

## ARTICLE ON MEDIATION AND CONCILIATION

### ➤ INTRODUCTION

Earlier, remedies for the disputes between the parties were settled down by court room, which were a costly exercise and time consuming as the parties to the proceedings had to follow long procedures. However, there was another remedy available for resolving the disputes amicably i.e. Alternative Dispute Resolution (ADR).



**Alternative Dispute Resolution (ADR)** refers to any means of settling disputes outside the courtroom. The various ADR alternatives are Negotiation, Arbitration, Conciliation and Mediation.

**Mediation** is an effective way of resolving the disputes without the need to go to the court which involves a third party i.e. a mediator. At the same time it is also a flexible process that can be used to settle the disputes between the parties in an amicable manner. Mediation differs from formal litigation as the process is voluntary which shall take place only if both the parties agree since the mediator has no coercive power or authority to impose a settlement on the disputed parties.

**Conciliation** is a process of adjusting or settling disputes in a friendly manner through extra judicial mean. It is a process whereby the parties to a dispute use a conciliator, who meets with both the parties separately in an attempt to resolve their differences. They do this in order to lower the tensions, improve communication between the parties, interpreting the issues efficiently, encouraging parties to explore potential solutions and assisting them to find a mutually acceptable outcome/solution. The parties seek to reach to an amicable dispute settlement with the support of the conciliator who acts as an intermediary between both the parties.

### ➤ MEDIATION AND CONCILIATION UNDER COMPANIES ACT, 2013

Section 442 of the Companies Act, 2013 (“**the Act**”) states that the Central Government (Powers are given to the Regional Director vide notification dated December 19, 2016) shall maintain a panel of experts to be called as the **Mediation and Conciliation Panel** which consists of such experts who possesses the requisite qualifications as prescribed. The said panel is required to be maintained for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or Appellate Tribunal (**hereinafter referred to as ‘Respective Authorities’**), as the case may be.

With effect from September 09, 2016, the Central Government makes Companies (Mediation and Conciliation) Rules, 2016.

Mediator or Conciliator shall **not** be bound by the Indian Evidence Act, 1872 or the Code of Civil Procedure, 1908 while disposing the matter but shall be guided by principal of fairness or natural justice.

➤ **PANEL OF MEDIATORS AND CONCILATORS**

Regional Director appointed by the Central Government in the Ministry of Corporate Affairs shall prepare panel of experts. In regards of the same, he may invite applications from persons who are interested to get empanelled as mediator or conciliator and who possesses the requisite qualifications. Any person intending for the same shall apply to the Regional Director in **Form MDC-1**. The said applications from the persons shall be invited every year during the month of February and accordingly, the Regional Director will update the panel. However, for the financial year 2016-17, the Regional Director may call for applications from the persons intending to get empanelled **within Sixty (60) days** from the date of publication of Companies (Mediation and Conciliation) Rules, 2016 and proceed to prepare the panel for the current financial year within a period of **Thirty (30) days**.

➤ **ELIGIBILITY CRITERIA TO EMPANEL AS A MEDIATOR OR CONCILIATOR**

The following persons **shall be qualified** to appoint as a mediator or conciliator:

- Judge of the Supreme Court of India; or
- Judge of a High Court; or
- District and Sessions Judge; or
- Member or Registrar of a Tribunal constituted at the National level under any law for the time being in force; or
- Officer in Indian Corporate Legal Service or Indian Legal Service with Fifteen (15) years of experience; or
- Qualified Legal Practitioner who has experience of Ten (10) years or more; or
- Professional who is or has been for at least Fifteen (15) years of continuous practice as a Chartered Accountant, Company Secretary, Cost Accountant; or
- Member or President of any State Consumer Forum; or
- Expertise in mediation or conciliation and has undergone training in mediation and conciliation.

➤ **DISQUALIFICATIONS TO EMPANEL AS MEDIATOR OR CONCILIATOR:**

The following persons **shall be disqualified** to appoint as a mediator or conciliator:

- Who is an undischarged insolvent or has applied to be adjudicated as an insolvent and his application is pending;
- Who is convicted for an offence which involves moral turpitude;
- Who is removed or dismissed from the service of the Government or the Corporation owned or controlled by the Government;
- Who is punished in any disciplinary proceeding, by the appropriate disciplinary Authorities;
- Who has any financial or other interest in the matter of dispute or is related to any parties of dispute, shall be discharged from the functions as a mediator or conciliator.

## ➤ **ROLE OF MEDIATOR OR CONCILIATOR**

- Encouraging voluntary resolution of the dispute by the parties;
- Communicating of the views of both the parties;
- Assisting the parties in identifying their issues;
- Reducing misunderstandings between the parties and to understand the priorities ;
- Exploring various areas of compromise in order to make a way out of other options available to ensure resolving the disputes;
- Drawing attention to the parties that they are responsible to take decisions and no imposition of any terms of settlement on the parties by himself;
- Maintaining confidentiality;



Further, on consent of both the parties, the mediator may impose such terms and conditions as it may deem fit.

## ➤ **APPLICATION FOR APPOINTMENT OF MEDIATOR OR CONCILIATOR**

The parties **may agree** on a **sole mediator or conciliator** for the purpose of mediation or conciliation between the disputed parties. However, there is an ambiguity to agree on a sole mediator/conciliator incase there are two or more sets of parties. In that case, either the Appellate Tribunal may appoint the mediator subsequent to asking each party to nominate such mediator or the Respective Authorities may appoint such mediator as they deem fit for mediation/conciliation between the parties. Accordingly, an application shall be made in **Form MDC-2** and the same shall be accompanied with a fee of Rs. 1,000/-.

Any mediator/conciliator intending to withdraw his/her name from the panel may make an application to the Regional Director by providing such reasons for the withdrawal and the Regional Director shall decide on such application within Fifteen (15) days of the receipt and accordingly update the panel.

## ➤ **PROCEDURE OF MEDIATION/CONCILIATION**

- (a) The mediator shall fix the date and time in consultation with both the parties wherein both the said parties are required to be present.
- (b) The mediator may conduct joint or separate meetings with the parties. When the **parties do not agree** on any particular procedure to be followed, the mediator/conciliator shall follow the procedure laid down:
- (c) Each party is required to provide mediator/conciliator a brief memorandum stating the issues, Ten days (10) days before a session and all such other information which is reasonably required by the mediator/conciliator in connection with the issues to be resolved so as to enable them to understand the issue. However, the aforesaid period may be reduced at the discretion of the mediator/conciliator.
- (d) With a view to resolve the disputes and in case where there are more than one mediator/conciliator, the mediator shall initiate the proceeding with the party who has agreed to nominate him/her followed by interacting with the other mediator/conciliator.



➤ **REPRESENTATION OF PARTIES.**

1. The parties to the disputes shall be:
  - present personally or;
  - through an authorised attorney or;
  - represented by the counsel with the permission of the mediator/ conciliator at the sessions or meetings notified by the mediator/conciliator.
2. However, if the party in dispute is **not residing in India** he may be represented by his/her authorized representative at the sessions with the permission of the mediator/ conciliator.

➤ **SETTLEMENT AGREEMENT:**

1. An agreement execute between the parties with respect to all the issues in the proceeding will be signed by the parties and in case any counsel has represented the parties, signature of counsel may also be obtained by the mediator or conciliator on the said agreement.
2. The signed agreement signed by the parties shall be submitted to the mediator/conciliator and he shall signed and forward the same to the Respective Authorities.
3. In case the agreement is not executed within the time specifies or where the mediator/conciliator is of the opinion that the settlement is possible, he shall report the same to the Respective Authorities or as the case may be.

➤ **PASSING OF ORDER:**

The Respective Authorities shall fix the date of hearing normally **Fourteen (14) days from the date of the receipt of the report** of the mediator or conciliator and on date of such hearing if the Respective Authorities are satisfied that the dispute is settled between the parties then it shall **pass an order** in accordance with the terms and conditions.

➤ **TIME LIMIT FOR COMPLETION OF MEDIATION OR CONCILIATION**

The process for mediation or conciliation shall be completed **within a period of Three (3) months** from the date of appointment of expert(s) from the panel. Consequent to the expiry of the said period the process shall stand terminated.

However, if the process in relation to any proceeding is pending, before the Tribunal/Appellate Tribunal the period may be extended by such period which shall not exceed **Three (3) months** provided an application is received from the mediator/conciliator.

➤ **FOLLOWING MATTERS ARE NOT TO BE REFERRED TO MEDIATION OR CONCILIATION**

All matters pending before Respective Authorities can be referred to mediation or conciliation **except** the following namely:-

- a) matters relating to proceedings in respect of **inspection or investigation**; or the matters which **relate to defaults or offences** for which application for compounding have been made by one or more parties.
- b) cases involving serious and specific allegations of **fraud, fabrication of documents forgery, impersonation, coercion** etc.
- c) cases involving **prosecution for criminal or non-compoundable offences**.
- d) cases which **involves public interest** or interest of numerous persons who are not parties before the Respective Authorities.

➤ **OUR VIEWS**

The move is welcoming where Government is working for Ease of Doing Business in India. The informal way of resolving dispute will reduce the time, energy and cost of business persons. The mediation process will give faster remedy in 3 months and all proceedings and documents are confidential and are not exposed to the general viewing, which will encourage parties to initiate mediation with the help of professionals or experts in the subject matter. Mediation and Conciliation is giving a fair opportunity to business owners to arrive at easier, faster, simpler solutions and settlement of disputes at a very reasonable cost, efforts and time.



However, the proceedings of mediation cannot be initiated if one or both the parties may not be willing to cooperate. It is a very informal manner of resolving the disputes and all process of law including the Indian Evidence Act, 1872 and Code of Civil Procedure 1908 may not be followed. The process may not always result in a settlement agreement.

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**Chief Editor: Mrs. Amita Desai**

**Editor: For Amita Desai and Company**  
**- Ms. Sonali Jain**  
**- Ms. Hirak Patel**