures shows that you are well informed.
- When one does not have the answers it is better to say so than to hazard guesses.
- Choice of words, using metaphors and turn of phrase add to the style and appeal of communication.

Having gained an understanding of the basic skills of communication, we return to mediation in the next chapter, so see how it is and practised.

¹ King Henry IV, Act 4 Scene 2.

INTRODUCTION

This chapter deals with the procedure for conducting a mediation starting from the decision to submit a dispute to mediation, and going up to the stage of agreement.

If a law suit over the dispute is pending in court then it may be referred to mediation either on the parties' request or *suo motu* by the court under Section 89 of the Civil Procedure Code, 1908 (CPC). In this case the court may either refer the matter to the court annexed mediation centre, to a particular mediator or mediation centre by name. Such a mediation is governed by the CPC under Section 89, CPC. The mediation agreement comes back to the court for being recorded in an order or decree.

Mediation conducted out of the court system is with the consent of the parties and is governed by provisions of Part III of the Arbitration and Conciliation Act, 1996 (ACA). The term "conciliation" used in this Act is to be also read as mediation, and is contrasted with court-annexed mediation, this can usefully be referred to as private mediation. This parties may jointly appoint the mediator or seek the help of an institution to do so. If the provision for mediation exists in a contract between the parties, the same can be followed. Part III of the ACA is a comprehensive set of rules governing private mediation including appointment, conduct of the process, confidentiality, termination etc. Agreements reached here are to be treated as arbitral awards by consent and are thus enforceable. It may be clarified here that it is also open to the court to refer a dispute to private mediation which will then be governed by the ACA.

Once the mediator(s) has been appointed, his first step is to provide the parties with information on the process of mediation. Some mediators like to have a knowledge of the case before commencing the mediation; these may request parties for a brief note on the facts and perhaps some essential documents. Chapter 10 provides more information on communication between parties and mediators prior to the actual mediation, and other pre- mediation protocols.

CONFLICT OF INTEREST

When approached to mediate a case, the mediator should check if there is any conflict of interest which makes it necessary or preferable that he should withdraw. Potential conflicts of interest arise from a relationship between the mediator and a party or on account of a connection the mediator may have with the subject matter of the dispute. Before proceeding with the mediation it must be ensured that there is no conflict of interest. If any such conflict exists or emerges during the mediation, the mediator must disclose the same and withdraw. He may continue only if both the

parties request him to so and he himself is of the opinion that the degree of relationship or connection is so minimal as not to constitute a conflict.²

In a private mediation, the terms of the engagement of the mediator viz. Fees and expenses should be agreed to by the parties. It is preferable that this be done in the beginning itself. An agreement to mediate with undertakings of confidentiality and to participate in good faith³ should also be signed by the mediator and the parties (See Annexure 3).

The next step is to fix the time, date and venue for the mediation session. The venue should be a neutral place. This may be at the mediation institution (if any) or the mediator's office, or another convenient venue. It is useful to have two rooms available for the mediation to allow for private sessions.

PARTICIPATION IN THE PROCESS

Once the parties have assembled at the mediation table, the mediator needs to ensure that all those who need to be present to resolve the dispute are present. Since the process emphasises the participation of the parties, it is preferable that they all be present in person. While in a few cases it may be adequate to proceed only with the lawyers representing the parties, in most mediations the mediators like to secure the presence of the parties since this enables full communication and greater discussion of options leading to better solutions. Indeed, the mediation process is adapted for participation by parties, unlike the one in court which is designed for lead roles of lawyers. Where the party is a corporation, firm, institution or the government, the officer representing it must have the authority to do so. It is preferable that this be in writing.

The representative should be empowered to take decisions at the mediation table. Sometimes the representative is given a limited power of decision-making, and needs to check with his superiors to go beyond that. Should the mediator insist that the ultimate decision-maker come? This is left to the mediator's discretion. In some cases it may be necessary to do so, especially when the discussion needs his presence. In other cases, it may be possible to proceed with the mediation, provided that a quick response and decision-making arrangement is in place. Business and locational realities are such that it may not be possible for the ultimate decision-taker to come to the mediation table. It should, however, be ensured that the representative is not merely a to-and-fro communicator or a person with extremely limited authority; he should be able to adequately participate in the discussion and the decision-making process.

There should not be too much disparity in the number of people representing each party. For example, the number of officers and lawyers representing it may be used by one side as a tactic to intimidate the other side.

² For a detailed discussion on conflict of interest, see Chapter 11.

³ For a detailed discussion on good faith and confidentiality in the mediation process, see Chapter 11.

It may also be necessary to keep some people out of the mediation session. Where numerous persons are affected in a dispute – for instance, many depositors seeking their moneys from a finance company – they will have to select their representatives; else, there will be too many voices at the table, decision-making becomes difficult, and the other side can be intimidated by the presence of so many rivals. Family members often want to be present, especially in matrimonial cases. The safer course is to keep them out, especially in the beginning. Their presence may inhibit the parties from speaking their minds; they may be, in fact, the root of the problem or contributories to it. Once the mediation is underway, it may be necessary to involve them not so much as to arrive at a decision but to carry it out. If, however, a party to the mediation, such a wife who is severely intimidated by the husband, is not able to effectively speak for herself, the assistance of a family member from the beginning is advisable.

Where minors are involved, care is indeed, In law, minors do not have the capacity to take decisions, and the ones taken on their behalf can be repudiated when the minor reaches the age of majority. Where it becomes necessary to deal with a minor's share, it is necessary that the person speaking for the minor is the parent or a guardian appointed by the court to represent the minor. In any event, mediator must be watchful that the minor's interests are not neglected or bartered away; if that seems to be the case the option to terminate are mediation should be exercised.

**What about
lawyers attending
the mediation
along with the
parties?**

Mediators should not prevent the appearance of legal counsel. It is better to have a lawyer – even a difficult one – at the table, rather than the party complaining later that it unknowingly gave up its rights in the mediation. Closing the door to the lawyer will just result in him advising the client outside that

representation.”⁴ pending.⁵ Of 2000.⁶ years.⁷ Of cases.⁸ The judges⁹ in,177.¹⁰
Despite).¹¹ At place.¹² years.”¹³ In population.¹⁴ While inadequate.¹⁵
All

⁴ *Id.* at 52

⁵ J. Venkatesan, “”

⁶ Indian .

⁷ *Ibid.*

⁸ *Id.* at 35.

⁹ *Id.* at 6:.

¹⁰ *First.*

¹¹ Indian 7.

¹² The.

¹³ 120th.

¹⁴ Recently,.

¹⁵ This

Telling people what to do is different from suggesting options and broadening their perspective to consider lines of thought or actions (for example, in a dispute over sale of land: 'Maybe you can think of a division of land or jointly developing the property.'). Mediators can open up possibilities for parties to reflect on. It is preferable to cast it in general terms, and to give two or more options so that mediator preference is not indicated. Even this is best done a little later in the process. Avoid doing this in the beginning.

In closing, mediators may keep in mind the following tips about communication:

- The focus should be on the other person, thereby fostering proper listening and understanding, and indicating that one is trying to appreciate the feelings of the other.
- One should show interest in what the other person is saying. Irrespective of status, all persons deserve respect and consideration.
- A word of appreciation goes a long way.
- Expressions carelessly used can hurt or belittle.
- Matters can be stated tactfully instead of bluntly.
- One should aim for clarity in communication. This stems from clarity of thought; such clarity should be maintained in speech.
- Words should be well chosen, and enunciated clearly.
- Precision should be sought and ambiguity avoided. Language ought to be easy to read and listen to. Being concise and relevant are the hallmarks of a good communicator; verbosity and repetition are displayed by the ineffective one.
- Using specific facts and figures shows that you are well informed.
- When one does not have the answers it is better to say so than to hazard guesses.
- Choice of words, using metaphors and turn of phrase add to the style and appeal of communication.

Having gained an understanding of the basic skills of communication, we return to mediation in the next chapter, to see how it is conducted and practised.

Chapter 7

The 'How to' of Conducting Mediation

"A peace is of the nature of a conquest; For then both parties nobly are subdued, And neither party loser."

— Shakespeare¹

Introduction	90
Conflict of Interest	90
Participants in the Process	91
The Steps in the Mediation Process	93
The Opening Round	93
Mediator's opening statement explaining the process and the ground rules	93
Joint and Separate Sessions	95
Narration of basic facts by the parties	96
Gathering relevant information	97
Exploring interests, settlement options, etc.	97
Making Separate Sessions Effective	98
Conflicting views on separate session	100
Resolving Disagreements over Facts	101
Facilitative and Evaluative Mediation	101
Moving the Parties away from Entrenched Positions to Interests	104
Typical questions to uncover interests	105
Offers and Proposals	105
Some typical questions for offers	106
Generating Options	106
Some suggestions for options	109
The Final Steps	111
The essentials of a settlement agreement	111

¹ King Henry IV, Act 4 Scene 2.

INTRODUCTION

This chapter deals with the procedure for conducting a mediation starting from the decision to submit a dispute to mediation, and going up to the stage of agreement.

If a law suit over the dispute is pending in court then it may be referred to mediation either on the parties' request or *suo motu* by the court under Section 89 of the Civil Procedure Code, 1908 (CPC). In this case the court may either refer the matter to the court annexed mediation centre, to a particular mediator or mediation centre by name. Such a mediation is governed by the CPC and the Mediation Rules framed by the respective High Court under Section 89, CPC. The mediation agreement comes back to the court for being recorded in an order or decree.

Mediation conducted out of the court system is with the consent of the parties and is governed by the provisions of Part III of the Arbitration and Conciliation Act, 1996 (ACA). The term "conciliation" used in this Act is to be also read as mediation, and as contrasted with court-annexed mediation, this can usefully be referred to as private mediation. The parties may jointly appoint the mediator or seek the help of an institution to do so. If the provision for mediation exists in a contract between the parties, the same can be followed. Part III of the ACA is a comprehensive set of rules governing private mediation including appointment, conduct of the process, confidentiality, termination etc. Agreements reached here are to be treated as arbitral awards by consent and are thus enforceable. It may be clarified here that it is also open to the court to refer a dispute to private mediation which will then be governed by the ACA.

Once the mediator(s) has been appointed, his first step is to provide the parties with information on the process of mediation. Some mediators like to have a knowledge of the case before commencing the mediation; these may request parties for a brief note on the facts and perhaps some essential documents. Chapter 10 provides more information on communication between parties and mediators prior to the actual mediation, and other pre-mediation protocols.

CONFLICT OF INTEREST

When approached to mediate a case, the mediator should check if there is any conflict of interest which makes it necessary or preferable

that he should withdraw. Potential conflicts of interest arise from a relationship between the mediator and a party or on account of a connection the mediator may have with the subject matter of the dispute. Before proceeding with the mediation it must be ensured that there is no conflict of interest. If any such conflict exists or emerges during the mediation, the mediator must disclose the same and withdraw. He may continue only if both the parties request him to do so and he himself is of the opinion that the degree of relationship or connection is so minimal as not to constitute a conflict.

In a private mediation, the terms of the engagement of the mediator viz. fees and expenses should be agreed to by the parties It is preferable that this be done in the beginning itself. An agreement to mediate with undertakings of confidentiality and to participate in good faith² should also be signed by the mediator and the parties (See Annexure 3).

The next step is to fix the time, date and venue for the mediation session. The venue should be a neutral place. This may be at the mediation institution (if any) or the mediator's office, or another convenient venue. It is useful to have two rooms available for the mediation to allow for private sessions.

PARTICIPANTS IN THE PROCESS

Once the parties have assembled at the mediation table, the mediator needs to ensure that all those who need to be present to resolve the dispute are present. Since the process emphasises the participation of the parties, it is preferable that they all be present in person. While in a few cases it may be adequate to proceed only with the lawyers representing the parties, in most mediations the mediators like to secure the presence of the parties since this enables full communication and greater discussion of options leading to better solutions. Indeed, the mediation process is adapted for participation by parties, unlike the one in court which is designed for lead roles of lawyers. Where the party is a corporation, firm, institution or the government, the officer representing it must have the authority to do so. It is preferable that this be in writing.

² For a detailed discussion on conflict of interest, see Chapter 11.

³ For a detailed discussion on good faith and confidentiality in the mediation process, see Chapter 11.

The representative should be empowered to take decisions at the mediation table. Sometimes the representative is given a limited power of decision-making, and needs to check with his superiors to go beyond that. Should the mediator insist that the ultimate decision-maker come? This is left to the mediator's discretion. In some cases it may be necessary to do so, especially when the discussion needs his presence. In other cases, it may be possible to proceed with the mediation, provided that a quick response and decision-making arrangement is in place. Business and locational realities are such that it may not be possible for the ultimate decision-taker to come to the mediation table. It should, however, be ensured that the representative is not merely a to-and-fro communicator or a person with extremely limited authority; he should be able to adequately participate in the discussion and the decision-making process.

There should not be too much disparity in the number of people representing each party. For example, the number of officers and lawyers representing it may be used by one side as a tactic to intimidate the other side.

It may also be necessary to keep some people out of the mediation session. Where numerous persons are affected in a dispute — for instance, many depositors seeking their moneys from a finance company — they will have to select their representatives; else, there will be too many voices at the table, decision-making becomes difficult, and the other side can be intimidated by the presence of so many rivals. Family members often want to be present, especially in matrimonial cases. The safer course is to keep them out, especially in the beginning. Their presence may inhibit the parties from speaking their minds; they may be, in fact, the root of the problem or contributory to it. Once the mediation is underway, it may be necessary to involve them not so much as to arrive at a decision but to carry it out. If, however, a party to the mediation, such as a wife who is severely intimidated by the husband, is not able to effectively speak for herself, the assistance of a family member from the beginning is advisable.

Where minors are involved, care is needed. In law, minors do not have the capacity to take decisions, and the ones taken on their behalf can be repudiated when the minor reaches the age of majority. Where it becomes necessary to deal with a minor's share, it is necessary that the person speaking for the minor is the parent or a guardian appointed by the court to represent the minor. In any event, the mediator must be watchful that the minor's interests are not

neglected or bartered away; if that seems to be the case the option to terminate the mediation should be exercised.

What about lawyers attending the mediation along with the parties?

Mediators should not prevent the appearance of legal counsel. It is better to have a lawyer — even a difficult one — at the table, rather than the party complaining later that it unknowingly gave up its rights in the mediation. Closing the door to the lawyer will just result in him advising the client outside the

mediation room that the process will work to the latter's disadvantage. In many cases, the parties will feel more secure having their legal advisers with them. Indeed, in some cases the mediators may even suggest that parties should bring along legal representation. A lawyer attuned to the mediation process can help in advising his client and focusing on solutions. Conversely, some lawyers can have an obstructive attitude to settlement: their clients may find mediation a difficult business and may have to override or change the lawyer. Even in such cases, it is better to have the lawyer in the room than out of it; the mediator can skillfully direct questions to him, the answers to which show that settlement is indeed a desirable option. While mediators encourage participation by the parties, their lawyers too can play a key role. In some cases the nature of the dispute, and the lack of ability and willingness of the parties to participate will call for a greater role to be played by the lawyers. Sometimes roles are shared: for example, opening statements are made by the parties, who also come in on key decisional matters, while the lawyers present the legal picture and work out the modalities of solutions.

THE STEPS IN THE MEDIATION PROCESS

The Opening Round

Mediator's opening statement explaining the process and the ground rules

The mediator will set the ball rolling with an opening statement. This is of utmost importance. It is often the first information that the parties have of the mediation process, and gives them their first view of their mediator. It sets the tone for the mediation. The mediator needs to take this very seriously; only then will the parties do so. Some new mediators may think that they can skim through this bit and go quickly to the case itself; they will find that they have made

their job so much harder and longer. The mediator's opening statement explains what mediation is all about. It conveys the essence of mediation. It educates the parties about this process. It reassures them that it poses no threat to them; instead it offers them unrivalled opportunity to participate in the mediation and end the dispute with a mutually acceptable solution. It stresses that mediation is voluntary, confidential, that decision-making lies with the parties and that the agreement reached is enforceable by the court.

The mediator will explain that he is not a judge or an arbitrator or an advocate for any party, but is a neutral facilitator. The mediator will make it clear that he is in charge of the process but that the outcome is very much in the domain of the parties to decide; they may also choose to call off the mediation at any time they wish. He will stress on the confidential nature of the separate sessions, and on the fact that nothing said during the mediation can be used in court. Of course, when an agreement of settlement is signed it can be enforced through the legal process.

The mediation procedure and steps in the process can then be explained. This includes the making of opening statements by the parties, joint and separate sessions, establishing facts and identifying issues, assessing interests, becoming realistic about the case and the situation, generating and evaluating options, and working on these to arrive at an agreement. The mediator will emphasise the importance of participation of the disputants.

Ground rules will be spelt out by the mediator. A basic one is courtesy in communication. This does not preclude statements indicating anger, hurt or disappointment. These can be expressed without crossing into the territory of abusive language. It makes little sense to be rude and disrespectful to the other party. As it is said, this poisons the well from which you must drink to get your settlement. The mediator must insist that parties must try to listen to the other without interruption. This is not easy for most of us, and is very difficult for parties in dispute. However, it is important that each party is allowed to put forth its case without impediment, and to extend the same courtesy to the other. While the mediation lasts, the mediator is in charge, and the parties must abide by his decision on the process to be followed.

The mediator may also point out that during the mediation sessions he may probe the parties to draw out their interests, or uncover a hidden agenda, or contradict an overly optimistic

expectation; these are part of the effort to bring the parties to a settlement and should not be misinterpreted as opposition or prejudice on his part. Similarly, there should not be any apprehension about the separate meetings mediators may hold with each party, since these are necessary for frank speaking and moving the process forward, and will be held with both sides.

The mediator should then ask the parties if they have any questions or doubts and must provide suitable clarification.

The aim of the opening statement is to first, ensure that parties fully understand the process and the role of the mediator, and second, to put the parties at ease and build trust and confidence in the mediator.

Check list for opening statement

- Welcome
- Introduction of mediators and parties
- Affirmation that all necessary parties are present
- Verification of authority of representatives
- Confirmation that the agreement to mediate and maintain confidentiality has been signed

Then explain:

- Process of mediation
- Role of the mediator
- Procedure to be followed in the mediation
- Ground rules
- Importance of confidentiality
- Role of parties' lawyers
- Clarify doubts

A model opening statement is provided in the next chapter.

Joint and Separate Sessions

Mediators have joint meetings with all the parties and can have separate meetings with each party. Most mediations start out with a joint meeting. This enables the basic facts to be recounted, the stands of parties to be articulated to each other, and for the contours of the dispute to emerge. Thereafter, as the mediation proceeds, most mediators will sooner or later have separate meetings with the parties.

In the USA, this is known as the "caucus". In the UK, the more conventional term "separate meeting" is used. The mediation progresses with joint and separate sessions which is left to the discretion of the mediator based on his assessment of the needs at the relevant time. The outline below of what happens at joint and separate sessions is not to be taken as cast iron.

Narration of basic facts by the parties

After the mediator has explained the process and the ground rules, he will usually ask each party to state the basic facts of the dispute in brief. This gives the parties the opportunity to explain their case the way they see it; it also makes them listen to the other's version of the dispute. Often, it is at the mediation table that each side first gets to know how the other views the matter and feels about it. It is also useful to allow the expression of these feelings; once they are vented, the discussion can move on to remedial aspects.

This opening round of statements by each of the parties provides the facts, and also gives the mediator some perception about the parties and their positions. Frequently, the facts stated by one side will be rebutted by the other; and vice versa; the mediator will allow this to happen, but make sure that parties don't interrupt each other and that all parties shall have an opportunity to speak. The mediator may himself seek clarification or explanation, avoiding the cross-examination method in favour of the broad open-ended mode of asking questions. Thus, instead of 'Isn't it true that you did not pay the plaintiff on this date?' a less challenging, 'Would it be possible for you to indicate the date of payment to the plaintiff?' is preferable. At this point in the process, the mediator should limit his questions and give room to the parties to vent their feelings and put forth their stand. Parties who have to keep responding to the mediator's questions rather than developing their point of view may feel inhibited or alienated and may not come out with useful information. The purpose of this session is to provide the opportunity of uninterrupted speaking to each party. After the parties' statements, the mediator can summarise and capture the essence of what was said, and do so in neutral terms.

As the facts emerge, the contours and the main elements of the dispute become clearer. The mediator and the parties can then see the specific areas of disagreement that need to be tackled, or, as mediators like to put it positively, the aspects on which agreement must be

reached for the dispute to be resolved. Framing it in the latter manner gives it a constructive edge, focusing less on liability and more on solutions. To ensure that he has understood the matter and to give parties that confidence as well, the mediator can spell out the issues that need to be resolved to end the dispute and check with the parties that this is a correct and comprehensive list.

Gathering relevant information

Rarely do all the relevant facts come out in the first opening statement of the parties. The mediator will have to probe to obtain more facts, to see where there is ambiguity or dispute on facts and how this can be resolved. It is recommended that at this stage separate sessions be held to understand from each party the background of the dispute, whether previous settlement discussions were held and their result, the relationship between the parties, financial and legal issues etc. All this information is relevant for the mediator to understand the case better, identify the real issues and see where lines of solution can emerge.

The mediator may continue with open-ended questions which better elicit information from parties and must refrain from interrupting unless absolutely necessary. It is important for the mediator to be prepared with the right questions to keep the parties on track and gather the relevant information. Where facts are in doubt, focused questions can be asked for clarification or elucidation.

Exploring interests, settlement options, etc.

Once the mediator has gathered all the relevant information in separate sessions, he will be better placed to draw from the parties their motives, interests and needs.

The long-term interests of each party have to be elicited, as also its real needs. Its fears and concerns must be revealed to the mediator, as also its willingness and ability to enter into settlement. These discussions require a party to travel well beneath the surface of dispute and may even make the party itself realise and assess, for the first time, what its real needs and interests are and why it seeks what it does. It may also cause the party to honestly and clearly examine its motives. Therefore, these discussions can only be done in separate sessions.

The breakthroughs and the movement towards settlement invariably happen at the separate sessions that the mediator holds with each party. These meetings enable the mediator to be informed of the interests of each party, as also their concerns, which they may be reluctant to state in the presence of the other party.

It also gives the mediator latitude to explore the possibilities of settlement, to know what concessions can be made, and what aids or blocks to settlement exist. Frequently, a mediator may have to point out that a party's assessment of its position in law and what a court proceeding will obtain for it is flawed or highly improbable. This is best done during a separate meeting; it will signal the end of the mediation if this assessment is given in the presence of the other side. Often the tension, if not hostility, between the parties is so strong that they simply will not make any positive move in joint sessions to identify interests or options for settlement. Separate meetings thus break the ice and help the process move forward.

It is in these sessions that the mediator can help parties to distinguish wants from needs, rational responses from emotional ones, future from the past, patent motives from latent ones, and realistic expectations from unrealistic hopes. Parties are assisted by the mediator to see the psychological, substantive and procedural aspects of the dispute.

Separate sessions are especially necessary for resolving impasse, when parties get stuck and movement does not take place. It is then that the key mediator strategies of resolving impasse are to be used. These will include making parties confront the legal inadequacies and difficulties with their case and the lack of appealing alternatives if no agreement is reached in mediation. It is in these sessions that the mediator can float ideas and options for parties to consider.

Making Separate Sessions Effective

Some points need to be borne in mind to make separate sessions more effective. In the opening statement itself it should be emphasised that holding separate sessions is a normal and accepted part of mediation. If a separate session is being held with one party, it should also be held with the other to demonstrate equal treatment. For the same reason the mediator should avoid disparity between the time spent with one party and that spent with the other. While having a separate session with one party, the mediator can assign some work to the other, such as listing out long-term interests, benefits of an

agreement, options for settlement, etc. Having them write it down concentrates their minds. It is not advisable to have separate sessions for too long a time; the other party may deplete its energies through boredom or speculate why so much time is being spent with its adversary.

At the initial stage it is preferable that the mediator not divulge any offer made by the other side; instead it is better to first get opening offers from both sides and to work with these. Another caution is that if an offer appears so unreasonable that the mere communication of it may cause the end of the mediation, the mediator will have to work with that party to examine the basis of the offer and how it might be brought to a more acceptable range.

The timing of the separate session should be chosen carefully. Generally, it can take place when it is necessary to probe into the crucial facts and underlying needs which will not be stated in front of the other party. It is also indicated when impasse takes place. That said, the mediator should avoid using separate sessions as a crutch.

At the end of every separate session the mediator can summarise the important points that have emerged. He should clarify what information the party would like to keep confidential. That request must be honoured. If the information to be withheld is such that the mediation cannot proceed without it being revealed, the mediator should explain this and must ask for permission to reveal it in an appropriate way. If the refusal is maintained, it may be necessary to terminate the mediation.

The focus in the separate sessions should first be on the needs, feelings and interests of the party to whom the mediator is talking, rather than that of the other. Only after the party has come out with its view should the mediator bring the other party into focus. In the separate sessions the mediator should go with the agenda of the party and not with the mediator's own agenda.

Subject to confidentiality, where facts mentioned by one party in a separate session are crucial or relevant, the mediator should verify the same with the other party either in a separate session or a joint one.

Negative or derogatory comments about the other party should not be relayed to it. Rephrasing statements will make a party see the issue more objectively. To give the parties some confidence, an issue or issues on which they are likely to be in agreement can be taken up first.

In the initial part of the separate sessions, the focus is on obtaining from parties the background and surrounding information about the dispute and identifying the issues. The parties may also have some offers for settlement, though at this stage it is unlikely that they will want to give much away. It is during the second individual session and sometimes even during the later portion of the first individual session that the gap between the offers starts to narrow.

One format for conducting mediations as taught and followed by the ADR Group UK involves commencing with a joint session where each party is given the opportunity to present their perspective on the facts and issues in dispute. This is followed by three sets of separate sessions with the parties. In the first set of separate sessions, called the 'what' sessions, the mediator further explores more facts about the dispute, the relationship between the parties, etc. The second set of separate sessions, the 'why' sessions, are focused on uncovering the underlying reasons for the dispute and the interests and needs of the parties. The last set of sessions, which may involve a back and forth between the mediating parties, is called the 'how' session. In these sessions, the mediator urges the parties towards solutions that would help them each achieve their interests and needs. It is the mediator's role to keep the separate sessions on track by asking the right questions that aim at first, getting the important information, then putting the parties in the right frame of mind with a focus on what is really important to them, and lastly, to develop solutions that would satisfy both parties' interests.

Conflicting views on separate session

It must be stated that there is an area of difference amongst mediators about the holding of separate sessions. Some practitioners of mediation are opposed to them, as they feel this gives the mediator excessive leverage and power, since it is only he who knows what transpires at these meetings. Another reason is that parties may be uncomfortable with the prospect of the mediator, the neutral, spending much time in conversation with the other party. Other mediators, who perhaps constitute a majority, are avid proponents of the separate meeting strategy, and hold that it requires meetings in private to effect the breakthroughs that come about when parties go beyond their expressed stands, look at underlying interests and fears, develop options and voice possible steps for solution. They feel that separate meetings well handled, are almost invaluable in directing parties to change the focus from contention to solution. To hold or

not to hold such separate sessions is the choice of the mediator, which may be dictated by his assessment of the case and the style that comes naturally to him. It would be good, however, to be aware of the limitations of the joint meeting and the possible problems with separate meetings, and to be flexible enough to adopt the mode which seems most appropriate at the time.

Resolving Disagreements over Facts

Parties in conflict usually dispute every fact every inch of the way, but once solution-oriented issues have been framed, many facts become redundant. Take the case of the Occupier and the Institution in Chapter 3. Once the focus centered on whether an amicable sharing of the land value could be achieved, a huge mass of facts relating to the original landholding and legality of the settlement processes, etc., were neatly kept aside. In the case of the businessmen neighbours (in Chapter 3), once the focus was on whether a suitable limitation on building and proper use of the land could be arrived at, bones of contention about previous meetings and agreements could be ignored, to be revisited only if an amicable solution was not forthcoming.⁴

Some facts will need to be established for resolution. Different methods are available for this. As already noted, an expert's view may be sought, for example, on a technical or scientific matter. This could be specified as non-binding and advisory. Sometimes independent methods or standards are available to provide valational figures such as market prices for land, interest or exchange rates. Appraisers frequently answer such questions. On occasions the mediation may proceed on the basis of assumptions, e.g., 'Let us assume that the property is worth so much,' and later on ascertain the real value if necessary.

Facilitative and Evaluative Mediation

An issue of fundamental importance needs to be dealt with here, and that is whether the mediator adopts the facilitative or evaluative mode of mediation. This choice will determine the manner in which the process is conducted, the role of the mediator and his interaction with the parties. The facilitative and evaluative are the main schools of

⁴ For a detailed analysis of these illustrations, also see Chapter 1.

mediation.⁵ The primary difference is the degree of intervention by the neutral.

The facilitative mediator plays the limited role of being the communicator between the parties. He will assist the parties in identifying relevant facts and issues; he will focus their attention from positions to their interests, and try to get them to gain clarity on their offers. Other than these he plays the limited role of the communicator between the parties. The mediator will take their proposals back and forth, transmit clarifications and changes, and may engage in examining proposals. It is the parties and their lawyers who will be doing the work of evaluating their case. Suggestions and options for settlement will have to come from the parties themselves. In this mode, the mediator steps back and the parties play a greater role in trying to resolve their dispute.

The evaluative school of mediation envisages a significantly greater role for the mediator. In addition to doing the work of facilitation as mentioned above, he will engage in reality testing, bringing home to the parties the problems with their case and their situation. He will draw attention to the problems that persist or await them if they do not settle. He might even express an opinion on the merits of the issues in dispute, if he thinks that will move them to settlement. He will get parties started on creating suggestions and ideas for resolution and can also on his own come up with some. He will engage quite actively with them on examining proposals, drawing out their fears and concerns and exploring ways and means of handling these. He can give them his assessment of the legal position, after entering the caveat that he is not a judge or arbitrator. However, he should avoid giving legal advice as to what a party should or should not do.

It is said that facilitative mediation is more interest based while evaluative mediation is more rights based. This is not accurate. While facilitative mediation does not get into examining legal rights of the parties, it is hardly the case that the evaluative mediator does not explore the interests of the parties, in addition to evaluating the merits of the case and assessing their legal rights. A good evaluative mediator will be doing the entire gamut - making parties look at their interests

⁵ Transformative mediation is the third school. The objective of this school is to transform the relationship between the parties. The proponents here hold that resolution of the conflict in hand will follow from the transformation of the relationship. The other schools focus on the resolution of the immediate conflict, with an improvement in the relationship being an agreeable, but not a necessary consequence.

and the realities of the situation, as well as assessing how strong their legal footing is, and also working actively with them on creating and refining suggestions for settlement.

One key area of difference between the two schools is in the making of suggestions to resolve the dispute. The facilitator will shy away; the evaluator will willingly enter the arena. However, even for the latter, there is an important distinction to maintain, a line not to be crossed. The mediator, even an evaluative one, must not decide, coerce or push parties to accept the settlement he has formulated. He can brainstorm with the parties, ask them to consider different ideas and approaches, and make suggestions for their consideration.

The best mediators are ones who can be facilitative and evaluative, with the capacity to use either mode, and the judgment to choose appropriately.

In the debate between the evaluative and facilitative schools, let us understand that this is not a one or the other situation. There are occasions when one is called for, and times when the other is required. Thus mediators can employ both methods. One rule of thumb (and no more than that) is that facilitative mediation is usefully employed in the beginning stages of mediation. Enable the parties to make their own movement; they would have come to the table with some concessions so let them make these on their own. This will also indicate the lines on which they are thinking. Your mediator strategies include a range of techniques to persuade and coax parties to move forward. Employing these strategies too early will exhaust your repertoire. So hold back for the time being. When they are not moving ahead on their own, then employ your tools of reality-testing of their case and situation, your ability to make them change their perspective thereby viewing their dispute in a different light and actively engage in devising and creating options for settlement and your other interventionist skills as a mediator to resolve impasse. When the mediation progresses and it is necessary to hone in on to a specific idea or ideas, the mediator can focus attention of parties, and engage with them in fuller examination and seeing where the blocks lie.

Positivist mediators were enthused by a study conducted by a Task Force on Improving Mediation Quality set up by the American Bar Association (ABA).⁶ Most users responded saying that they

⁶ Just Resolutions E newsletter, ABA Section of Dispute Resolution, February 2007.

expected more from their mediators than expertise, fairness and persistence. They wanted mediators to do more than shuttle between parties to get a settlement figure. They thought that the mediator should use a creative and intuitive approach, and actively work towards reaching settlement. Many users wanted vigorous reality testing and suggestion of ideas for resolution. Many also wanted mediators to prepare thoroughly by talking with parties/counsel in advance of the mediation about substantive matters relating to key interests, the party's backgrounds, the real issues and what might stand in the way of settling.

It helps to look at the mediation process as a spectrum ranging from the facilitative to evaluative processes. Flexibility of approach and adoption is necessary, rather than rigid classification. That said, it is the author's view that we are witnessing a shift towards the evaluative mode. One reason for this is the growth of court-annexed mediation in which there is a discernible focus on rights and the involvement of lawyers and former judges as mediators. It does also appear that facilitative mediators are now acknowledging the need to be more involved with the parties in the process of overcoming their differences and reaching solutions. In the Asian context it is seen that the evaluative practice is called for, especially since the mediator is looked up to as an authority figure, guide and controller of the process, leading the way forward.

Moving the Parties away from Entrenched Positions to Interests

As mentioned above, in the separate sessions with the parties the mediator explores the parties' long-term interests and needs.⁷ This is a key part of the mediation process. The parties come locked into their positions, the stands which they take on the issue. Sometimes these are at different points on an axis: for example, workers demanding a bonus of 20 per cent and management willing to give only 8.33 per cent. In these cases the entitlement is not in issue, the quantum is. Other cases may see parties fighting for the same thing — custody of a child, control of a company. In some cases there may be jointly owned assets which have to be allocated among the owners, such as a partition of property or an inheritance. Virtually every case sees contrary stands being taken and held. Discussions which centre around these positions usually result in reiteration, justification and

⁷ Refer to Chapter 4 for a discussion on positions, interest, and needs.

further entrenchment. A key mediation strategy and skill lies in moving the parties from positions to interests.

Interests are long-standing in perspective; and when attention is switched to them, a few important things happen. The parties discover that their long-term interests do not collide, as their positions often do; they realise that continuous disputing works against such interests; and they frequently discover that each of them has some needs which are more important to one than the other. Two illustrations: productivity, profits and good remuneration are long-term interests which both employees and management share; for a divorcing couple with children, the long-standing concerns are emotional and financial stability for the children, individual needs for security, and resolution of the conflict in order to move on in life. The shift to a longer-vision mode opens parties to the need for, and desirability of, a solution. Without such attention on interests, the discussion would remain stuck in predictable models of blame and accusations, with either no agreement or an unsatisfactory one.

Typical questions to uncover interests

- What do you want out of this mediation?
- What do you really want?
- Why do you want it? (The question "why" is excellent to reveal real interests.)
- What will you do with it? Can you do without it?
- What is the case of the other person? (Stating the other's case is difficult, but helps to at least partially understand it).
- What are the relationships between you? (For example, college, profession, personal, etc.)
- What are your plans for the future?
- How were things before all this started?
- What would be good for a future relationship?
- Is it important that this dispute be resolved? Why?
- What do you both agree on? Let us build on that.

Offers and Proposals

Once parties recognize their interests the next step is to seek offers from them that would help them realize their interests. In a joint session or separate sessions, the mediator should ask parties to think

of offers for settlement that they would be willing to make. This could also be something that the mediator leaves a party to think about while meeting the other party for a separate session. These offers could set the ball rolling towards settlement. While getting these offers, the mediator can start the process of getting the offer to be more reasonable.

Some typical questions for offers

- What can you suggest as a solution?
- What offer would you be willing to make to resolve this situation?
- Could you explain the basis of your offer?
- How far would this take us to settlement?
- How do you think the other side will react to your offer? How would you have reacted?
- Can you think of something/a solution which will be acceptable to you and the other side? Remember that it takes both of you to make an agreement.

The first round of offers is likely to see parties quite apart. This in itself can be a sobering factor, as the parties then have to factor in the demands and stand of the other side. This may lead to them giving up more, since usually people start out on the more extreme end. The process of negotiation continues, aided by the mediator, who clarifies and communicates, and helps parties to examine, modify and refine their offers and proposals.

When the initial exchange of offers does not move the parties towards settlement, it is necessary to widen the frame by engaging the parties in developing options for settlement, which can be creative and multiple.

Generating Options

Devising options for settlement represents a significant part of mediation.⁹ This is where it differs most significantly from contentious litigation. Mediators encourage the parties to come up with their own options for settlement since the parties know best their desired outcome, their priorities and what and how much they are willing to forego. The key strategy is to give them the freedom to

create options and bring them up for discussion; in other words, to brainstorm. Parties are told that they can, without reservation, come out with ideas for settlement, and that they cannot be held to or be bound by their suggestions by just making them. The object is to get all possible options out on the table.

With this one move, the focus of effort has changed from the battleground of conflict to exploring the contours of a settlement acceptable to both parties. Attacking the problem replaces attacking each other. All the ideas in the examples in Chapter 3 which led to positive solutions came as a result of creating room for the parties to devise options for settlement.

One instance—deserves to be quoted. In the Company and Converter case,⁹ the idea that finally clicked came from a junior officer of the Company. In the mediation session where ideas were asked for, he raised his hand, and quickly lowered it when he was spotted by the mediator. He did this thrice. Obviously he had an idea but was also apprehensive that it would be shot down. He was encouraged to speak his mind by the mediator stating this was the best way for creative ideas to emerge and that the process was risk free. Reassured, he stepped forward with his suggestion: 'If we continue to give conversion orders to this converter, we could recover our dues.' The instant reaction from his colleagues was: 'Never heard of once bitten, twice shy?' Hard glances from superiors were directed his way. (Not so risk free, this mediation thing, he must have thought.) However, the idea was put on the table, and taken up when other options were rejected. An unthinkable proposition became a wonderfully creative and successful solution, saving the Company money and loss of reputation. It wouldn't have emerged without the freedom to create options.

Another example is a specific performance suit filed by a buyer against the seller of land. This can lead to a sale on a revised valuation or the buyer accepting compensation to give up his claim, or open up options for joint development, sharing of land, part or deferred sale and so on.

Should mediators suggest options for settlement? Yes, they can, and especially in the Asian context, they will be expected to. It is permissible to indicate possibilities. Parties may be nudged to move towards areas and lines of thinking that seem productive of a solution.

⁹ Refer to Chapter 9 for different creative strategies to generate solutions.

⁹ For a detailed analysis of the illustration, see Chapter 3.

However, mediators must maintain the important distinction between making a suggestion, and telling the parties what to do.

Parties should be encouraged to brainstorm options, to just put all possible ideas on the table without filtering them for chances of success. Mediators can themselves throw up options. It is better if all options are first put on the table rather than examining them one at a time. In a separate session the mediator can tell a party that if it is unwilling to show that it is putting forth an option, the mediator can suggest the option as his idea. Again, in a separate session, the mediator can tell a party that an option put forth by it will not be accepted by the other side.

Options need to be tested in relation to the interests of parties. Criteria should be developed for assessing options: meeting the interests of all the parties, acceptability, workability, durability, etc. It is also necessary to consider the need for saving face. Options that enlarge the pie are especially valuable. This can enable both parties to be in a win-win situation and be significantly better off than they were before the dispute started. An example is a dispute over a patent which leads to a profitable joint venture.

The concept of trade-offs is at the heart of the mediation process. It essentially calls for identifying aspects and components in the dispute and in the possible solution package that are more important to one party than the other. This enables a solution which can secure to each party what it desires the most, yielding to the other party on what is not so important or is less desirable. The classic mediation example to illustrate this is the case of two parties fighting over the single egg of a rare bird,¹⁰ till they realise that one needs the yolk, and the other the shell, and that they can now cooperate to secure and share the egg, each taking what is most important to it. Real-life situations are nowhere as easy of admitting such 100 per cent win-win solutions, but the point is, as the successes of mediation show, that given communication and the opportunity to explore options, possible lines of settlement do start to appear and the parties can identify differential needs and priorities. Working on these produces settlement agreements that substantially satisfy all parties to the dispute. Thus, in the

¹⁰ For a detailed analysis of the illustration, see Chapter 5.

professional partners' case,¹¹ one was willing to yield several pending contracts because he had some new lucrative ones coming to him which depended on the dispute being resolved. The Hotel¹² did the trade-off of agreeing to forego a portion of its claim for the larger interest of preserving a profitable commercial relationship and future business. In a dispute over property, it can turn out that one is more interesting in establishing ownership, while the other values the right to use. Mediators can develop package proposals that contain such barter and satisfy the important interests of each party. More movement can be generated once attention is focused on such a package deal, rather than on disparate issues. Discussions on trade-offs can proceed on a contingent basis: 'If you give up here, you will receive that.'

Some suggestions for options

- Think of something — an action, an outcome, etc. — which is good for you, and the other party.
- How can we move forward in this matter?
- What do you think can be done in this situation? What can you do?
- Just put options / ideas / suggestions for resolution on the table.
- Do you think this — assessment, offer, course — is realistic?
- Would you move forward if you got an offer like this?
- Is this really your bottom line?
- What is your proposal?
- What range will you accept?
- If you could imagine a solution, what would it be?
- Will you accept this package deal?
- Put yourself in the shoes of the other — Can you picture yourself as the other party? Why do you think the other party wants this? What would you do if you were the other party? Can you think of a reason why the other party may not accept your proposal? How can you modify your proposal to secure acceptance?

¹¹ For a detailed analysis of the illustration, see Chapter 3.

¹² For a detailed analysis of the illustration, see Chapter 3.

Options must be worked on, discussed with the respective parties, evaluated against the criteria for agreement, refined and fine-tuned till the stage of acceptability is reached. This can be hard work. The parties will balk, will refuse to consider and will be obdurate. Mediators can expect to encounter blocks, resistance, stubbornness—some valid, others understandable, and some sheer pig-headed. The mediator's skill and powers of persuasion will be needed to move parties beyond these obstruction points by making changes, proposing alternative formulations, building on areas of agreement, and introducing a fresh perspective. Once the process is appreciated and the mediator trusted, the parties respond; they communicate better, become more constructive, voice ideas and work at possible lines of solutions. Reaching this stage, the parties become more responsive as they see the positives; their initial skepticism gives way to interest and then to actually seeing the possibility of an agreement—the light at the end of the tunnel.

Sometimes parties may be too far away in their offers and/or unable to devise or develop options for settlement which can yield an agreement. They will refuse to move from their stands. This is called an impasse. There are a range of mediator strategies to overcome impasse. These are discussed in Chapter 9. Some key strategies in the armoury of a mediator are legal realism, lack of alternatives to settlements, going back to basics, identifying the block, stressing relationships and other problem solving approaches.

Crossing an impasse enables parties to get back on the track of devising options and making proposals. The mediator will continue to be engaged with them in this. Sometimes a stage is reached where the parties themselves engage in discussion with each other. This is a positive aspect since it shows the extent to which the communication between the parties has improved. So the process of discussion, considering offers, revising and refining proposals, and resolving impasse continues till parties reach agreement.

The mediator must beware, though, when he thinks the end is near. This is when he may encounter surprisingly stiff resistance from the parties. The last bit is sometimes more difficult to cross than the big stretches in between. Mediators have seen parties give up millions in claims, and yet get stuck on the last few thousands. Giving up a dispute is sometimes not an easy process; for some people it has

become a part of their lives. Resistance at the last post should, therefore, be expected.

The Final Steps

Then comes the task of putting the agreement into writing. The parties and their lawyers can draft the agreement; usually the mediator would be asked to assist. It is advisable to keep the language simple, straightforward and crisp.¹³ The broad outlines of an agreement can be developed and then the details worked in. Tax implications should be considered. The parties should sign the agreement. Cases vary and each will have its own terms of settlement. Here is a generalised list of what may figure in a settlement agreement.

The essentials of a settlement agreement

- Nature of dispute, briefly mentioned
- The coming to mediation, appointment of mediator, dates of sessions
- That settlement has taken place, in whole or part
- Performance—who is to do what, and when (be specific)
- Payment of interest
- Other terms and conditions
- Compliance and consequences of non-compliance
- Penalty for delay
- Withdrawal of legal proceedings
- Monitoring and review (if needed)

Having looked at the theory of how to conduct a mediation, let us now visit in the next chapter one actually being conducted.

¹³ Elements of an agreement are spelt out in Chapter 11 and Annexure 3.

Legality of Referral of Criminal Compoundable Cases to Mediation (para 59-62)

Dayawati v. Yogesh Kumar Gosain

243 (2017) Delhi Law Times 117 (DB), decided on October 17, 2017

GITA MITTAL, ACTING CHIEF JUSTICE

1. The legal permissibility of referring a complaint cases under Section 138 of the NI Act for amicable settlement through mediation; procedure to be followed upon settlement and the legal implications of breach of the mediation settlement is the subject matter of this judgment.

2. The brief Facts:

Before dealing with the questions raised before us, it is necessary to briefly note some essential facts of the case. The appellant Smt. Dayawati (“*complainant*” hereafter) filed a complaint under Section 138 of the NI Act, complaining that the respondent Shri Yogesh Kumar Gosain herein (“*respondent*” hereafter) had a liability of Rs.55,99,600/- towards her as on 7th April, 2013 as recorded in a regular ledger account for supply of fire-fighting goods and equipment to the respondent on different dates and different quantities. In part discharge of this liability, the respondent was stated to have issued two account payee cheques in favour of the complainants of Rs.11,00,000/- (Cheque No.365406/- dated 1st December, 2014) and Rs.16,00,000/- (Cheque No.563707 dated 28th November, 2014). Unfortunately, these two cheques were dishonoured by the respondent’s bank on presentation on account of “*insufficiency of funds*”.

7. As a result, the complainant was compelled to serve a legal notice of demand on the respondent which, when went unheeded, led to the filing of two complaint cases under Section 138 of the NI Act before the Patiala House Courts, New Delhi being CC Nos.89/1/15 and 266/1/15. In these proceedings, both parties had expressed the intention to amicably settle their disputes. Consequently, by a common order dated 1st April, 2015 recorded in both the complaint cases, the matter was referred for mediation to the Delhi High Court Mediation and Conciliation Centre.

8. We extract hereunder the operative part of the order dated 1st April, 2015 which reads as follows :

“... Ld. Counsel for accused submits that accused is willing to explore the possibilities of compromise. Ld. Counsel for complainant is also interested (sic) in compromise talk. Let the matter be referred to Mediation Cell, High Court Delhi, Delhi. Parties are directed to appear before the Mediation Cell, Hon’ble High Court, Delhi on 15.04.2015 at 2:30 p.m.”

9. It appears that after negotiations at the Delhi High Court Mediation and Conciliation Centre, the parties settled their disputes under a common settlement agreement dated 14th May, 2015 under which the accused agreed to pay a total sum of Rs.55,54,600/- to the complainant as full and final settlement amount in installments with regard to which a mutually agreed payment schedule was drawn up. It was undertaken that the complainant would withdraw the complaint cases after receipt of the entire amount. In the agreement drawn up, the parties agreed to comply with the terms of the settlement which was signed by both the parties along with their respective counsels.

10. This settlement agreement was placed before the court on 1st June, 2015 when the following order was recorded:

“File received back from the Mediation Centre with report of settlement. Settlement agreement dated 14.05.2015 gone through. At joint request, put up for compliance of abovesaid settlement agreement and for making of first installment on 30.06.2015”

11. Unfortunately, the accused/respondent herein failed to comply with the terms of the settlement. Though vested with the obligation thereunder to pay a sum of Rs.11,00,000/- as the first installment on 25th June, 2015, he paid only a sum of Rs.5,00,000/- to the complainant through RTGS without giving any justification. On the 30th June of 2015, the Metropolitan Magistrate consequently recorded thus:

“... Ld. Counsel for complainant submits that the accused has not made the payment of first installment in terms of mediation settlement dated 14.05.2015. Ld. Counsel for complainant further submits that accused was to pay first installment of Rs.11,00,000/- on or before the 25.06.2015 however he has paid only Rs.5,00,000/- through RTGS. No reasonable explanation for the non-payment of full amount of first installment is given by the accused. Further, no assurance is given by the accused for making of the due installments within the stipulated time.

Considering the facts of the case and submissions on behalf of both the parties, it is apparent that the accused is not willing to comply with the terms and conditions of the mediation settlement. Hence, mediation settlement failed.

Let the matter be proceeded on merit, put up on 14.08.2015”

12. Thereafter, two more opportunities were given by the Metropolitan Magistrate on 14th August, 2015 and 21st August, 2015 to the accused to comply with the settlement. Finally, in view of the continued non-compliance, the matter was listed for framing of notice on 28th September, 2015 and trial on merits.

13. In the meantime, the Negotiable Instruments (Amendment) Ordinance, 2015, received the assent of the President of India on the 26th of December, 2016. On account of promulgation of the ordinance, Section 142 of the Negotiable Instruments Act, 1881 stood amended with regard to jurisdiction of offences under Section 138 of the enactment and therefore these cases stood transferred from Patiala House Courts to Tis Hazari Courts at which stage the matter came to be placed before the Id. referral judge.

14. At this stage, an application dated 16th November, 2015 was filed by the complainant seeking enforcement of the settlement agreement dated 14th May, 2015 placing reliance on the judicial precedents reported at **2013 SCC OnLine Del 124 Hardeep Bajaj v. ICICI**; **2015 SCC OnLine Del 7309 Manoj Chandak v. M/s Tour Lovers Tourism (India) Pvt Ltd** and **2015 SCC OnLine Del 9334 M/s Arun International v. State of Delhi**. The complainant urged that the settlement agreement was arrived at after long negotiations and meetings; that it was never repudiated by the accused nor challenged on grounds of it being vitiated for lack of free consent or any other ground and lastly, that the accused having paid part of the first agreed installment, has also acted upon the mediation settlement and cannot be allowed to wriggle free of his obligation under the same.

15. The respondent, on the other hand, argued that the settlement agreement was not binding contending primarily, for the first time, that the settlement amount was exorbitant and onerous pointing out that the complaints were filed with regard to two cheques which were for a cumulative amount of Rs.27,00,000/- while the settlement amount was of Rs.55,54,600/- and this by itself was evidence that the agreement was unfair, arbitrary and not binding on the accused. It was further urged that on receipt of the case from the mediation cell, the statement of the parties ought to have been recorded before the court whereby the parties would have adopted the mediation settlement agreement so that the same bore the *imprimatur* of the court. As per the respondent, absence of such statement in the case denuded the settlement agreement of its binding nature and efficacy.

16. The Id. Metropolitan Magistrate was of the view that these questions had arisen, not just in this case, but a plethora of other cases as well. Consequently, the order dated 13th of January 2016 was passed making the aforesaid reference under Section 395 of the Cr.P.C. to this court. At the same time, so far as the complaints under Section 138 of the NI Act are concerned, the Id. MM additionally directed thus:

“In view of the question of law that has arisen in the present case, the decision on which is necessary for further proceedings and a proper adjudication of the present case – a reference has been made u/s 395 of the CrPC for consideration and guidance of the Hon’ble High Court of Delhi.

The office attached to this court is directed to send this Reference Order to the Ld. Registrar General, Hon’ble High Court of Delhi in appropriate manner and through proper channel.

List the matter now on 06.06.2016 awaiting the outcome of the reference and clarity on the legal issue.”

VIII. Dispute resolution encouraged in several cases by the Supreme Court in non-compoundable cases as well

59. We note that there have been several instances when the Supreme Court has approved exercise of inherent powers under Section 482 of the Cr.P.C. by the High Court for quashing criminal cases on account of compromise/settlement even though they are not included in the list of compoundable cases under Section 320 of the Cr.P.C. ***In (2012) 10 SCC 303, Gian Singh v. State of Punjab***, it was held that this was in exercise of statutory power of the High Court under Section 482 of the Cr.P.C. The relevant extract of the judgment is reproduced as under:

“61. ... But the criminal cases having overwhelmingly and predominately civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing

the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.”

60. In a recent pronouncement dated 4th October, 2017, reported at **2017 SCC OnLine SC 1189 Parbatbhai Aahir @ Parbatbhai Bhimsinhabhai Karmur and Ors v. State of Gujarat and Anr** a three-Judge bench of the Supreme Court speaking through D.Y. Chandrachud, J. cited with approval, inter alia, the judgment in **Gian Singh** reiterating that in exercise of its inherent jurisdiction under Section 482 of the Cr.P.C, the High Court is empowered to quash FIRs/Criminal Proceedings emanating from non-compoundable offences if the ends of justice and the facts of the case, so warrant. While, so approving the Supreme Court, laid down the exposition of the law in the form of exhaustive guidelines which are extracted thus:

‘(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is noncompoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) *The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;*

(vi) *In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;*

(vii) *As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;*

(viii) *Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;*

(ix) *In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and*

(x) *There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.'*

61. The judicial precedent in (2013) 5 SCC 226, **K. Srinivas Rao v. D.A. Deepa** is in the context of a complaint filed by the respondent wife under Section 498A of the Indian Penal Code, against the appellant husband and his family members, the offence under Section 498A of the IPC being non-compoundable. Noting that mediation, as a method of alternative dispute redressal had got legal recognition, observations regarding settlements of matrimonial disputes were made in paras 39 and 46 by the Supreme Court to the courts dealing with matrimonial matters which read thus :

“39. Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted out. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10% to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore, feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres.....

xxx

xxx

xxx

44. We, therefore, feel that though offence punishable under Section 498-A IPC is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. This is, obviously, not to dilute the rigour, efficacy and purport of Section 498-A IPC, but to locate cases where the matrimonial dispute can be nipped in bud in an equitable manner. The Judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law. During mediation, the parties can either decide to part company on mutually agreed terms or they may decide to patch up and stay together. In either case for the settlement to come through, the complaint will have to be quashed. In that event, they can approach the High Court and get the complaint quashed. If, however, they choose not to settle, they can proceed with the complaint. In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest. Obviously, the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and

genuine. Such a course, in our opinion, will be beneficial to those who genuinely want to accord a quietus to their matrimonial disputes.

xxx

xxx

xxx

46. We, therefore, issue directions, which the courts dealing with the matrimonial matters shall follow.

Xxx

xxx

xxx

46.2. The criminal courts dealing with the complaint under Section 498-A IPC should, at any stage and particularly, before they take up the complaint for hearing, refer the parties to mediation centre if they feel that there exist elements of settlement and both the parties are willing. However, they should take care to see that in this exercise, rigour, purport and efficacy of Section 498-A IPC is not diluted. Needless to say that the discretion to grant or not to grant bail is not in any way curtailed by this direction. It will be for the court concerned to work out the modalities taking into consideration the facts of each case.

46.3. All mediation centres shall set up pre-litigation desks/clinics; give them wide publicity and make efforts to settle matrimonial disputes at pre-litigation stage.”

62. Therefore, the Supreme Court has recognized the permissibility of the High Court’s quashing the criminal prosecutions in exercise of their inherent jurisdiction under Section 482 of the Cr.P.C. on a consideration of the subject matter of the cases. The Supreme Court has accepted compromises in non-compoundable offences upon evaluation of the genuineness, fairness, equity and interests of justice in continuing with the criminal proceedings relating to noncompoundable offences, after settlement of the entire dispute especially in offences arising from “*commercial, financial, civil, partnership*” or such like transactions or relating to matrimonial or family disputes which are private in nature.

**United Nations Convention on International Settlement Agreements
Resulting from Mediation, 2018
(Singapore Convention on Mediation)**

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute (“settlement agreement”) which, at the time of its conclusion, is international in that:

- (a) At least two parties to the settlement agreement have their places of business in different States; or
- (b) The State in which the parties to the settlement agreement have their places of business is different from either:
 - (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or
 - (ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

- (a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;
- (b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

- (a) Settlement agreements:
 - (i) That have been approved by a court or concluded in the course of proceedings before a court; and
 - (ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

- (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
- (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

- (a) A party to the settlement agreement was under some incapacity;
- (b) The settlement agreement sought to be relied upon:
 - (i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;
 - (ii) Is not binding, or is not final, according to its terms; or
 - (iii) Has been subsequently modified;
- (c) The obligations in the settlement agreement:
 - (i) Have been performed; or
 - (ii) Are not clear or comprehensible;
- (d) Granting relief would be contrary to the terms of the settlement agreement;
- (e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or
- (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

- (a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:
 - (a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;
 - (b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.
2. No reservations are permitted except those expressly authorized in this article.
3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.
4. Reservations and their confirmations shall be deposited with the depositary.
5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatories.
3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Alternative Dispute Resolution, including Arbitration, Mediation and Conciliation

All India Bar Examination Preparatory Materials
By Dr. Aman Hingorani

Introduction

Article 39A of the Constitution directs the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and in particular, to provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The Supreme Court has recognized the “right to speedy trial” as being implicit in Article 21 of the Constitution. (*Hussainara Khatoon v State of Bihar*, AIR 1979 SC 1360).

To give effect to the said mandate, Parliament has recognized various alternative dispute resolution (**ADR**) mechanisms like arbitration, conciliation, mediation and Lok Adalats to strengthen the judicial system.

Section 89 of the Code of Civil Procedure, 1908 (**the Code**) expressly provides for settlement of disputes through ADR.

Section 89 (1) of the Code provides that where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation.

Section 89 (2) of the Code provides that where a dispute has been so referred

- for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (**the 1996 Act**) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.
- to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of Section 20 (1) of the Legal Services Authorities Act 1987 (**the 1987 Act**) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat.
- for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all other provisions of the 1987 Act shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act.
- for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Order X Rule 1 A of the Code further provides that after recording the admissions and denial, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as may be opted by the parties. Order X Rule 1B of the Code provides for the fixing of the date of appearance before the conciliatory forum or authority, while Order X Rule 1C contemplates the referral of the matter back to the Court consequent to the failure of efforts of conciliation.

The Code contemplates recourse to ADR in several other circumstances. Order XXXII-A, which pertains to suits relating to matters concerning the family, imposes a duty on the Court to assist the parties, where it is possible to do so consistently with the nature and circumstances of the case, in arriving at a settlement in respect of their dispute and empowers it to secure the assistance of a welfare expert for such purpose. Similarly, Order XXVII Rule 5 (B) mandates that in every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be the duty of the Court to make, in the first instance, every endeavour, where it is possible to do so consistently with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit.

Model Civil Procedure Alternative Dispute Resolution Rules

The 1996 Act and the 1987 Act do not contemplate a situation where the Court asks the parties to choose one of the ADR mechanism, namely, arbitration, conciliation or through Lok Adalat. These Acts, thus, are applicable only from the stage after reference is made under Section 89 of the Code. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

In view of right to speedy trial being implicit in Article 21 of the Constitution and in order to provide fair, speedy and inexpensive justice to the litigating public, the Supreme Court has recommended the High Courts to adopt, with or without modification, the model Civil Procedure Alternative Dispute Resolution and Mediation Rules framed by the Law Commission of India. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353)

The model Alternative Dispute Resolution Rules framed by the Law Commission lay down the procedure for directing parties to opt for alternative modes of settlement. The Court is mandated to give guidance as it deems fit to the parties, by drawing their attention to the relevant factors which the parties will have to take into account, before exercising their option as to the particular mode of settlement. The Rules provide for the procedure for reference by the Court to the different modes of settlement, as also the procedure for the referral back to the Court and appearance before the Court upon failure to settle disputes by ADR mechanisms. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

It is permissible for the High Courts to frame rules under Part X of the Code covering the manner in which the option to one of the ADRs can be made. The rules so framed by the High Courts are to supplement the rules framed under the Family Court Act, 1984. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

Arbitration

Arbitration is an adjudicatory process in which the parties present their disputes to a neutral third party (arbitrator) for a decision. While the arbitrator has greater flexibility than a Judge in terms of procedure and rules of evidence, the arbitration process is akin to the litigation process.

A valid arbitration must be preceded by an arbitration agreement which should be valid as per the Indian Contract Act, 1872. The parties to an agreement must have the capacity to enter into a contract in terms of Sections 11 and 12 of the said Act.

Apart from statutory requirement of a written agreement, existing or future disputes and an intention to refer them to arbitration (Section 7, 1996 Act), other attributes which must be present for an agreement to be considered an arbitration agreement are

- the arbitration agreement must contemplate that the decision of the arbitral tribunal will be binding on the parties to the agreement.

- the jurisdiction of the arbitral tribunal to decide the rights of the parties must derive either from the consent of the parties or from an order of the Court or from the statute, the terms of which make it clear that the process is to be arbitration.
- the agreement must contemplate that substantive rights of the parties will be determined by the arbitral tribunal.
- the arbitral tribunal must determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides.
- the agreement of the parties to refer their disputes to the decision of the arbitral tribunal must be intended to be enforceable in law.
- the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when the reference is made to the tribunal.
- the agreement should contemplate that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward.

(*K. K. Modi v K. N. Modi*, AIR 1998 SC 1297, *Bharat Bhushan Bansal v U.P. Small Industries Corporation*, AIR 1999 SC 899, *U.P Rajkiya Nirgam Ltd. V Indure (P) Ltd.*, AIR 1996 SC 1373).

It is possible to spell out an arbitration agreement in a contract by correspondence with the Government. (*P.B. Ray v Union of India*, AIR 1973 SC 908). But even such contract by correspondence with the Government has to be entered into by the officer duly authorized to enter into contract on behalf of the Government under Article 299 of the Constitution. A contract by a person not so authorized is void. (*State of Punjab v Om Prakash*, AIR 1988 SC 2149).

Arbitration and Expert Determination

Expert determination is the referral of a dispute to an independent third party to use his expertise to resolve the dispute. Such determination is helpful for determining valuation, intellectual property or accounting disputes. The expert is not required to give reasons for his determination. However, the determination of an expert is not enforceable like an arbitral award. Nor it can be challenged in a court of law.

To hold that an agreement contemplates arbitration and not expert determination, the Courts have laid emphasis on

- existence of a “formulated dispute” as against an intention to avoid future disputes.
- the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submission made by the parties before it.
- the decision is intended to bind the parties.

(*K. K. Modi v K. N. Modi*, AIR 1998 SC 1297).

Nomenclature used by the parties may not be conclusive. One has to examine the true intent and purpose of agreement. The terminology “arbitrator” or “arbitration” is persuasive but not always conclusive.

Illustration : Two groups of a family arrived at a MoU for resolving the disputes and differences amongst them. The relevant clause of this memorandum purported to prevent any further disputes between the two groups, in connection with division of assets in agreed

proportions, after their valuation by a named body and under a scheme of division by another named body. It further intended to clear any other difficulties which may arise in implementation of the agreement by leaving it to the decision of the Chairman of the Financial Corporation, who was entitled to nominate another person for deciding another question. The clause did not contemplate any judicial determination or recording of evidence. It was held to be a case of expert determination and not arbitration, even though the parties in correspondence used the word 'arbitration'. (*K. K. Modi v K. N. Modi*, AIR 1998 SC 1297).

Institutional Arbitration

The contract between the parties often contains an arbitration clause which designates an institution to administer and conduct the arbitration process under pre-established set of rules. Examples of such institutions are the Court of Arbitration of International Chambers of Commerce, London Court of International Arbitration and American Arbitration Association. Should the administrative costs of the institution, which may be substantial, be not a factor, the institutional approach is generally preferred. The advantages of institutional arbitration to those who can afford it are

- availability of pre-established and well tried rules and procedures which assure that arbitration will get off the ground.
- availability of administrative and technical assistance.
- availability of a list of qualified and experienced arbitrators.
- appointment of arbitrators by the institution should the parties request it.
- physical facilities and support services for arbitrations.
- assistance in encouraging reluctant parties to proceed with arbitration and
- final review and perspective of a valid award ensuring easier recognition and enforcement.
- operational benefits of the parties rarely disputing proper notice.
- availability of panel of arbitrators to fall back on if appointment is challenged or the arbitrator resigns or is replaced.
- The primary disadvantages of institutional arbitration are that it is slow and rigid.
- administrative fees for services and use of facilities may be high in disputes over large amounts, especially where fees are related to the amount in dispute. For lesser amounts in dispute, institutional fees may be greater than the amount in controversy.
- the institution's bureaucracy may lead to added costs and delays.

Ad-hoc Arbitration

Ad hoc arbitration is a proceeding constructed by the parties themselves (and not a stranger or institution) with rules created solely for that specific case. The parties make their own arrangement with respect to all aspects of the arbitration, including the law which will be applied, the rules under which the arbitration will be carried out, the method for the selection of the arbitrator, the place where arbitration will be held, the language, and finally and most importantly, the scope and issues to be resolved by means of arbitration.

If the parties approach the arbitration in a spirit of cooperation, ad hoc proceedings can be more flexible, suitable, cost effective and faster than an institutional arbitration proceeding.

However, the disadvantages of ad hoc arbitration are

- there is high party control which entails the need of party cooperation right upto the end since there are no pre established set of rules.
- the parties run risk of drafting inoperative arbitral clauses. Clauses are often drafted in great detail and which are rarely workable and are susceptible to different interpretations, leading to litigation.
- the arbitral award itself may be rendered unenforceable if wrong procedure is prescribed and followed
- it suffers from lack administrative supervision to schedule hearings, fees, engagement of translators etc. It is also attendant with lack of facilities and infrastructure.

Ad hoc arbitration need not be entirely divorced from institutional arbitration. Parties can choose choosing applicability of rules of an institution to conduct arbitration without giving function to institution. Conversely, the parties can designate an institution to administer the arbitration proceeding but excluding applicability of part of its rules. The parties can simply require an institution to only appoint the arbitrator for them. While parties in ad hoc arbitration adopt own set of rules, it is always open to them to adopt the rules of an arbitral institution adapted to their case or of Model Law of UNCITRAL.

Statutory Arbitration

There are a large number of Central and State Acts, which specifically provide for arbitration in respect of disputes arising on matters covered by those enactments. Instances of such enactments are the Electricity Act, 1910 and Electricity (Supply) Act, 1948. In view of the position that such an arbitration would also governed by the 1996 Act, the provision for statutory arbitration is deemed to be arbitration agreement (*Grid Corporation of Orissa v Indian Change Chrome Ltd.*, AIR 1998 Ori 101).

Fast Track Arbitration/Documents only Arbitration

Should the parties agree that no oral hearings shall be held, the arbitral tribunal could fast track the arbitration process by making the award only on the basis of documents.

Arbitration under the 1996 Act

The 1996 Act repeals the earlier law on arbitration contained in the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

The 1996 Act seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules. However, the said Model Law and Rules do not become part of the Act so as to become an aid to construe the provisions of the Act. (*Union of India v East Coast Boat Builders and Engineers Ltd.*, AIR 1999 Del 44).

The 1996 Act is a long leap in the direction of ADR. The decided cases under the Arbitration Act, 1940 have to be applied with caution for determining the issues arising for decision under the

1996 Act (*Firm Ashok Traders v Gurumukh Das Saluja*, (2004) 3 SCC 155.) Interpretation of the provisions of the 1996 Act should be independent and without reference to the principles underlying the Arbitration Act, 1940 (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565).

Under the Arbitration Act, 1940, there was a procedure for filing and making an award a rule of Court i.e. a decree, after the making of the award and prior to its execution. Since the object of the 1996 Act is to provide speedy and alternative solution to the dispute, the said procedure is eliminated in the 1996 Act. Even for enforcement of a foreign award, there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the Court or decree and the other to take up execution thereafter. The Court enforcing the foreign award can deal with the entire matter in one proceeding. (*Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*, AIR 2001 SC 2293).

Commencement of 1996 Act

Though the 1996 Act received the Presidential assent on 16 August 1996, but it, being a continuation of the Arbitration and Conciliation Ordinance, is deemed to have been effective from 25 January 1996 i.e. the date when the first Ordinance was brought in force. (*Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*, AIR 2001 SC 2293). Therefore, the provisions of the Arbitration Act, 1940, will continue to apply to the arbitral proceedings commenced before 25 January 1996. (*Shetty's Construction Co. (P) Ltd. v Konkan Railway Construction*, (1998) 5 SCC 599).

Section 85 (2) (a) of the 1996 Act further provides that notwithstanding the repeal of the Arbitration Act, 1940, its provisions shall continue to apply in relation to arbitration proceedings which commenced prior to the coming into force of the 1996 Act on 25 January 1996, unless otherwise agreed by the parties. Section 21 gives the parties an option to fix another date for commencement of the arbitral proceedings. Therefore, if the parties to the arbitration had agreed that the arbitral proceedings should commence from a day post 25 January 1996, the provisions of the 1996 Act will apply.

In cases where arbitral proceedings had commenced before coming into force of the 1996 Act and are pending before the arbitrator, it is open to the parties to agree that the 1996 Act will be applicable to such arbitral proceedings. (*Thyssen Stahlunion GmbH v Steel Authority of India*, (1999) SCC 334).

Domestic Arbitration

The expression “domestic arbitration” has not been defined in the 1996 Act. An arbitration held in India, the outcome of which is a domestic award under Part I of this Act, is a domestic arbitration (Sections 2(2) and 2(7)). Therefore, a domestic arbitration is one which takes place in India, wherein parties are Indians and the dispute is decided in accordance with substantive law of India (Section 28(1) (a)).

Part I of the 1996 Act

Part I restates the law and practice of arbitration in India, running chronologically through each stage of arbitration, from the arbitration agreement, the appointment of the arbitral tribunal, the conduct of the arbitration, the award to the recognition and enforcement of awards.

Once the parties have agreed to refer a dispute to arbitration, neither of them can unilaterally withdraw from the arbitral process. The arbitral tribunal shall make an award which shall be final and binding on the parties and persons claiming under them respectively (Section 35), and such

award unless set aside by a court of competent jurisdiction (Section 34), shall be enforceable under the Code, in the same manner as if it were a decree of the Court (Section 36).

Limited judicial intervention

Under the 1996 Act, there is no provision for reference to arbitration by intervention of the Court. Section 5 of the 1996 Act provides for limited role of judiciary in the matters of arbitration, which is in consonance with the object of the Act to encourage expeditious and less expensive resolution of disputes with minimum interference of the Court (*P. Anand Gajapathi Raj v P.V.G. Raju*, AIR 2000 SC 1886).

Arbitration Agreement

The existence of arbitration agreement is a condition precedent for the exercise of power to appoint an arbitrator under Section 11 of the 1996 Act. The issue of existence and validity of the “arbitration agreement” is altogether different from the substantive contract in which it is embedded. The arbitration agreement survives annulment of the main contract since it is sepearable from the other clauses of the contract. The arbitration clause constitutes an agreement by itself. (*Firm Ashok Traders v Gurumukh Das Saluja*, (2004) 3 SCC 155).

In cases where there is an arbitration clause, it is obligatory for the Court under the 1996 Act to refer the parties to arbitration in terms of their arbitration agreement (Section 8). However, the Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated by Section 8 of the Act.

Similarly, the Court is to refer the parties to arbitration under Section 8 of the 1996 Act only in respect to “a matter which is the subject matter of an arbitration agreement”. Where a suit is commenced “as to a matter” which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words “a matter” indicates that the entire subject matter of the suit should be subject to arbitration agreement. (*Sukanya Holdings Pvt. Ltd. V Jayesh H. Pandya*, (2003) 5 SCC 531).

Section 8 of the 1996 Act is attracted to only arbitrable disputes, which the arbitrator is competent or empowered to decide.

Illustration : The parties agreed to refer the question of winding up a company to arbitration. However, the power to order winding up of a company is conferred upon the company court by the Companies Act. As the arbitrator has no jurisdiction to wind up a company, the Court cannot make such a reference under Section 8. (*Haryana Telecom Ltd. v Sterlite Industries (India) Ltd.*, AIR 1999 SC 2354).

Illustration : The parties agreed to refer the question as to whether probate should be granted or not to arbitration. Since the judgement in the probate suit under the Indian Succession Act is a judgement *in rem*, such question cannot be referred to arbitration (*Chiranjilal Shrilal Goenka v Jasjit Singh*, (1993) 2 SCC 507).

The application under Section 8 of the 1996 Act can be filed in the same suit or as an independent application before the same Court.

Ordinarily the application under Section 8 of the 1996 Act has to be filed before filing of written statement in the concerned suit. But when the defendant even after filing the written statement applies for reference to arbitration and the plaintiff raises no objection, the Court can refer the dispute to arbitration. The arbitration agreement need not be in existence before the action is brought in Court, but can be brought into existence while the action is pending. Once the matter

is referred to arbitration, proceedings in civil suit stands disposed of. The Court to which the party shall have recourse to challenge the award would be the Court as defined in Section 2 (e) of the Act, and not the Court to which an application under Section 8 is made. (*P. Anand Gajapathi Raju v P.V.G Raju* AIR 2000 SC 1886).

Where during the pendency of the proceedings before the Court, the parties enter into an agreement to proceed for arbitration, they would have to proceed in accordance with the provisions of the 1996 Act.

Illustration : The High Court, in exercise of its writ jurisdiction, has no power to refer the matter to an arbitrator and to pass a decree thereon on the award being submitted before it. (*T.N Electricity Board v Sumathi*, AIR 2000 SC 1603).

Interim measures by the Court

The Court is empowered by Section 9 of the 1996 Act to pass interim orders even before the commencement of the arbitration proceedings. Such interim orders can precede the issuance of notice invoking the arbitration clause. (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565). The Court under Section 9 merely formulates interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. (*Firm Ashok Traders v Gurumukh Das Saluja*, (2004) 3 SCC 155).

If an application under Section 9 of the 1996 Act for interim relief is made in the Court before issuing a notice under section 21 of the Act, the Court will first have to be satisfied that there is a valid arbitration agreement and that the applicant intends to take the dispute to arbitration. Once it is so satisfied, the Court will have jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances of the case warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings the Court, while exercising the jurisdiction under section 9, can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing arbitral proceedings. (*Sundaram Finance Ltd v NEPC India Ltd*, AIR 1999 SC 565).

Once the matter reaches arbitration, the High Court would not interfere with the orders passed by the arbitrator or the arbitral tribunal during the course of arbitration proceedings. The parties are permitted to approach the Court only under Section 37 or through Section 34 of the 1996 Act. (*SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

Composition of Arbitral Tribunal

The arbitral tribunal has been defined by Section 2 (d) of the 1996 Act to mean a sole arbitrator or a panel of arbitrators appointed in accordance with the provisions of Sections 10 and 11 of the Act. The number of arbitrators should not be an even number.

An arbitrator must be independent and impartial. A prospective arbitrator should disclose in writing to the parties any circumstances likely to give rise to justifiable doubts as to his independence or impartiality (Section 12(1), 1996 Act). The 1996 Act prescribes the procedure for challenging the arbitrator, terminating his mandate, and his replacement by a new arbitrator (Sections 13 to 15).

Arbitration under the 1996 Act is a matter of consent and the parties are generally free to structure their agreement as they see fit. The parties have been given maximum freedom not only to choose their arbitrators, but also to determine the number of arbitrators constituting the arbitral tribunal.

There is no right to challenge an award if the composition of the arbitration tribunal or arbitration procedure is in accordance with the agreement of the parties even though such composition or procedure is contrary to Part I of the 1996 Act. Again, the award cannot be challenged if such composition or procedure is contrary to the agreement between the parties but in accordance with the provisions of the 1996 Act. If there is no agreement between the parties about such composition of the arbitral tribunal or arbitration procedure, the award can be challenged on the ground that the composition or procedure was contrary to the provisions of the Act. (*Narayan Prasad Lohia v Nikunj Kumar Lohia*, (2002) 3 SCC 572).

Where the agreement between the parties provides for appointment of two arbitrators, that by itself does not render the agreement as being invalid. Both the arbitrators so appointed should appoint a third arbitrator to act as the presiding officer (Section 11 (3), 1996 Act). Where the parties have participated without objection in an arbitration by an arbitral tribunal comprising two or even number of arbitrators, it is not open to a party to challenge a common award by such tribunal on the ground that the number of arbitrators should not have been even. The parties are deemed to have waived such right under Section 4 of the 1996 Act. (*Narayan Prasad Lohia v Nikunj Kumar Lohia*, (2002) 3 SCC 572).

The determination of the number of arbitrators and appointment of arbitrators are two different and independent functions. The number of arbitrators, in the first instance is determined by the parties, and in default, the arbitral tribunal shall consist of a sole arbitrator. However, the appointment of an arbitrator should be in accordance with the agreement of the parties, or in default, in accordance with the mechanism provided under Section 11 of the 1996 Act.

The power of the Chief Justice under Section 11 of the 1996 Act to appoint the arbitral tribunal is a judicial power. Since adjudication is involved in constituting an arbitral tribunal, it is a judicial order. The Chief Justice or the person designated by him is bound to decide

- whether he has jurisdiction.
- whether there is an arbitration agreement.
- whether the applicant is a party to the arbitration agreement.
- whether the conditions for exercise of power have been fulfilled.
- if the arbitrator is to be appointed, the fitness of the person to be appointed.

(*SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

The process, being adjudicatory in nature, restricts the power of the Chief Justice to designate, by excluding non judicial institution or non judicial authority from performing such function. The Chief Justice of India can, therefore, delegate such power only to another Judge of the Supreme Court, while the Chief Justice of a High Court can delegate such power only to another Judge of the High Court. It is impermissible to delegate such power to the District Judge. (*SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

Notice must be issued to the non applicant to given him an opportunity to be heard before appointing an arbitrator under Section 11 of the 1996 Act. (*SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

No appeal lies against the decision of the Chief Justice of India or his designate while entertaining an application under Section 11 (6) of the 1996 Act, and such decision is final. However, it is open to a party to challenge the decision of the Chief Justice of a High Court or his designate by way of Article 136 of the Constitution. (*SBP and Co. v Patel Engineering Ltd.*, 2005 (3) Arb LR 285 (SC)).

Where an application for appointment of arbitrator is made under Section 11(2) of the 1996 Act in an international commercial arbitration and the opposite party takes the plea that there was no mandatory provision for referring the dispute to arbitration, the Chief Justice of India has the power to decide whether the agreement postulates resolution of dispute by arbitration. If the agreement uses the word 'may' and gives liberty to the party either to file a suit or to go for arbitration at its choice, the Supreme Court should not exercise jurisdiction to appoint an arbitrator under Section 11 (2) of the Act (*Wellington Associates Ltd. v Kirit Mehta*, AIR 2000 SC 1379). Where the arbitrator is to be appointed, the Supreme Court can use its discretion in making an appointment after considering the convenience of the parties. (*Dolphin International Ltd. v Ronark Enterprises Inc.*, (1998) 5 SCC 724).

Jurisdiction of Arbitral Tribunal

The arbitral tribunal is invested with the power to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement. For that purpose, the arbitration clause shall be treated as an agreement independent of the other terms of the agreement even though it is part of the said agreement. So, it is clear that even if the arbitral tribunal decides that the agreement is null and void, it shall not entail *ipso jure* the invalidity of the arbitration clause. (*Olympus Superstructures (P) Ltd. v Meena Vijay Khetan*, AIR 1999 SC 2102).

Objections to jurisdiction of the arbitral tribunal must be raised before the arbitral tribunal. If the arbitral tribunal accepts the plea of want of jurisdiction, it will not proceed further with the arbitration on merits and the arbitral proceedings shall be terminated under Section 32 (2) (c) of the 1996 Act. Such decision, however is appealable (Section 37 (2) (a)). In case the tribunal rejects the plea of jurisdiction, it will continue with the arbitral proceedings and make an arbitral award, which can be challenged by the aggrieved party under Section 34 (2) of the 1996 Act. The Court has no power to adjudicate upon the question of the want of jurisdiction of an arbitral tribunal.

Section 16 of the 1996 Act, however, does not take away the power of Chief Justice in a proceeding under Section 11 to decide as to whether there is a valid arbitration agreement or not, before deciding whether the dispute should be referred to the arbitrator for arbitration. (*Wellington Associates Ltd. v Kirit Mehta*, AIR 2000 SC1379).

The arbitral tribunal, during the arbitral proceedings, can order interim measure for the protection of the subject matter of the dispute and also provides for appropriate security in respect of such a measure under Section 17 of the 1996 Act. Such an order for interim measures is appealable under Section 37 (2) of the Act.

The power of interim measure conferred on the arbitral tribunal under Section 17 of the 1996 Act is a limited one. The tribunal is not a Court of law and its orders are not judicial orders. The tribunal cannot issue any direction which would go beyond the reference or the arbitration agreement. The interim order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. No power has been conferred on the arbitral tribunal under this section to enforce its order nor does it provide for judicial enforcement thereof. (*M.D Army Welfare Housing Organization v Sumangal Services (P) Ltd.*, AIR 2004 SC 1344).

Conduct of Arbitral Proceedings

Sections 18 to 27 of the 1996 Act lay down various rules dealing with arbitral procedure. Section 19 establishes procedural autonomy by recognizing parties' freedom to lay down the rules of procedure, subject to the fundamental requirements of Section 18 of equal treatment of parties. Section 20 gives right to the parties to agree on the place of arbitration.

The arbitral tribunal is not bound by the procedure set out by Code. It is for the parties to agree on a procedure and if the parties are silent, then the arbitrator has to prescribe the procedure. However, the procedure so prescribed should be in consonance with the principles of natural justice. The doctrine of natural justice pervades the procedural law of arbitration as its observance is the pragmatic requirement of fair play in action.

Arbitral award

The award-making process necessarily minimizes the derogable provisions of the 1996 Act and is mainly concerned with the role of the arbitrator in connection with making of the award (Sections 28 to 33). Section 28 pertains to the determination of the rules applicable to the substance of the disputes. Section 29 provides the decision-making procedure within the tribunal. Section 30 relates to settlement of a dispute by the parties themselves and states that with the agreement of the parties, the arbitration tribunal may use mediation, conciliation and other procedures at any time during the arbitral proceedings to encourage settlement. Section 31 refers to the form and contents of arbitral award. Unlike the 1940 Act, the arbitral award has to state reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an arbitral award on agreed terms under Section 30. Section 32 pertains to the determination of the arbitral proceedings, while Section 33 relates to the corrections and interpretation of an award as also to making of additional awards.

Recourse against arbitral award

Section 34 of the 1996 Act provides for recourse against the arbitral award. The limited grounds for setting aside an arbitral award are

- incapacity of party.
- invalidity of agreement.
- absence of proper notice to the party.
- award beyond scope of reference.
- illegality in the composition of arbitral tribunal or in arbitral procedure.
- dispute being non arbitrable.
- award being In conflict with public policy.

Section 34 of 1996 Act is based on Article 34 of the UNCITRAL Model law. The scope for setting aside the award under the 1996 Act is far less than that under Sections 30 or 33 of the Arbitration Act, 1940. (*Olympus Superstructures (P) Ltd. v Meena Vijay Khetan*, AIR 1999 SC 2102).

The arbitrator is the final arbiter of a dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusions or has failed to appreciate the facts. (*Sudershan Trading Co. v Government of Kerala*, AIR 1989 SC 890).

The arbitrator is the sole judge of the quality and quantity of evidence and it will not be for the Court to re-appreciate the evidence before the arbitrator, even if there is a possibility that on the same evidence, the Court may arrive at a different conclusion than the one arrived at by the arbitrator (*M.C.D. v Jagan Nath Ashok Kumar*, (1987) 4 SCC 497). Similarly, if a question of law is referred to the arbitrator and he gives a conclusion, it is not open to challenge the award on the ground than an alternative view of the law is possible (*Alopi Parshad & Sons Ltd v Union of India*, (1960) 2 SCR 793).

The power of the arbitral tribunal to make an award is different from its power to issue procedural orders and directions in the course of the arbitration proceedings. Such orders and directions are not awards and hence are not open to challenge under Section 34 of the 1996 Act, though they may provide basis for setting aside or remission of the award. For instance, questions concerning the jurisdiction of the arbitral tribunal or the choice of the applicable substantive law are determinable by arbitral process resulting in an award. On the other hand, questions relating to the admissibility of evidence or the extent of discovery are procedural in nature and are determinable by making an order or giving a direction and not by an award.

In view of the principles of acquiescence and estoppel, it is not permissible for a party to challenge an arbitration clause after participating in arbitration proceeding.

Illustration: Where a party consented to arbitration by the arbitral tribunal as per the arbitration clause and participated in the arbitral proceedings, it cannot later take the plea that there was no arbitration clause (*Krishna Bhagya Jala Nigam Ltd. V G Hari's Chandra Reddy*, (2007) 2 SCC 720).

However, the principle of acquiescence is inapplicable where the arbitrator unilaterally enlarges his power to arbitrate and assumes jurisdiction on matters not before him.

Illustration : The parties, by express agreement, referred to arbitration only the claims for refund of the hire charges. The arbitrator, upon entering into the reference, enlarged its scope. Since the arbitrator continued to adjudicate on such enlarged dispute, despite objections, the parties were left with no option, but to participate in the proceedings. Such participation did not amount to acquiescence. Once appointed, the arbitrator has the duty to adjudicate only the matter brought before it by the parties. The award is liable to be set aside as the arbitrator had misdirected himself and committed legal misconduct. (*Union of India v M/s G. S. Atwal*, AIR 1996 SC 2965).

The Court to which the party shall have recourse to challenge the award would be the Court as defined in Section 2(1)(e) of the 1996 Act and not the Court to which an application under Section 8 of the Act was made (*P. Anand Gajapathi Raju v P.V.G Raju*, AIR 2000 SC 1886)

Finality and enforcement of awards

Section 35 of the 1996 Act provides that subject to the provisions of Part I of the Act, an arbitral award shall become final and binding on the parties claiming under them respectively. The word 'final' with respect to an award, as used in this section, is not to be confused with the expression 'final award'. The word 'final' means that unless and until there is a successful challenge to the award, it is conclusive as to the issues with which it deals as between the parties to the reference and persons claiming under them. The award can, therefore, be enforced, even if there are other issues outstanding in the reference.

Section 36 of the 1996 Act renders an arbitral award enforceable in the same manner as if it were a decree, if no challenge is preferred against it within the time prescribed for making a challenge or, when upon a challenge being preferred, it has been dismissed. However, the fact that an arbitral award is enforceable as if it were a decree does not make the arbitral proceedings a suit.

The arbitral award becomes immediately enforceable without any further act of the Court once the time expires for challenging the award under Section 34 of the 1996 Act. If there were residential doubts on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favor of curtailment of the Court's powers by the exclusion of the operation of Section 5 of the Limitation Act (*Union of India v Popular Constructions*, (2001) 8 SCC 470)

When the arbitration proceedings commenced before the 1996 Act came into force but award was made after the 1996 Act came into force, the award would be enforced under the provisions of Arbitration Act, 1940. (*Thyssen Stahlunion GmbH v Steel Authority of India*, (1999) SCC 334).

International Commercial Arbitration and Foreign Awards

An “international commercial arbitration” has been defined in Section 2(f) of the 1996 Act to mean an arbitration relating to disputes arising out of legal relationships considered commercial under the law in force in India and where atleast one of the parties is

- a foreign national or an individual habitually resident outside India
- a body corporate incorporated outside India
- a company or association of individuals whose central management and control is exercised by a country other than India
- the Government of a foreign country

The law applicable may be Indian law or foreign law depending upon the contract (Section 2(1)(f) and Section 28(1)(b)).

Part I of the 1996 Act is to also apply to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. The definition of international commercial arbitration in Section 2(1)(f) of the 1996 Act makes no distinction between international commercial arbitration held in India or outside India. Part II of the 1996 Act only applies to arbitrations which takes place in a convention country. An international commercial arbitration may, however, be held in a non-convention country. The 1996 Act nowhere provides that the provisions of Part I are not to apply to international commercial arbitrations which take place in a non-convention country. The very object of the Act is to establish a uniform legal framework for the fair and efficient settlement of disputes arising in international commercial arbitrations. (*Bhatia International v Bulk Tradings*, AIR 2002 SC1432).

Illustration : Even if in terms of the arbitration agreement, the arbitration proceedings between two foreign parties were being held under I.C.C Rules outside India, yet a party to the arbitration proceedings may seek an interim injunction under Section 9 of the Act against Oil and Natural Gas Commission, a Government Company, for restraining it making any payment to the opposite party till the arbitration proceedings pending between the parties is not concluded. Such injunction in respect of the properties within territory of India is maintainable. However, if the injunction is sought for properties outside the country, then such an application under Section 9 is not maintainable in Indian Court. (*Olex Focas Pty. Ltd. V Skodoeport Co. Ltd.*, AIR 2000 Del. 161).

Part II of the 1996 Act pertains to the enforcement of certain foreign awards and consists of two chapters. Chapter I relates with New York Convention Awards which are supplemented by the First Schedule to the 1996 Act. Chapter II refers with Geneva Convention Awards which is to be read with the Second and the Third Schedule of the Act.

The expression “foreign award” which means an arbitral award on differences between persons arising out of legal relationship considered as commercial under the law in India. An award is ‘foreign’ not merely because it is made on the territory of a foreign state but because it is made in such a territory on an arbitration agreement not governed by the law of India. (*NTPC v Singer Company*, AIR 1993 SC 998).

A foreign award given after the 1996 Act came into force can be enforced only under Part II of 1996 Act, there being no vested right to have the same enforced under the Foreign Awards

(Recognition and Enforcement) Act, 1961. It is relevant that arbitral proceedings had commenced in the foreign jurisdiction before the commencement of the 1996 Act. (*Thyssen Stahlunion GmbH v Steel Authority of India*, (1999) SCC 334).

Mediation

Mediation is a voluntary, disputant-centred, non binding, confidential and structured process controlled by a neutral and credible third party who uses special communication, negotiation and social skills to facilitate a binding negotiated settlement by the disputants themselves. The result of the mediation agreement is a settlement agreement, and not a decision.

The focus in mediation is on the future with the emphasis of building relationships, rather than fixing the blame for what has happened in the past. The purpose of mediation is not to judge guilt or innocence but to promote understanding, focus the parties on their interests, and encourage them to reach their own agreement. The ground rules of mediation include

- neutrality : the mediator should be neutral having no interest with the dispute or either party.
- self determination : mediation is based on the principle of the parties' self-determination, which means each party makes free and informed choices. The mediator is, therefore, responsible in the conduct of the process while the parties control the outcome.
- confidentiality : it is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them as well. Were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty free discovery process. The mediator must state to the parties
- that he and the parties shall keep confidential all matters relating to the mediation proceedings, and that confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for the purposes of its implementation and enforcement.
- that unless otherwise agreed by the parties, it would be legally impermissible for him to act as an arbitrator or a witness in any arbitral or judicial proceeding in respect of the dispute that is the subject of mediation proceedings and that the parties are not allowed to introduce such evidence – neither on facts (like the willingness of one party to accept certain proposals) nor on views, suggestions, admissions or proposals made during the mediation.
- that the only behavior that might be reported is the information about whether parties appeared at a scheduled mediation and whether or not they reached a solution.
- fair process : the process is just as important as the outcome. It is crucial that parties feel they are being treated fairly and their concerns are being heard.
- voluntary process : mediation is possible only with consent of parties, who get bound once they sign the settlement arrived at during mediation.

Pre-mediation preparation

The mediator often asks for a pre-mediation summary from the parties to familiarize himself with the dispute. The participants during mediation need not necessarily be only the actual disputants but all parties that could facilitate or block a settlement.

In preparing the case, it will be useful for the mediator and/or the parties to analyze the dispute. In doing so, the mediator must be conversant with the applicable law and practice, the perspective of both sides on the facts and the issues that are of most concern to either party.

Demeanor of the mediator

The mediator should try to establish his neutrality and control over the process by maintaining neutral body language; using neutral, plain and simple words; using words of mutuality that apply to all parties; having appropriate eye contact; using calm, moderate, business like and deliberative tone and having an attentive posture. Importance must be given to seating arrangement so as to ensure closeness, eye contact and audibility.

Opening Statement

The mediation commences with the opening statement by the mediator, which must be simple and in a language/ style adapted to the background of parties. In the opening statement, the mediator

- introduces himself, his standing, training and successful experience as a mediator.
- expresses his hope to bring about a settlement in the present case.
- asks the parties to introduce themselves.
- asks parties which language they would prefer to be addressed in and how they would they like to be addressed.
- welcomes their lawyer.
- enquires about previous experience of parties and counsel in any mediation process.
- declares impartiality and neutrality, and describes the role of the mediator.
- addresses confidentiality and neutrality by using appropriate eye contact, words and body language.
- emphasizes on the non adversarial aspect of the process like the absence of recording of evidence or pronouncement of judgment or award or order.
- emphasizes the voluntary nature of process.
- informs that he can go beyond the pleadings and may cover other disputes.
- states the mediation process (i.e. gives a road map) and the possibility of having private sessions.
- explains procedure where there is settlement or no settlement.
- informs that Court fee is refunded on settlement.

The mediator manages any outbursts, handles administrative matters such as breaks or order of presentation, determines whether the parties are clear about what to do, gets confirmation that the parties want mediation and invites both parties to state their perspective. Either side can speak first, both having been given an assurance of equal opportunity.

Stages and sessions of Mediation

Introduction is followed by

- problem understanding stage.
- needs and interests understanding stage.
- problem defining stage.
- issues identification stage.
- options identification stage.
- options evaluation stage.

These stages could be in joint session or private session (caucus)

In a joint session

- parties and respective counsels are present.
- parties are advised not to say anything that will upset the other parties and that any such information can be stated in private session.
- parties/counsels are allowed to speak without interruption.
- normally the party is asked to speak first, with the counsel supplementing with legal issues.
- any friend or relative of the parties are heard too.
- the mediator summarizes after hearing each party/counsel as to what he has understood.
- parties/counsels may add on any information.
- the mediator should accede to the request of parties who would like to talk.
- the mediator may seek clarifications.
- after hearing one side, the mediator listens to the other side.
- no interruptions are allowed as the decorum and dignity is to be maintained.

Where a party requests for a private caucus, the mediator should conclude the joint session before meeting in private. The private session with one party should be followed with private session with other party. The mediator should explain beforehand that a private session may take more time with one party.

The mediator should use private session

- to share private matters and information that cannot be discussed in joint sessions.
- to regain control when a party is getting out of hand.
- when the parties are near a deadlock or impasse.
- to allow the parties to vent their emotions in a productive manner.

- to expose unrealistic expectations.
- to shift from discussion to problem solving.
- to evoke options for settlement.
- to communicate offers and counter-offers.

The mediator should avoid private session

- when a party can be directly persuaded.
- a party can communicate a compelling position.

Mediation Techniques

Mediation is all about transforming conflicts. The mediator must take the sting out of the hostility between the parties. The mediator could use the technique of neutral reframing to rephrase an offensive or inflammatory statement of a party in an inoffensive manner by focusing on the positive need in that statement

Illustration ∴ Party : He is so dominating that he never talks to me, forcing me to keep everything bottled up.

Mediator : You would like to be heard

The mediator has thus not only converted the negative statement into a positive one, he has exposed the other party to the positive need (of being heard) underlying the statement. Other mediation techniques listed by commentators are

- summarizing : the mediator restates the essence of the statement of the party briefly, accurately and completely.
- acknowledgement : the mediator reflects back the statement of a party in a manner that recognizes that party's perspective.
- re-directing : the mediator shifts the focus of a party from one subject to another in order to focus on details or respond to a highly volatile statement by a party.
- deferring : the mediator postpones a response to a question by a party in order to follow an agenda or gather additional information or defuse a hostile situation.
- setting an agenda : the mediator establishes the order in which the issues, positions or claims are to be addressed.
- handling reactive devaluation : the mediator takes ownership of an information or statement of a party in order to pre-empt the other party from reacting negatively to such information or statement solely based on the source of the information.

The mediator should endeavor to shift from positions to interests by

- talking to the parties to uncover their long term interests, and in the process, discover interests common to the parties.
- using open questions to elicit more facts.

- inviting options again from the parties for settlement.
- putting all settlement options, no matter how ostensibly insignificant, on the table.
- examining each options one by one as any given option might just appeal to a party on deeper analysis.
- do reality check by comparing a pending offer with
- the best result a party can get in litigation (BATNA or best alternative to a negotiated agreement).
- the worst result a party can get in litigation (WATNA or worst alternative to a negotiated agreement).
- the most likely result a party can get in litigation (MLATNA or most likely alternative to a negotiated agreement).

Handling emotions

The mediator should be familiar with his own reaction when faced with emotions. Strategies to handle emotions include

- accepting some venting, though preferably in a private session.
- utilizing active listening to verify the sincerity of the emotions.
- identifying the source or reason for the emotion and addressing the cause, not the behavior .
- insisting that order be maintained.
- moving to an easier issue on the agenda.
- dealing with one issue at a time.
- inviting parties to disclose the emotional impact of the situation or express their feelings to one another.
- simply suggesting a recess.

Role of silence in mediation

Use of silence in mediation cannot be overemphasized. A mediator is required to understand the relevance of the pauses and silence of the parties during mediation. Sometimes an important piece of information is revealed after a period of silence.

Silence can be helpful to the speaker because it:

- allows the speaker to dictate the pace of the conversation.
- gives time for thinking before speaking.
- enables the speaker to choose whether or not to go on.
- Silence can be useful to the listener because

- demonstrates interest, respect and patience.
- gives an opportunity to observe the speaker and pick up non-verbal clues.

Use of Apology and Saving Face approach in mediation

Apology is to acknowledge and express regret for a fault without defense. The emphasis is on that the act done cannot be undone but it should not go unnoticed. Fear of losing face is also a powerful emotion to make parties stick to their positions or continue with litigation. The mediator should explore settlement options that give honorable “exit”.

Handling Impasse

The mediator could

- shift gears between private and joint sessions get the parties to do a reality check on how “foolproof” their case actually is.
- Have a private session with the counsel if he has given legally untenable advise to his client who is falsely assured that he is bound to win in litigation.
- warn the participants/ bring the parties together to acknowledge the situation.
- solicit any last ditch efforts.
- change atmosphere/use humor to relax atmosphere.
- revisit issues, or areas of agreement.
- proceed with preferably an easier issue.
- ask parties about cause of an impasse.
- ask parties to suggest options to overcome the deadlock.
- praise work and accomplishments of parties.
- try role-reversal.
- propose hypothetical solutions .
- suggest (or threaten) ending the mediation.
- suggest third party/ expert intervention.
- allow emotions to emerge.
- take a break.

Settlement agreement

The settlement agreement must be reduced in writing. It must

- comprise the statement about parties’ future relationship.
- describe responsibility of each party in implementing the settlement.
- be clear, concise, complete, concrete, realistic and workable.
- be balanced and should reflect each party is gaining something.
- be positive, without any blame assessment.

- contain non-judgmental language.

The settlement agreement can be drafted by the parties but it is preferable if it is drafted by the mediator. If mediator drafting the agreement, the mediator should orally recite the terms of the settlement, clarify the terms and confirm the terms before putting it down.

While drafting an agreement, the mediator should be specific and must avoid ambiguous words such as "reasonable", "soon", "frequent", "co-operative" or "practicable". He should state clearly "who" will do "what", "when", "where", "how", "how much" and for "how long".

The mediator should avoid legal jargon and use plain language, preferably the language of the parties. The parties to the agreement should sign each page, while the counsel should attest the signature of their client by signing on the last page. Once the settlement agreement is signed by the parties, the mediator should sign the agreement and furnish a copy of the same to each party.

Ending mediation

The mediator should pay special attention on a proper ending to the mediation process, which is the outcome of the efforts of the parties. If parties do not come to terms, the mediator should congratulate them for the progress made, with hope for settlement in future. There is no such thing as failed mediation. If parties come to terms, the mediator should congratulate parties. Mediation ends on the date of the settlement agreement.

Model Civil Procedure Mediation Rules 2003

While there is no comprehensive statute governing mediation in India, the Supreme Court has recommended the High Courts to adopt, with or without modification, the model Civil Procedure Mediation Rules framed by the Law Commission of India. (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

The Rules provide for the procedure for appointment of a mediator, the qualifications of the mediator and procedure for mediation. Rule 12 provides that the mediator is not bound by the Evidence Act 1872 and the Code, but shall be guided by principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute, Rule 16 describes the role of mediator and states that the mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute, emphasizing that it is the responsibility of the parties to take decision which affect them; he shall not impose any terms of settlement on the parties.

Rule 17 emphasises that the parties alone responsible for taking decision and that the mediator will not and cannot impose any settlement or give any warranty that the mediation will result in a settlement. The Rules have strict provisions with regard to the confidentiality of the mediation process. While Rule 11 enables the mediator to meet or communicate with each of the parties separately, Rule 20 restrains the mediator from disclosing to the other party any information given to him by a party subject to a specific condition that it be kept confidential, and mandates the mediator and the parties to maintain full confidentiality in respect of the mediation process. The Rule 20 further requires the parties not to rely on or introduce the said information in any other proceedings as to

- views or admissions expressed by a party in the course of the mediation proceedings
- confidential documents, notes, drafts or information obtained during mediation
- proposals made or views expressed by the mediator

- the fact that a party had or had not indicated his willingness to accept a proposal for settlement.

Rule 21 limits the communication between the mediator and the Court to informing the Court about the failure of a party to attend and, with the consent of the parties, his assessment that the case is not suited for settlement through mediation or that the parties have settled their disputes.

Rule 24 provides for the reduction of the agreement between the parties into a written settlement agreement duly signed by the parties. The settlement agreement is to be forwarded to the Court by the mediator with a covering letter. The Court would pass the decree in terms of the settlement under Rule 25. Should the settlement dispose of only certain issues in the suit which are severable from the other issues, the Court may pass decree straightaway in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues which are not settled. If the issues are not severable, the Court shall wait for the decision of the Court on the other issues which are not settled.

Rule 27 lays down ethical standards of a mediator, stating that he should

- follow and observe the Rules strictly and diligently.
- not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator.
- uphold the integrity and fairness of the mediation process.
- ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the process.
- satisfy himself that he is qualified to undertake and complete the mediation in a professional manner.
- disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias.
- avoid, while communicating with the parties, any impropriety or appearance of impropriety.
- be faithful to the relationship of trust and confidentiality imposed in the office of mediator.
- conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law.
- recognize that the mediation is based on principles of self-determination by the parties and that the mediation process relies upon the ability of parties to reach a voluntary agreement.
- maintain the reasonable expectations of the parties as to confidentiality, refrain from promises or guarantees of results.

Conciliation

Conciliation is a term often used interchangeably with mediation. Some commentators view conciliation as a pro-active form of mediation, where the neutral third party takes a more active

role in exploring and making suggestions to the disputants how to resolve their disputes (*Salem Advocates Bar Association v Union of India*, AIR 2005 SC 3353).

The manner of conducting conciliation, the ground rules and ethical standards are similar to that of mediation.

The 1996 Act is the first comprehensive statute on conciliation in India. Part III of the 1996 Act adopts, with minor contextual variations, the UNICITRAL Conciliation Rules, 1980.

The 1996 Act provides the procedure for commencement of conciliation proceedings through invitation of one of the disputants (Section 62) and the submission of statements to conciliator describing the general nature of the dispute and the points at issue (Section 65). The conciliator is not bound by the Code or the Indian Evidence Act, 1872 (Section 66).

Role of Conciliator

Section 67 of the 1996 Act describes the role of conciliator as under

- the conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.
- the conciliator shall be guided by principles of objectivity, fairness and justice giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.
- the conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.
- the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons thereof.

Confidentiality is integral to the conciliation process. While Section 69 of the 1996 Act enables the conciliator to meet or communicate with each of the parties separately, Section 70 restrains the conciliator from disclosing to the other party any information given to him by a party subject to a specific condition that it be kept confidential. Section 75 mandates that notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Unless otherwise agreed by the parties, the conciliator is barred by the 1996 Act from acting as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings as also from being presented by the parties as a witness in any arbitral or judicial proceedings (Section 80).

Section 81 of the 1996 Act provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings

- views expressed or suggestions made by the other party in respect of a possible settlement of the dispute.
- admissions made by the other party in the course of the conciliation proceedings.
- proposals made by the conciliator.
- the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

Section 73 of 1996 Act mandates that the settlement agreement signed by the parties shall be final and binding on the parties and persons claiming under them respectively, which is to be authenticated by the conciliator. Section 74 confers the settlement agreement to have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30 i.e. the status of a decree of a Court.

A successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such agreement which has the status and effect of legal sanctity of an arbitral award under section 74 of the 1996 Act. (*Hareesh Dayaram Thakur v State of Maharashtra*, AIR 2000 SC 2281)

Conciliation under other statutes

Several statutes contain provisions for settlement of disputes by conciliation, like the Industrial Disputes Act, 1947, the Hindu Marriage Act, 1948, the Family Courts Act, 1984 and the Gram Nyayalayas Act 2008. Section 20 of the 1987 deals with cognizance of cases by Lok Adalats and mandates that every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles. The 1987 Act also provides for pre-litigation conciliation and settlement and lays down the procedure for reference of the matter to conciliation before the Permanent Lok Adalat which is to assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.

DUTIES OF ARBITRATOR

By

P.C. Markanda, Naresh Markanda & Rajesh Markanda, Advocates, Supreme Court of India

(Source: <http://www.markandalaw.com/wp-content/themes/twenty-sixteen/pdf/Impartiality-of-Arbitrator.pdf>)

Duty to act fairly

Duty to act fairly is the first and foremost function of an arbitrator. He must act in a fair and reasonable manner to both the parties and in the arbitration hearings he must not show or exhibit favour towards one party more than towards the other and must refrain from doing for one party which he cannot do for the other. Showing undue favours to one party at the cost of the other in matters handled by him would be looked upon with suspicion by the Courts. It was in this context that Donaldson J. in the *Myron*, (1969) 1 Lloyd's Rep. 411 (at page 415) observed that "Mr. ___ had, indeed, been the arbitrator appointed by them on several occasions and was described before me as their first choice arbitrator, language more usually heard in the context of Smithfield or Covent Garden market produce than of a well-known arbitrator, but the meaning is clear enough."

The position of the arbitration is like that of Creaser's wife who should be above all suspicion. The Courts have continually held that rules of natural justice must be followed by the arbitrators including the principles incorporated in the maxim *audi alterem partem*. Ignorance of the rules of natural justice cannot be defended on the plea that the evidence was inconsequential or had not affected the mind of the arbitrator or was of a trifling nature.

Adherence to the principles of natural justice

An arbitrator must act in accordance with the principles of natural justice. It is now well settled that an arbitrator is not bound by the technical and strict rules of evidence which are founded on fundamental principles of justice and public policy. However, in proceedings of arbitration, there must be adherence to justice, equity, law and fair play in action. The proceedings must adhere to the principles of natural justice and must be in consonance with practice and procedure which will lead to proper resolution of dispute.

The rule of natural justice requires that parties should be given an opportunity to be heard by the arbitrators, which means whatever material they want to place before the arbitrators should be allowed to be placed. *Oil & Natural Gas Commission Ltd. v. New India Civil Erectors Pvt. Ltd.*, 1996 (Suppl) Arb LR 426 (DB—Bom).

Where the arbitrator refuses to consider the contentions of the contractor and refuses permission to produce evidence, inasmuch as directions were not given to the government to produce the record which had been withheld on the ground of privilege, without even

indirectly or incidentally mentioning the nature and volume of the record held privileged, it was held that these lacunas are the violations of the principle of natural justice and denial of opportunity to the contractor to press and prove his case. *President of India v. Kesar Singh*, AIR 1966 J&K 113: 1966 Kash LJ 287.

In Mustill and Boyd's Law and Practice of Commercial Arbitration in England, 1982 Ed., p. 261, the following cardinal rules have been suggested for being followed by the arbitral tribunal in order to ensure fairness in conducting arbitration between the litigant parties:

- 1) Each party must have a full opportunity to present his own case to the tribunal.
- 2) Each party must be aware of his opponent's case, and must be given a full opportunity to test and rebut it.
- 3) The parties must be treated alike. Each must have the same opportunity to put forward his own case, and to test that of the opponent.

The above principles (Sr. Nos. 1 and 3) are in consonance with Section 18 of the Act and the principle stated at Sr. No. 2 conforms to Section 23(1) of the Act. The principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary.

Hearing in absence of one party

An arbitrator would be guilty of misconduct if he is charged with any information having been obtained from one side which was not disclosed to the other. Such an information may be oral or in writing. It is with this aspect in mind that the Legislature provided in Section 24(3) of the Act that "All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties".

When the arbitrator accepts documents from one party in the absence of the other party, the arbitrator would be guilty of misconducting the proceedings because no arbitrator can accept document from one party at the back of the other. *Padam Chand Jain v. Hukam Chand Jain*, AIR 1999 Del 61.

During the conduct of a reference the arbitrator required the attendance of a witness whom neither side proposed to call. After this witness had given evidence the proceedings terminated, and the arbitrator said that he required nothing further from either of the parties. Subsequently, however, the plaintiff found the arbitrator closeted with the witness and a special pleader who was acting for the defendants, the three persons being engaged in considering the papers and plans connected with the arbitration. The arbitrator explained that the witness was explaining to him information in connection with the case, by which, however, his opinion would not be biased. Held that, as there had been an opportunity for the mind of the arbitrator to have been biased by information given on behalf of one side without

the other having had an opportunity of meeting it, the award eventually made by the arbitrator must be set aside [(1844) 14 L.J.Q.B. 17]

Failure to consider vital documents

The well-settled rule of law is that an arbitrator misconducts the proceedings if he ignores very material documents to arrive at a just decision to resolve the controversy. Even if the department did not produce those documents before the arbitrator, it was incumbent upon him to get hold of all the relevant documents for arriving at a just decision. In *K.P. Poulose vs State of Kerala*, AIR 1975 SC 1259, it had been held by the Hon'ble Supreme Court as under:

"Misconduct under Section 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision.

In the instant case, the Arbitrator has misconducted the proceedings by ignoring the two very material documents to arrive at a just decision to resolve the controversy between the Department and the contractor. Even if Department did not produce those documents before the Arbitrator, it was incumbent upon him to get hold of all the relevant documents including the two documents in question for the purpose of a just decision. Further, he arrived at an inconsistent conclusion even on his own finding. The award suffered from a manifest error apparent ex facie."

The making of an award without the basic documents, namely, the arbitration agreement before the arbitrators at the time of application of mind, i.e. at the time of considering the rival contentions of the parties is not permissible. The arbitrator has to insist on the production of the agreement, even if not presented by the parties, as without such agreement being on record, the respective contentions of the parties cannot be adjudicated upon. *Hooghly River Bridge, Commissioner v. Bhagirathi Bridge Construction Co. Ltd.*, AIR 1995 Cal 274.

Arbitrator must act within submission

The aim of arbitration is to settle all disputes between the parties and to avoid further litigation. Hence, where the contractor claimed amounts for work done after arbitration proceedings had begun and the claim statement filed with the arbitrator also included this claim, the arbitrator had jurisdiction to make an award on the said claim also. *Shyama Charan Agarwala & Sons v. Union of India*, (2002) 6 SCC 201.

In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimants could raise a particular dispute or claim before the arbitrator. If the answer is in affirmative, then it is clear that arbitrator would have the jurisdiction to deal with such a claim. On the other hand, if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a

dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim, then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction the court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made. *Himachal Pradesh State Electricity Board v. R.J. Shah*, (1999)4 SCC 214; *Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises*, 1999(3) RAJ 326 (SC).

An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialized branch of the law of agency (Mustill and Boyd's Commercial Arbitration, 2nd Ed., p.641). He commits misconduct if by his award he decides matters excluded by the agreement (Halsbury Laws of England, Vol. II, 4th Ed., para 622). As an arbitrator derives his jurisdiction only from the agreement for his appointment, it is never open to him to reject any part of that agreement, or to disregard any limitation placed on his authority. A deliberate departure from contract amounts to not only manifest disregard of his authority or misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award, *Shyama Charan Agarwala & Sons v. Union of India*, (2002)6 SCC 201.

It is an integral part of the duties of the arbitrator to adhere to the conditions of the contract agreed to between the parties and must always be within the terms of reference in accordance with which the parties desire him to make and publish the award. Thus, it is mandatory and obligatory on his part to act strictly in accordance with the law laid down by the Courts and not to act whimsically and arbitrarily and in the manner which he thinks is just and reasonable.

Where in a works contract a contractor demands extra costs due to price escalation, which had been barred specifically under the terms of the agreement, the award of such extra costs by the arbitrator was held to be bad in law on the ground that the arbitrator acted in excess of the jurisdiction conferred on him. *Continental Construction Co. Ltd. vs State of Madhya Pradesh*, AIR 1988 SC 1166)

An arbitrator derives authority from the reference made to him either by the parties or by a person named in the agreement having the authority to appoint the arbitrator, as authorized by the parties in the agreement itself. The arbitrator is not permitted in law to enlarge the scope of reference. Any decision or award on an item(s) which is beyond the scope of reference shall not have the sanction of law. If the award on an item not referred for adjudication in arbitration had been decided by the arbitrator and is not severable from the rest of the award, then the whole of the award shall be set aside by the Court. In *Jivrajbhai Ujamshi Sheth and others vs Chintamanrao Balaji and others*, AIR 1965 SC 214, the Hon'ble Supreme Court laid down the law as under:

"If the parties set limits to action by the arbitrator, then the arbitrator has to follow the limits set for him, and the Court can find that he has exceeded his jurisdiction on proof of such action. The assumption of jurisdiction not possessed by the arbitrator renders the award, to the extent to which it is beyond the arbitrator's jurisdiction, invalid. And if it is not possible to sever such invalid part from the other part of the award, the award must fail in its entirety."

Arbitrator to decide on his skill and knowledge

Lord Goddard, CJ in *Mediterranean & Eastern Export Co. Ltd. vs Fortress Fabrics Ltd.*, [1948]2 All ER 186, held as under:

"A man in the trade who is selected for his experience would be likely to know and indeed be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them.....".

Arbitrator cannot delegate his functions

In Russell on Arbitration, 20th Ed., page 228, it has been stated as under:

"One who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for this, being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done".

"Arbitrators cannot refer their arbitrements to others, nor to an umpire; if the submission be not so; neither can they make their arbitrement in the names of themselves and of a third person to whom no submission was made; nor alter it after it is once made."

Power to proceed *ex-parte*

An arbitrator ought not to proceed *ex parte* against a party if he has not appeared at one of the sittings. The arbitrator should give another notice fixing date, time and venue and intimate that he would proceed with the matter *ex parte* if either party fails to attend. Even after notice if the defaulting party does not attend, the arbitrator may proceed in his absence. *Hemkunt Builders P. Ltd. v. Panjabi University, Patiala*, 1993(1) Arb LR 348.

As per terms of the arbitration agreement, both the parties were required to nominate their respective arbitrators. Delay occurred on the part of one party to nominate its arbitrator. Thereupon, the nominee-arbitrator of the other party started conducting arbitration proceedings *ex parte* in a tearing haste without waiting for other party. He not only proceeded *ex parte* on same date but also recorded statement of witness and heard arguments. It was held

that the procedure adopted by the arbitrator was in violation of the principles of natural justice and the award rendered by him was set aside, *Shri Ram Ram Niranjan v. Union of India*, AIR 2001 Del 424

Russell on Arbitration, 20th Ed., p. 263 states:

“In general, an arbitrator is not justified in proceeding *ex parte* without giving the party absents himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator’s intention clearly, otherwise the award may be set aside.

“If a party says: “I will not attend, because you (the arbitrator) are receiving illegal evidence, and no award which you can make will be good, the arbitrator may go on with the reference in his absence; and it seems that it is not necessary in such a case to give the recusant any notice of the subsequent meetings. But, though it may not always be necessary, it is certainly advisable that notice of every meeting should be given to the party who absents himself, so that he may have the opportunity of changing his mind, and of being present if he pleases.”

If the arbitrator did not allow adjournment of just one day, as the counsel of the party was busy in another arbitration proceedings and proceeded to pass an *ex parte* award, without giving notice of his intention to do so, the award would be invalid. *Executive Engineer, Prachi Division v. Gangaram Chhapolia*, AIR 1983 NOC 205 (Ori).

Failure to act without unreasonable delay

Section 14(1)(a) of the Act provides that the mandate of an arbitrator shall terminate if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay. Thus, where the named arbitrator does not act for three months despite repeated reminders, it can be clearly said that the mandate of the named arbitrator shall be deemed to have been terminated as he failed to act without undue delay as contemplated under section 14(1)(a) and the court gets the power to appoint a new arbitrator under section 11(5). *Deepa Galvanising Engg. Industries Pvt. Ltd. v. Govt. of India*, 1998(1) ICC 410 (AP).

Where the parties stipulated by consent that if the arbitrator does not complete the arbitral proceedings on or before a particular date his mandate shall stand terminated, then the mandate automatically terminates on the expiry of that date. Consent order is nothing but an agreement between the parties with super imposed seal of the court. *Kifayatullah Haji Gulam Rasool v. Bilkish Ismail Mehsania*, AIR 2000 Bom 424.

What is reasonable dispatch depends upon the type of arbitration and the size and complexity of the dispute. The question of reasonableness should be determined by reference to the nature of arbitration and the interests of the parties and not individual circumstances of the arbitrator. Thus, if the arbitrators were delayed in proceeding by illness or unexpected absence abroad, they would be open to removal, even though they had not personally flawed. Conversely, fault is not sufficient to amount to a failure to use all reasonable dispatch: an

arbitrator may be incompetent or guilty of misconduct and yet not be guilty of such delay. (Mustil & Boyd's Commercial Arbitration, p. 474).

In this regard, Karnataka High Court in *Rudramani Devaru v. Shrimad Maharaj Niranjana Jagadguru*, AIR 2005 Kant 313 summarized the principles to be followed by an arbitral tribunal as under:

“The minimum requirements of a proper hearing should include: (i) each party must have notice that the hearing is to take place and of the date, time and place of holding such hearing; (ii) each party must have a reasonable opportunity to be present at the hearing along with his witnesses and legal advisers, if any, if allowed; (iii) each party must have an opportunity to be present throughout the hearing; (iv) each party must have a reasonable opportunity to present statements, documents, evidence and arguments in support of his own case; (v) each party must be supplied with the statements, documents and evidence adduced by the other side; (vi) each party must have a reasonable opportunity to cross-examine his opponent's witnesses and reply to the arguments advanced in support of his opponent's case. It is expected of an arbitral tribunal that it should ensure that the date of the hearing is not so close that the case cannot be properly prepared. Equally, an arbitral tribunal, while fixing the date of hearing, should try to accommodate any party who is placed in difficulty by his absence due to unavoidable circumstances such as illness or compelling engagements of himself elsewhere etc. Each party is also entitled to know any statements, documents, evidence or information collected by the arbitral tribunal itself which are adverse to his interest, if they are not contested. The arbitral tribunal is neither to hear evidence nor arguments of one party in the absence of the other party, unless despite opportunity, the other party chooses to remain absent. So also, the arbitral tribunal is not to hear evidence in the absence of both the parties unless both the parties choose to remain absent despite proper notice. Each party to arbitration reference is entitled to advance notice of any hearing and of any meeting of the arbitral tribunal as provided under S.24 of the Act”.

2015 Amendment to the Arbitration and Conciliation Act, 1996

By Argus Partners

Introduction

The Arbitration and Conciliation Act, 1996 (“Act”) has been amended by the Arbitration and Conciliation (Amendment) Ordinance, 2015 (“Ordinance”), promulgated by the President of India on October 23, 2015.

The Ordinance has introduced significant changes to the Act and seeks to address some of the issues, such as delays and high costs, which have been affecting arbitrations in India.

The Ordinance is an attempt to make arbitration a preferred mode for settlement of commercial disputes and to make India a hub of international commercial arbitration. With the amendments, arbitrations in India are sought to be made more user-friendly and cost effective. The major changes brought about by the Ordinance are summarized in this update.

Interim Measures

The Ordinance introduces a paradigm shift in the mode and method of grant of interim measures in an arbitration proceeding.

Recent judicial decisions (*Bharat Aluminum Co v. Kaiser Aluminum Technical Services*, Supreme Court (2012) 9 SCC 552) had held that Part I of the Act (which, inter alia, includes provisions on seeking interim reliefs before a Court in India) would not apply to foreign seated arbitrations. The Ordinance has inserted a proviso to section 2 of the Act, whereby, sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 (all falling in Part I of the Act) have been made applicable to international commercial arbitrations, even if the place of arbitration is outside India. As a result a party to an arbitration proceeding will be able to approach Courts in India for interim reliefs before the commencement of an arbitration proceeding, even if the seat of such arbitration is not in India.

Importantly, under the newly inserted section 9(3), a Court cannot, as a matter of course, entertain an application for interim measure once an arbitral tribunal has been constituted, unless the Court finds that circumstances exist which may not render the remedy available under section 17 of the Act, i.e. approaching the arbitral tribunal for interim measures, efficacious. The intention of the Legislature is to limit the involvement of Courts in an arbitration proceeding thereby making such proceedings swift and effective.

Another important change introduced by the Ordinance is the power of an arbitral tribunal to grant interim reliefs. Though the original section 17 of the Act afforded an arbitral tribunal the power to grant interim measures, it definitely did lack the saber-tooth. In this regard the Supreme Court of India had held that though section 17 of the Act gave an arbitral tribunal the power to pass interim orders, but the same could not be enforced as an order of a Court (*M/s. Sundaram Finance v. M/s. NEPC India Ltd.*, AIR 1999 SC 565,

and *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*, AIR 2004 SC 1344). The Ordinance has substituted section 17 by a new section which ensures that an order passed by an arbitral tribunal under section 17 will now be deemed to be an order of the Court and shall be enforceable under the Code of Civil Procedure, 1908. Moreover, as discussed above, once the arbitral tribunal is constituted, all applications seeking interim measures would now be directed to it and not the Court.

Strict Timelines

The Ordinance brings about some strict timelines in completion of arbitration proceedings. Proceedings before Courts have also been made time-bound.

Commencing arbitration proceedings after obtaining an interim order from a Court

In order to discourage litigants who obtain an interim order under section 9 of the Act, but do not commence arbitration proceedings, a timeline of 90 (ninety) days to commence arbitration proceedings after obtaining an order under section 9 of the Act has been introduced.

Application to set aside an arbitral award

An application to set aside an arbitral award under Section 34 of the Act has to be disposed of by the Court within a period of 1 (one) year from its filing.

Application for appointment of an arbitrator

The Ordinance provides that the Chief Justice of the High Court or the Chief Justice of the Supreme Court of India, in an application for appointment of an arbitrator, can only confine themselves to ascertaining that a valid arbitration agreement exists. Such application is required to be disposed of within a period of 60 (sixty) days.

Completion of arbitration proceedings

As far as arbitration proceedings are concerned, newly introduced section 29A of the Act mandates completion of arbitration proceedings within a period of 12 (twelve) months of entering into a reference. Amended section 12 of the Act now requires an arbitrator to make a specific disclosure if there are circumstances which would affect his ability to complete the arbitration proceeding within the period of 12 (twelve) months.

Further, amended section 24 of the Act now empowers the arbitrator to impose exemplary costs on a party that seeks an adjournment before the arbitral tribunal without citing sufficient cause.

The parties to an arbitration may, however, by consent, extend the period for making an arbitration award for a further period not exceeding 6 (six) months. In case of expiry of the extended period, the mandate of the arbitral tribunal will stand terminated, unless a Court grants a further extension of the period, upon an application of the parties to the arbitration proceeding. When the Court grants an extension of time as above, it may substitute some or all of the arbitrators.

Fast Track Arbitrations

The Ordinance introduces a fast track arbitration proceeding.

Newly introduced section 29B of the Act provides for an option whereby the parties to an arbitration agreement may mutually decide to appoint a sole arbitrator who decides the dispute on the basis of written pleadings, documents and submissions. Oral hearing and technical formalities may be dispensed with for the sake of an expeditious disposal. An award has to be rendered within a period of 6 (six) months of entering into a reference.

Challenging an Award

Public Policy

Section 34 of the Act provides that an arbitral award may be set aside if it is contrary to 'public policy'.

The Supreme Court of India in *ONGC v. Saw Pipes* (2003) had expanded the test of 'public policy' to mean an award that violates the statutory provisions of Indian law or even the terms of the contract in some cases. Such an award would be considered as 'patently illegal' and therefore in violation of public policy. This interpretation practically afforded the losing party an opportunity to re-agitate the merits of the case. Though in a very recent judgment, the Supreme Court noted that while the merits of an arbitral award can be scrutinized when a challenge is made on grounds that an arbitral award has violated 'public policy', there were limitations as to the extent to which, such a re-evaluation can be conducted.

The Ordinance, however, clarifies that an award will be in conflict with the public policy of India, only in certain circumstances, such as if the award is induced or affected by fraud or corruption, or is in contravention with the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. Further, the Ordinance provides that a determination of whether there is a contravention with the fundamental policy of Indian law cannot entail a review of the merits of the dispute. This amendment seeks to limit the re-appreciation of the merits of the dispute at the stage of challenge to the award before the Court.

Hence, the Legislature has fundamentally reduced the scope of the inquiry by the judiciary into the question of violation of 'public policy'.

Patent illegality

Another amendment brought about by the Ordinance is that an arbitral award can be set aside by a Court if the award is vitiated by patent illegality appearing on the face of the award.

However, an award cannot be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence.

Stay on enforcement of an award

The Ordinance provides that the mere filing of an application challenging an arbitration award would not automatically stay the execution of the award. The execution of an award will only be stayed when the Court passes any specific order of stay on an application by a party to the proceeding.

Ensuring Impartiality of an Arbitrator

The Ordinance gives foremost importance to the impartiality of an arbitrator. Original Section 12 of the Act necessitated an arbitrator to disclose in writing circumstances likely to give rise to justifiable doubts as to his independence or impartiality. The Ordinance specifies in elaborate detail the circumstances which may lead to such justifiable doubts. The newly inserted fifth schedule of the Act lists 34 (thirty four) such grounds which shall act as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. It is now important to see how proximate the arbitrator is to a party to the proceeding and/or the party's lawyer.

Arbitration Fees

In a very significant step, the Ordinance provides a cap on the fees to be paid to an arbitrator, barring international commercial arbitrations and institutional arbitrations. The amendment to Section 11 of the Act empowers the concerned High Court to frame rules to determine the fees of the Arbitral Tribunal and the mode of such payment. The rates specified in the newly inserted fourth schedule have to be considered.

The Definition of 'Court'

Original Section 2(e) of the Act provided a single definition of "Court", which meant a District Court, or the High Court exercising its ordinary original civil jurisdiction, as the case may be. The Ordinance, however, bifurcates the definition and clearly specifies that unlike other arbitrations, in case of international commercial arbitrations, only a High Court exercising its ordinary original civil jurisdiction will qualify as a "Court".

The 2019 Arbitration Amendment Act and the Changes It Ushers In - A Primer

By

Dr. Amit George

Source: <https://barandbench.com/npac-arbitration-review-2019-arbitration-amendment-act/>
(August 12, 2019)

Having received presidential assent on August 9, 2019, the Arbitration and Conciliation (Amendment) Act, 2019 ('2019 Amendment') has formally been published in the Official Gazette. The key features of the Amendment are dealt with below:

Modified timeline for completion of proceedings

The 2019 Amendment relaxes the stringent time-period for completion of arbitration proceedings as prescribed by the 2015 Amendment to a certain extent.

The 2019 Amendment frees international commercial arbitrations from a pre-determined time-period, albeit retaining a 'pious-hope' provision for completion thereof within a period of 12 months from the date of completion of pleadings. In the case of a domestic arbitration, the time-period of 12 months (extendable of course by another 6 months subject to consent by the parties, and thereafter by the Court) for the conclusion of the proceedings is now to be reckoned from the date of completion of pleadings instead of from the date of constitution of the arbitral tribunal.

In order to ensure that this phase of completion of pleadings does not become a runaway-horse, there is a period of six months which has been prescribed for the filing of the Statement of Claim and Defence. It is, however, unclear as to what are the consequences of a breach of the six-month period by the parties.

Mandate of the Arbitrator(s) to continue pending an application for extension of time

The 2019 Amendment specifies that when the parties have approached the Court concerned with an application under Section 29A for extension of time for completion of the arbitration proceedings, then the mandate of the arbitrator(s) shall continue till the disposal of the said application.

This ensures the continuation of the arbitration proceedings for the period when the said application is pending before the Court, which period prior to this amendment could not be put to any beneficial use inasmuch as an arbitrator(s) with a lapsed mandate could revive the proceedings only once the Court would allow an application filed under Section 29A.

Yet further, it has also been provided in the 2019 Amendment that if a Court deems it fit to effect a reduction in the fees of the arbitrator(s) while considering such an application, it shall

do so only after giving the arbitrator(s) concerned an opportunity of being heard in the matter.

Confidentiality of Arbitration Proceedings

The 2019 Amendment explicitly incorporates a requirement for the arbitrator(s), the arbitral institution concerned and the parties themselves to maintain the confidentiality of all arbitration proceedings, except where disclosure of the award is necessary for the purpose of its implementation and enforcement.

Manner of demonstrating circumstance(s) that would justify interference with an award in a petition under Section 34

An interesting modification brought about by the 2019 Amendment is in relation to the manner of ‘proving’ the pre-requisites for interference with an award under Section 34. Whereas the provision in the 1996 Act required a party to ‘furnish proof’ of the existence of circumstances that would justify interference with an award, the 2019 Amendment clarifies that the said circumstances have to be established on the basis of the record of the arbitral tribunal. This not only removes the otherwise ambiguous phrase ‘furnish proof’, yet further, it seems to expressly clarify that the demonstration has to be made by the party concerned on the basis of the record of the arbitral tribunal alone, thereby expressly barring reference to material which was not placed before the arbitral tribunal.

Excision of Power of Arbitrators to make orders under Section 17 in the Post-Award stage

The 2015 Amendment had permitted the parties to obtain interim measures from an arbitral tribunal under Section 17 of the 1996 Act during the pendency of the arbitration proceedings or at any time after the making of the award, but before it was enforced in accordance with Section 36.

This period for which the arbitral tribunal can order interim relief has now been reduced in the 2019 Amendment, by the removal of the said power after the making of the arbitral award. This, therefore, means that after the making of an award and before its enforcement, it is the concerned Court only which can be approached for interim measures under Section 9 of the 1996 Act. This ties in with the general prescription that the arbitral tribunal is by and large *functus-officio* after the passing of the award except for certain limited functions such as those mentioned in Section 33 of the 1996 Act.

Protection for Arbitrators

The 2019 Amendment also puts in place an express safety-net for arbitrators and clarifies that no suit or other legal proceedings shall lie against an arbitrator(s) for anything done in good faith or intended to be done under the 1996 Act.

Prima Facie finding enough for refusal to refer parties to Arbitration under Section 45

The 2019 Amendment has sought to bring about textual equivalence between Section 45 and Section 8 of the 1996 Act as regards the nature of the determination required to be made by a Court. Section 45 which required the Court to come to a definitive finding that a matter was not capable of settlement through arbitration, has now been amended to reflect, *pari-materia* with Section 8(1), that a Court may refuse a reference to arbitration under Section 45 upon arriving at a prima-facie finding that the arbitration agreement was null and void, inoperative or incapable of being performed.

Formal recognition of Arbitral Institutions and delegation of crucial functions

The 2019 Amendment brings to practical fruition the normative push initiated by the 2015 Amendment towards setting up and establishing arbitral institutions in the country. To this end, the 2019 Amendment specifically empowers the Supreme Court and the High Courts to designate arbitral institutions for performing crucial functions, including appointment of arbitrators.

This is a significant step inasmuch as appointment of arbitrators under Section 11 has consistently been regarded as a judicial function in terms of the judgment of the Supreme Court in *SBP & Co. v. Patel Engineering Ltd.* [(2005) 8 SCC 618], though there was a dilution of this principle in the 2015 Amendment inasmuch as it provided, under Section 11(6)(B), that delegation of the powers of appointment of an arbitrator by the Court concerned to an arbitral institution shall not amount to a delegation of judicial power.

This function has now by the 2019 Amendment been expressly permitted to be delegated to an institution to be so designated by the Court concerned. The applications for appointment which were hitherto to be filed before the Supreme Court, in the case of an international commercial arbitration, and the High Court, in the case of a domestic arbitration, are now to be filed before the institution, if any, designated by the Supreme Court and the High Court respectively.

An arbitral institution when so approached is required to dispose of the application within a period of 30 days from the date of service of notice on the opposite party, though the practicality or mandatory enforceability of this provision is uncertain. Yet further, if the High Court concerned is unable to designate an arbitral institution for lack of availability, then the High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator(s) would be deemed to be an arbitral institution.

While there can be a lot of debate about the efficacy of delegating such a function to an arbitral institution, on an ancillary note, it is definitely another indicator of the rapidly denigrating position of the Supreme Court as a Constitutional Court, and its evolution into a predominantly appellate forum.

The present position is that orders passed by the High Courts in exercise of jurisdiction under Section 11 are, due to the lack of an appellate provision in the 1996 Act, directly assailed before the Supreme Court in exercise of jurisdiction under Article 136 of the Constitution of India. Now, with the delegation of the power of appointment of arbitrators under Section 11 being delegated to arbitral institutions, the Supreme Court of India will directly hear challenges, under Article 136, against orders passed by designated arbitral institutions. This distinction or affliction, depending on the perspective, is seemingly unique to the Indian Supreme Court amongst apex judicial forums in countries across the world.

Applicability of the Fee Provisions enshrined in the Fourth Schedule

The 2019 Amendment postulates, through some very convoluted language, that in the absence of a designated arbitral institution, the High Court is required to maintain a panel of arbitrators and if a party were to appoint an arbitrator from such a panel then the fee as stipulated in the Fourth Schedule shall be applicable to the arbitrator so appointed.

Yet further, any reference to an arbitrator from this panel is to be deemed to be a reference to an arbitral institution. Even in the case of a designated arbitral institution, unless in the case of an international commercial arbitration or in the case where the parties have agreed for determination of fees as per the rules of an arbitral institution, then the fee as stipulated in the Fourth Schedule shall be applicable to the arbitrator so appointed by the arbitral institution concerned.

Establishment of the Arbitration Council of India

Tied in with the introduction of arbitral institutions is the creation of the Arbitration Council of India which, in terms of the provisions of the 2019 Amendment, has been modelled as a premier arbitration regulator/overseer performing various functions for promoting, reforming and advancing the practice of arbitration in the country. In the furtherance of this goal, the Arbitration Council of India has been given powers inter-alia for grading arbitral institutions, recognizing professional institutes providing accreditation of arbitrators, maintaining a repository of arbitral awards made in India etc.

The constitution of the Arbitration Council of India as comprising of the Chairperson, a Chief Executive Officer and various members has also been laid down in perfunctory detail. For greater clarity on the exact scope of the powers and functions of the Arbitration Council of India, and its internal constitution, one would have to await the introduction of the relevant

regulations in this regard which the Central Government has been empowered to frame and prescribe.

Express Qualifications to be accredited as an Arbitrator

Unlike the 1996 Act or the 2015 Amendment, wherein there were no specific qualifications prescribed for being appointed as an arbitrator, aside from the general requirements of independence and impartiality, the 2019 Amendment has introduced the Eighth Schedule which specifically provides that only a certain specific class of persons holding certain qualifications would be eligible to be accredited as an arbitrator including advocates, chartered accountants, cost accountants and company secretaries [all with 10 years of experience] or officers of the Indian legal service, or officers with a law degree or an engineering degree [both in the government and in the private sector with 10 years of experience], officers having senior level experience of administration [both in the government and in the private sector with 10 years of experience], or a person having educational qualification at the degree level with 10 years of experience in a technical or scientific stream in the fields of telecom, information technology, intellectual property rights or other specialized areas [both in the government and in the private sector].

The ability to be an arbitrator is therefore expressly tied-in with qualification and experience. There are a few more vague general norms applicable to arbitrators, which primarily deal with their impartiality and independence and their legal and practical competence to be able to render a reasoned award and their understanding of the applicable law and best practices.

Significantly, any person having been convicted of any offence involving moral turpitude or an economic offence would fall afoul of these norms. However, both these qualifications and norms, are introduced by the 2019 Amendment in relation to Section 43J which pertains to accreditation of arbitrators by the Arbitration Council of India. There does not seem to be any express reference to the incorporation of these parameters in the existing Fifth Schedule or the Seventh Schedule, meaning thereby that for the moment there is no proscription against persons not falling within the parameters as specified in the Eighth Schedule being appointed as arbitrators.

Non-Retrospective

The retrospective nature of the far-ranging 2015 Amendment inasmuch as it related to Court proceedings has been conclusively determined by the Supreme Court in the judgment in *Board of Control for Cricket in India v. Kochi Cricket (P.) Ltd.* [(2018) 6 SCC 287] in the context of Section 36 of the 1996 Act, and in *Ssangyong Engineering and Construction Co.*

Ltd. v. National Highways Authority of India [2019 (3) Arb. LR 152 (SC)] in the context of Section 34 of the 1996 Act.

In *Kochi Cricket* (supra), the Supreme Court had gone so far as to express its displeasure with the then pending proposal to render the 2015 Amendment prospective in nature. The Supreme Court had urged a re-think in this regard. However, Parliament has specifically disregarded the advice of the Supreme Court, and through the 2019 Amendment expressly made the 2015 Amendment prospective in nature i.e. the provisions of the 2015 Amendment would only apply to cases where the arbitration was invoked post October 23, 2015. The all-encompassing language makes the applicability of the 2019 Amendment prospective not only to arbitration proceedings themselves but also related court proceedings.

The immediate fallout of this, inter-alia, would that be a large number of execution petitions which, inspired by the decision in *Kochi Cricket* (supra), had come to be filed in relation to awards which arose from arbitrations which were invoked prior to October 23, 2015 and in which Section 34 award-challenge petitions are pending, would now, unless the same have already been disposed of, be rendered non-maintainable inasmuch as Section 36 of the un-amended 1996 Act provides for automatic stay of awards upon the filing of a Section 34 award-challenge petition.

However, the 2019 Amendment does not itself contain an express provision about the retrospectivity or otherwise of the changes it introduces to the 1996 Act. Whereas such an omission arguably veers to a presumption of prospectively, this issue is nonetheless likely to lead to future litigation on this aspect in the absence of an express provision.

Excerpts from Drafting Dispute Resolution Clauses

American Arbitration Association

Drafting clear, unambiguous clauses contributes to the efficiency of the ADR process. For example, arbitration agreements require a clear intent to arbitrate. It is not enough to state that “disputes arising under the agreement shall be settled by arbitration.” While that language indicates the parties’ intention to arbitrate and may authorize a court to enforce the clause, it leaves many issues unresolved. Issues such as when, where, how and before whom a dispute will be arbitrated are subject to disagreement once a controversy has arisen, with no way to resolve them except to go to court. Some of the more important elements a practitioner should keep in mind when drafting, adopting or recommending a dispute resolution clause follow.

- The clause might cover all disputes that may arise, or only certain types.
- It could specify only arbitration – which yields a binding decision – or also provide an opportunity for non-binding negotiation or mediation.
- The arbitration clause should be signed by as many potential parties to a future dispute as possible.
- To be fully effective, “entry of judgment” language in domestic cases is important.
- It is normally a good idea to state whether a panel of one or three arbitrator(s) is to be selected, and to include the place where the arbitration will occur.
- If the contract includes a general choice of law clause, it may govern the arbitration proceeding. The consequences should be considered...
- The parties are free to customize and refine the basic arbitration procedures to meet their particular needs. If the parties agree on a procedure that conflicts with otherwise applicable AAA rules, the AAA will almost always respect the wishes of the parties....
- The parties can provide for arbitration of future disputes by inserting the following clause into their contracts (the language in the brackets suggests possible alternatives or additions).
- Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.
- We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial [or other] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award.

The standard clause is often the best to include in a contract. It makes clear that all disputes are arbitrable. Thus, it minimizes dilatory court actions to avoid the arbitration process. It is self-enforcing. Arbitration can continue despite an objection from a party, unless the proceedings are stayed by court order or by agreement of the parties. It provides a

complete set of rules and procedures. This eliminates the need to spell out dozens of procedural matters in the parties' agreement. It provides for the selection of a specialized, impartial panel. Arbitrators are selected by the parties from a screened and trained pool of available experts.

The parties should consider adding a requirement regarding the number of arbitrators appointed to the dispute and designating the place and language of the arbitration.....For strategic or long-term commercial international contracts, the parties may wish to provide a "step" dispute resolution process encouraging negotiated solutions, or mediation in advance of arbitration or litigation. A model step clause and mediation clause follow.

"In the event of any controversy or claim arising out of or relating to this contract, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the International Mediation Procedures of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution."

Usually, the effective management of time and expense in arbitration is best left in the hands of experienced case managers and arbitrators. Occasionally, however, parties wish to ensure that matters are resolved in a minimum of time and without recourse to the expense and time necessitated by common law methods of pre-hearing information exchange. The clauses that follow limit the time frame of arbitration (clauses presented in the alternative) and the amount of pre-hearing information exchange available to the parties. One word of caution: once entered into, these clauses will limit the arbitrator's authority to mold the process to the specific dictates of the case.

Other Provisions That Might be Considered

A. Specifying a Method of Selection and the Number of Arbitrators

The parties may agree to have one arbitrator or three (which significantly increases the cost).

The arbitration clause can also specify by name the individual whom the parties want as their arbitrator. However, the potential unavailability of the named individual in the future may pose a risk. All of these issues and others can be dealt with in the arbitration clause. Some illustrative provisions follow.

➤ The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within 10 days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request the American Arbitration Association to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall provide an oath or undertaking of impartiality.

➤ Within 14 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within 10 days of their appointment. [The party-selected arbitrators will serve in a non-neutral capacity.] If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association.

➤ In the event that arbitration is necessary, [name of specific arbitrator] shall act as the arbitrator.

When providing for direct appointment of the arbitrator(s) by the parties, it is best to specify a time frame within which it must be accomplished. Also, in many jurisdictions, the law permits the court to appoint arbitrators where privately-agreed means fail. Such a result may be time consuming, costly, and unpredictable. Parties who seek to establish an ad-hoc method of arbitrator appointment might be well advised to provide a fallback, such as, should the particular procedure fail for any reason, “arbitrators shall be appointed as provided in the AAA Commercial Arbitration Rules.”

B. Arbitrator Qualifications

The parties may wish that one or more of the arbitrators be a lawyer or an accountant or an expert in computer technology, etc. In some instances, it makes more sense to specify that one of three arbitrators be an accountant, for example, than to turn the entire proceeding over to three accountants. Sample clauses providing for specific qualifications of arbitrators are set forth below.

- The arbitrator shall be a certified public accountant.
- The arbitrator shall be a practicing attorney [or a retired judge] of the [[specify]] [Court].
- The arbitration proceedings shall be conducted before a panel of three neutral arbitrators, all of whom shall be members of the bar of the state of [specify], actively engaged in the practice of law for at least 10 years.
- The panel of three arbitrators shall consist of one contractor, one architect, and one construction attorney.
- The arbitrators will be selected from a panel of persons having experience with and knowledge of electronic computers and the computer business, and at least one of the arbitrators selected will be an attorney.
- In the event that any party’s claim exceeds \$1 million, exclusive of interest and attorneys’ fees, the dispute shall be heard and determined by three arbitrators.

Parties might wish to specify that the arbitrator should or should not be a national or citizen of a particular country. The following examples can be added to the arbitration clause to deal with this concern.

- The arbitrator shall be a national of [country].

- The arbitrator shall not be a national of either [country A] or [country B].
- The arbitrator shall not be of the nationality of either of the parties.

C. Locale Provisions

Parties might want to add language specifying the place of the arbitration. The choice of the proper place to arbitrate is most important because the place of arbitration implies generally a choice of the applicable procedural law, which in turn affects questions of arbitrability, procedure, court intervention and enforcement. In specifying a locale, parties should consider (1) the convenience of the location (e.g., availability of witnesses, local counsel, transportation, hotels, meeting facilities, court reporters, etc.); (2) the available pool of qualified arbitrators within the geographical area; and (3) the applicable procedural and substantive law. Of particular importance in international cases is the applicability of a convention providing for recognition and enforcement of arbitral agreements and awards and the arbitration regime at the chosen site. An example of locale provisions that might appear in an arbitration clause follows.

- The place of arbitration shall be [city], [state], or [country].

D. Language

In matters involving multilingual parties, the arbitration agreement often specifies the language in which the arbitration will be conducted. Examples of such language follow.

- The language(s) of the arbitration shall be [specify].
- The arbitration shall be conducted in the language in which the contract was written.

Such arbitration clauses could also deal with selection and cost allocation of an interpreter.

E. Governing Law

It is common for parties to specify the law that will govern the contract and/or the arbitration proceedings. Some examples follow.

- This agreement shall be governed by and interpreted in accordance with the laws of the State of [specify]. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement.

- Disputes under this clause shall be resolved by arbitration in accordance with Title 9 of the US Code (United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association.

- This contract shall be governed by the laws of the state of [specify].

F. Conditions Precedent to Arbitration

Under an agreement of the parties, satisfaction of specified conditions may be required before a dispute is ready for arbitration. Examples of such conditions precedent include written notification of claims within a fixed period of time and exhaustion of other contractually established procedures, such as submission of claims to an architect or engineer. These kinds of provisions may, however, be a source of delay and may require linkage with a statute of limitations waiver (see below). An example of a “condition precedent” clause follows.

➤ If a dispute arises from or relates to this contract, the parties agree that upon request of either party they will seek the advice of [a mutually selected engineer] and try in good faith to settle the dispute within 30 days of that request, following which either party may submit the matter to mediation under the Commercial Mediation Procedures of the American Arbitration Association. If the matter is not resolved within 60 days after initiation of mediation, either party may demand arbitration administered by the American Arbitration Association under its [applicable] rules.

G. Preliminary Relief

If the parties foresee the possibility of needing emergency relief akin to a temporary restraining order, they might specify an arbitrator by name for that purpose in their arbitration clause or authorize the AAA to name a preliminary relief arbitrator to ensure an arbitrator is in place in sufficient time to address appropriate issues. Specific clauses providing for preliminary relief are set forth below.

➤ Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal’s determination of the merits of the controversy).

Pending the outcome of the arbitration, parties may agree to hold in escrow money, a letter of credit, goods, or the subject matter of the arbitration. A sample of a clause providing for such escrow follows.

➤ ESCROW 1 : Pending the outcome of the arbitration [name of party] shall place in escrow with [law firm, institution, or AAA] as the escrow agent, [the sum of _____], a letter of credit, goods, or the subject matter in dispute]. The escrow agent shall be entitled to release the [funds, letter of credit, goods, or subject matter in dispute] as directed by the arbitrator(s) in the award, unless the parties agree otherwise in writing.

H. Consolidation

Where there are multiple parties with disputes arising from the same transaction, complications can often be reduced by the consolidation of all disputes. Since arbitration is a process based on voluntary contractual participation, parties may not be required to arbitrate a dispute without their consent. However, parties can provide for the consolidation of two or more separate arbitrations into a single proceeding or permit the joinder of a third party into

an arbitration. In a construction dispute, consolidated proceedings may eliminate the need for duplicative presentations of claims and avoid the possibility of conflicting rulings from different panels of arbitrators. However, consolidating claims might be a source of delay and expense. An example of language that can be included in an arbitration clause follows.

➤ The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies, and other parties concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first-filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).

I. Document Discovery

Under the AAA rules, arbitrators are authorized to direct a prehearing exchange of documents. The parties typically discuss such an exchange and seek to agree on its scope. In most (but not all) instances, arbitrators will order prompt production of limited numbers of documents which are directly relevant to the issues involved. In some instances, parties might want to ensure that such production will in fact occur and thus provide for it in their arbitration clause. In doing so, however, they should be mindful of what scope of document production they desire. This may be difficult to decide at the outset. If the parties address discovery in the clause, they might include time limitations as to when all discovery should be completed and might specify that the arbitrator shall resolve outstanding discovery issues. Sample language is set forth below.

➤ Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents [relevant to the issues raised by any claim or counterclaim] [on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration panel], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s).

J. Depositions

Generally, arbitrators prefer to hear and be able to question witnesses at a hearing rather than rely on deposition testimony. However, parties are free to provide in their arbitration

clause for a tailored discovery program, preferably to be managed by the arbitrator. This might occur, for example, if the parties anticipate the need for distant witnesses who would not be able to testify except through depositions or, in the alternative, by the arbitrator holding a hearing where the witness is located and subject to subpoena. In most cases where parties provide for depositions, they do so in very limited fashion, i.e., they might specify a 30-day deposition period, with each side permitted three depositions, none of which would last more than three hours. All objections would be reserved for the arbitration hearing and would not even be noted at the deposition except for objections based on privilege or extreme confidentiality. Sample language providing for such depositions is set forth below.

➤ At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] [insert number] per party and shall be held within 30 days of the making of a request. Additional depositions may be scheduled only with the permission of the [arbitrator(s)] [chair of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of [three hours] [six hours] [one day's] duration. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

K. Duration of Arbitration Proceeding

Parties sometimes underscore their wish for an expedited result by providing in the arbitration clause, for example, that there will be an award within a specified number of months of the notice of intention to arbitrate and that the arbitrator(s) must agree to the time constraints before accepting appointment. Before adopting such language, however, the parties should consider whether the deadline is realistic and what would happen if the deadline were not met under circumstances where the parties had not mutually agreed to extend it (e.g., whether the award would be enforceable). It thus may be helpful to allow the arbitrator to extend time limits in appropriate circumstances. Sample language is set forth below.

➤ The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the parties or by the arbitrator(s) if necessary.

L. Remedies

Under a broad arbitration clause and most AAA rules, the arbitrator may grant “any remedy or relief that the arbitrator deems just and equitable” within the scope of the parties’ agreement. Sometimes parties want to include or exclude certain specific remedies. Examples of clauses dealing with remedies follow.

- The arbitrators will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.
- In no event shall an award in an arbitration initiated under this clause exceed \$_____.
- In no event shall an award in an arbitration initiated under this clause exceed \$_____ for any claimant
- The arbitrator(s) shall not award consequential damages in any arbitration initiated under this section.
- Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount.
- If the arbitrator(s) find liability in any arbitration initiated under this clause, they shall award liquidated damages in the amount of \$_____.
- Any monetary award in an arbitration initiated under this clause shall include pre-award interest at the rate of ____% from the time of the act or acts giving rise to the award.

M. "Baseball" Arbitration

"Baseball" arbitration is a methodology used in many different contexts and is particularly effective when parties have a long-term relationship.

- The procedure involves each party submitting a number to the arbitrator(s) and serving the number on his or her adversary on the understanding that, following a hearing, the arbitrator(s) will pick one of the submitted numbers, nothing else.

A key aspect of this approach is that there is incentive for a party to submit a highly reasonable number, since this increases the likelihood that the arbitrator(s) will select that number. In some instances, the process of submitting the numbers moves the parties so close together that the dispute is settled without a hearing. Sample language providing for "baseball" arbitration is set forth below.

- Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted.

N. Arbitration within Monetary Limits

Parties are often able to negotiate to a point but are then unable to close the remaining gap between their respective positions. By setting up an arbitration that must result in an award within the gap that remains between the parties, the parties are able to eliminate extreme risk, while gaining the benefit of the extent to which their negotiations were successful. There are two commonly-used approaches. The first involves informing the arbitrator(s) that the award should be somewhere within a specified monetary range. Sample contract language providing for this methodology is set forth below.

➤ Any award of the arbitrator in favor of [specify party] and against [specify party] shall be at least [specify a dollar amount] but shall not exceed [specify a dollar amount]. [Specify a party] expressly waives any claim in excess of [specify a dollar amount] and agrees that its recovery shall not exceed that amount. Any such award shall be in satisfaction of all claims by [specify a party] against [specify a party].

A second approach is for the parties to agree but not tell the arbitrator(s) that the amount of recovery will, for example, be somewhere between \$500 and \$1,000. If the award is less than \$500, then it is raised to \$500 pursuant to the agreement; if the award is more than \$1,000, then it is lowered to \$1,000 pursuant to the agreement; if the award is within the \$500-1,000 range, then the amount awarded by the arbitrator(s) is unchanged. Sample contract language providing for this methodology is set forth below.

➤ In the event that the arbitrator denies the claim or awards an amount less than the minimum amount of [specify], then this minimum amount shall be paid to the claimant. Should the arbitrator's award exceed the maximum amount of [specify], then only this maximum amount shall be paid to the claimant. It is further understood between the parties that, if the arbitrator awards an amount between the minimum and the maximum stipulated range, then the exact awarded amount will be paid to the claimant. The parties further agree that this agreement is private between them and will not be disclosed to the arbitrator.

O. Assessment of Attorneys' Fees

The AAA rules generally provide that the administrative fees be borne as incurred and that the arbitrators' compensation be allocated equally between the parties and, except for international rules, are silent concerning attorneys' fees; but this can be modified by agreement of the parties. Fees and expenses of the arbitration, including attorneys' fees, can be dealt with in the arbitration clause. Defining the term 'prevailing party' within the contract is recommended to avoid misunderstanding. Some typical language dealing with fees and expenses follows.

➤ The prevailing party shall be entitled to an award of reasonable attorney fees.

➤ The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees.

➤ Each party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration.

➤ The arbitrators may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorneys' fees.

P. Reasoned Opinion Accompanying the Award

In domestic commercial cases, arbitrators usually will write a reasoned opinion explaining their award if such an opinion is requested by all parties. While some take the position that reasoned opinions detract from finality if they facilitate post-arbitration resort to the courts, parties sometimes desire such opinions, particularly in large, complex cases or as already provided by most applicable rules in international disputes. If the parties want such an opinion, they can include language such as the following in their arbitration clause.

- The award of the arbitrators shall be accompanied by a reasoned opinion.
- The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.
- The award shall include findings of fact [and conclusions of law].
- The award shall include a breakdown as to specific claims.

Q. Confidentiality

While the AAA and arbitrators adhere to certain standards concerning the privacy or confidentiality of the hearings (see the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI), parties might also wish to impose limits on themselves as to how much information regarding the dispute may be disclosed outside the hearing. The following language might help serve this purpose.

- Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

The preceding language could also be modified to restrict only disclosure of certain information (e.g., trade secrets).

R. Appeal

The basic objective of arbitration is a fair, fast and expert result, achieved economically. Consistent with this goal, an arbitration award traditionally will be set aside only in egregious circumstances such as demonstrable bias of an arbitrator. Sometimes, however, the parties desire a more comprehensive appeal, most often in the setting of legally complex cases. Some sample clauses incorporating appeal provision are

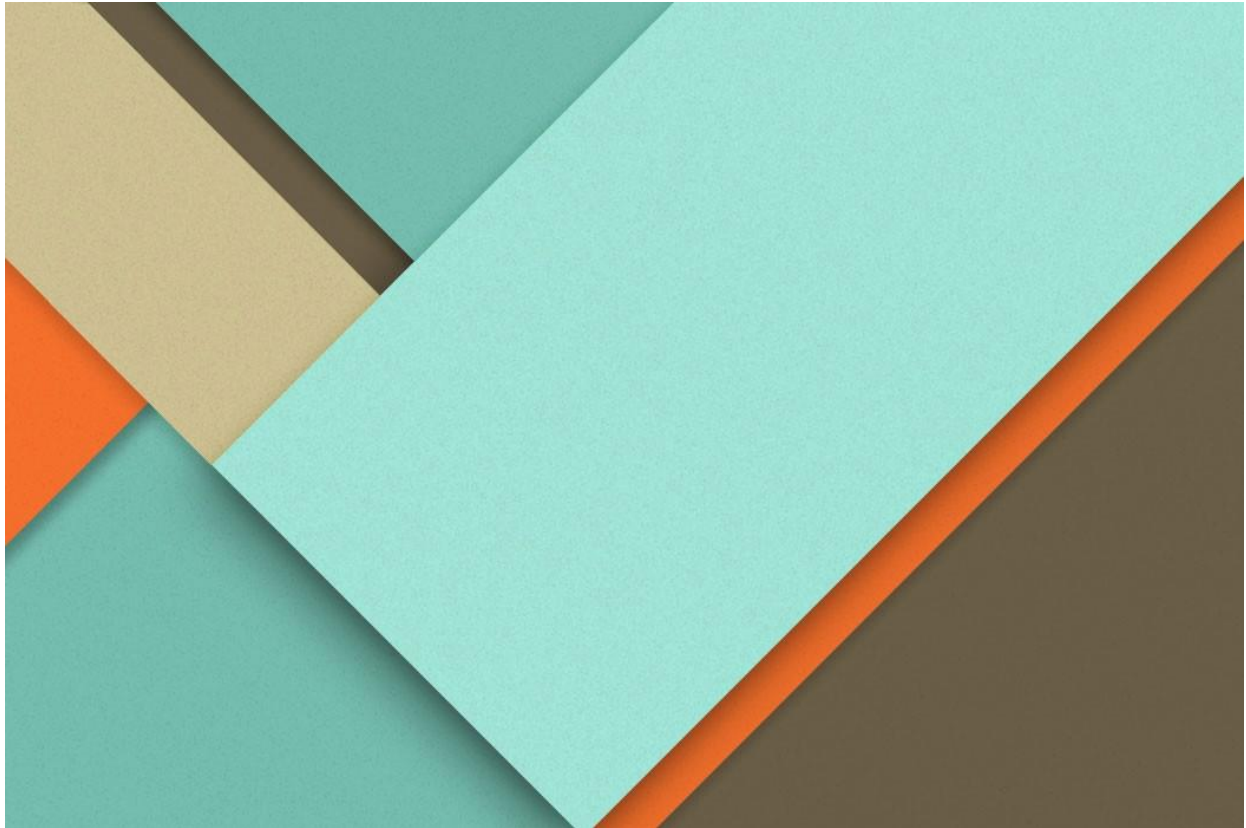
- “Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA’s Optional Appellate Arbitration Rules (“Appellate Rules”); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a

Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof..”

S. Mediation-Arbitration

A clause may provide first for mediation under the AAA’s mediation procedures. If the mediation is unsuccessful, the mediator could be authorized to resolve the dispute under the AAA’s arbitration rules. This process is sometimes referred to as “Med-Arb.” Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator. Sample:

If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If all parties to the dispute agree, a mediator involved in the parties’ mediation may be asked to serve as the arbitrator.



Draft Mediation Bill 2021

Some points of discussion

05.04.2022

—

[Dr. Sunanda Bharti](#)

& Contributing Colleagues (Dr. Neelam Tyagi...)

ADR

Update

Overview

The following may be considered as a working paper on what may be discussed during lectures, by teachers, on the Draft Mediation Bill, 2021.

What appears to be a drawback		What appears to be a good point
<p>Chapter 8 provides for the establishment of a mediation council in India; but it does not have any practicing mediator in its constitution...can this be a professional council then?</p>	1	<p>Mediation and Conciliation have to be used interchangeably—that is one confusion sorted.</p>
<p>Section 7 and 1st Schedule give out a list of exclusions—15 of them. It makes one wonder what can be mediated then! None seems merited except for heinous criminal offenses perhaps.</p> <p>Anything that can be potentially settled should have the option of being settled through mediation.</p>	2	<p>It calls for registration of mediators—which at least hints at creating mediation into a stand-alone profession.</p>
<p>For some curious reason, the Bill reserves only 'commercial' disputes for international mediation. Domestic mediation can be resorted to for even noncommercial disputes.</p> <p>Similarly, for international commercial disputes to which a non-Indian law applies has not been mentioned at all</p>	3	<p>It makes pre-litigation mediation compulsory which appears to be good on the face of it. It may provide mediation the necessary fillip—but at the same time it would be removed from the umbrella of ADR—for it would cease to be an 'alternative'...</p>
<p>Under the proposed section 29, a MSA can be challenged on grounds of fraud, impersonation, or corruption, or if the matter is in the 1st schedule—except for fraud, the remaining three appear to be vague/not defined and/or problematic.</p>	4	<p>Finally, we are talking of mediation legislation—it would streamline many things...</p>

<p>It calls for registration of mediators by the Mediation Council—it may be seen as a cumbersome requirement Also would non registered mediators be allowed to practise?</p>	5	<p>It devotes a chapter to online mediation giving them sanctity and status.</p>
<p>Should it be a Code rather than an Act? After all, its implementation is dependent on so many other laws—the Laws of Contract, Personal laws, CPC for instance.</p>	6	<p>Community mediation is recognised</p>
<p>A few types of settlement agreements are excluded from the scope of the Singapore Convention, namely settlement agreements that have been approved by a court or concluded in court proceedings, and that are enforceable as a judgment or decree of a court.</p> <p>The Draft Mediation Bill Clause 28 provides that ‘mediated settlement agreement resulting from mediation is final and binding and is enforceable in accordance with the provisions of Code of Civil Procedure, 1908, in the same manner as if it were a judgement or decree passed by a court.’</p> <p>Now the problem is that if an international mediation is conducted in India, and results in a MSA, it would be enforceable as a judgment of the court.</p> <p>On one hand the Bill proclaims to make India a hub of mediation, on the other hand it ensures that we do not get the benefit of the Singapore Convention.</p> <p>A FEW MORE POINTS:</p> <ol style="list-style-type: none"> 1. The consequences of non-registration and non-compliance with a Mediated 	7	<p>Situation where confidentiality would not apply have been mentioned</p> <ol style="list-style-type: none"> 1. Binding nature of the mediation settlement agreement and to recognise it as a judgment or decree of a court that will be



<p>Settlement are missing under the Draft Bill.</p> <ol style="list-style-type: none">2. As per Section 23(1)(iii) of the Bill, documents produced during the mediation will not be admissible in the courts or tribunals. However, if one of the parties sues the opposite party after the failure of mediation, this provision will prevent introducing these key documents as evidence in court being part of the mediation proceedings.3. The Bill provides that the chairperson will be appointed by the central government rather the members of the council should be experts in mediation and CJI should have a role in these appointments.4. The Bill does not lay down any details of qualifications or criteria to become a trained mediator.5. Community mediation must have provisions to check these proceedings to prevent any party from becoming a victim of caste or gender discrimination, especially in rural areas.6. Section 18 of the Draft Bill requires the mediator to communicate ‘the view of each party to the other to the extent agreed to by them’. It could give rise to a conflict of interest and strike the confidentiality requirement of the mediation process which must be kept supreme throughout.7. Making pre-litigation mediation mandatory will be contrary to the core/spirit of mediation i.e. it is a voluntary process. What if the parties are unwilling to mediate.	<p>binding and enforceable by law.</p> <ol style="list-style-type: none">2. Recognition of institutional mediation and constitution of Mediation Council of India under chapter IX of the Draft Bill that will recognise mediation institutes for grading of the Mediation Service Providers and to maintain a panel of mediators.3. Time-limit for completion of mediation mentioned under Section 20 of the Draft Bill stipulates 180 days from the commencement of mediation for its completion, with a further extension for an additional period of 180 days with the parties' consent.
---	---