

Mediation: Possibility, Method, And Techniques: An Analytical Study

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Meaning of Mediation

One of the efficient and well-known alternative dispute resolution techniques is mediation. With the support of a neutral third party known as a "Mediator," mediation enables litigants to settle their problems willingly and amicably. Through his abilities, the mediator helps the parties resolve their conflicts.

A neutral third party, the mediator, assists the parties in resolving their disagreement in a way that is agreeable to both parties.

The content of the dispute or the resolution's outcome are not advisory or determined by the mediator, but they may provide guidance or control over the mediation process itself. Private mediation is an option, as is court-ordered mediation. In both forms, a mediator may be involved in the beginning stage or pre-mediation phase.

Laws Governing Mediation in India

Mediation first came to be legally recognised as a method of dispute resolution in the Industrial Disputes Act, 1947.

In 1999, the Code of Civil Procedure Amendment Act was passed by the Parliament. It provided in Section 89 of the Code of Civil Procedure, 1908 which allowed the courts to refer to alternative dispute resolution (ADR) methods to settle pending disputes.

Under this, consent of the parties was made mandatory and the court could refer cases for arbitration, conciliation, judicial settlement through Lok Adalat, or mediation.

Moreover, the Civil Procedure- Mediation Rules, 2003 provide for mandatory mediation under r. 5(f)(iii). These allow the court to refer cases for mediation even when the parties are not ready for reference for mediation if there is an element of settlement².

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² How Does The Mediation Process Work – Steps and Procedure, December 28, 2017 , accessed from <https://blog.ipleaders.in/mediation-in-india-process/> accessed on 17/2/2022

The court maintains a list of qualified mediators from which the parties may select one. The court appoints the mediator and sets a date for the mediation's conclusion. The findings of the mediation are kept confidential, and any agreement reached during it is enforceable as a court decision.

Because the case is referred to a court-annexed mediation agency, which ensures that general oversight of the procedure is maintained, there is no sense of system desertion. Judges, lawyers, and litigants are among the system's participants, and it is thought that all of these parties contributed to the settlement.

The same solicitors who appeared in court on behalf of the parties represent them in the mediation.

The mediation is binding as a judgement passed by court

Types of Mediation

Mediation is of many kinds-

- **Statutory/Mandatory**

There are some kinds of disputes that are required by law to be subjected to the mediation process, such as disputes in labour and family law. In India, r. 5(f)(iii) of the Civil Procedure- Mediation Rules, 2003 provide for mandatory mediation, though recourse to it is rare.

- **Court Ordered**

Some sort of alternative dispute resolution is required by most jurisdictions in India before resolution through the judicial process. As soon as a case is filed, the parties are provided with a number of ADR options out of which they must select and pursue one unless exempted by the court.

1. **Court-Annexed**

Under Court-Annexed Mediation, the mediation services are provided by the court as part of the judicial system.

2. **Court-Referred**

Under Court-Referred Mediation, the court merely refers the matter to a mediator.

- **Private**

In private mediation, mediation services are offered on a private, monetary basis by qualified mediators to the Court, general public, and the commercial and governmental sectors for dispute resolution through mediation. Recourse may also be taken to private mediation in pending cases or pre-litigation disputes.

Contractual

1. Parties to a contract may include a mediation clause to resolve disputes as part of the terms of their agreement as it can effectively resolve contractual disputes before they turn into a protracted legal battle. The conditions of the mediation and the selection of the mediator are mentioned in the contract. The results of the mediation may be enforced as judgements of a court.

2. Voluntary Parties to a dispute may also decide to seek mediation off their own accord, without being compelled by the law, the court or a contract. This can be done at any time and is controlled by the parties.

3. **Analysing the Mediation Procedure through an examination of the various stages of the mediation process:**

The mediation procedure can be divided into six steps, each of which represents a particular stage of the mediation process. These stages, for the sake of convenience, have been outlined below:-

a. Convening process and preliminary arrangements

b. Mediation introduction and laying down the ground rules for mediation

c. Statements by negotiators, followed by a restatement of the problem by the mediator Setting the agenda for mediation

d. Facilitating the mediation, by generating options, if necessary

f. Reaching a negotiated settlement

I will be closely scrutinizing each step of the mediation process in order to assess it properly. To facilitate analysis, I have included two or more steps in each of the stages indicated above. This analysis will outline some of the acts that the mediator and/or parties must take as well as others that they are unable to take. It will also give a general summary of the entire process.

a. Convening process and preliminary arguments:

The act of setting up the mediation is frequently the most complex and stressful element of the mediation process since it frequently necessitates bringing together parties who either do not want to negotiate or whose relationships are so tense that they may not want to.

There are various ways to bring parties together, and these vary greatly between jurisdictions. Only the parties must freely agree to enter the mediation process in America. In India, the circumstances are different and more outside pressure can be applied to persuade the parties to participate in mediation. In fact, under Section 89 of the Rules of Civil Procedure, the Court might order the parties to participate in court-appointed mediation.

b. Mediation introduction and laying down the ground rules for mediation:

This phase of the mediation process is crucial. At this point in the mediation, the mediator must outline the process that will be used moving forward. In other words, the mediator must describe how the mediation will be conducted at this point.

The parties must also be informed by the mediator of any circumstances that could reduce the mediation's chances of success. For instance, the mediator must explain to the parties that achieving a settlement is not required and that mediation participation is voluntary.

However, as was already mentioned, neither India nor America have a set of uniform rules that must be observed. In actuality, if the parties can come to a

c. Statements by negotiators, followed by a restatement of the problem by the Mediator:

At this point, the mediator will ask the parties to make statements. This stage is required, and it is when the parties express their positions so that the other side may clearly grasp what they are seeking.

This is crucial if the parties were not friendly or even on speaking terms before to the mediation. It will also be easier for parties to start comprehending the interests of the parties that underlie the views if they are aware of the positions of the parties on the opposing side.

Even if the mediator is aware of the issue between the parties, he or she must go by this rule of procedure in order to eliminate discrepancies in the parties' perceptions of the facts and, as a result, to make sure that the parties are on the same page.

d. Setting the agenda for mediation:

The establishment of the sequence or order in which the negotiations will take place during this stage is a crucial responsibility placed on the mediator because it brings clarity to the mediation, which not only helps the mediator by assisting the parties in reaching a settlement, but also the parties because they now have a standard by which they can assess the status of their negotiations on an individual basis. In order to avoid ambiguity, the mediator may include in the agenda-setting process not only the times and locations of the negotiating sessions, but also the issues that must be discussed by the parties in order.

Facilitating the negotiation, by generating options, if necessary:

The mediator helps the parties conduct the negotiation successfully at this point. Here, the significance of the mediator's objectivity and the confidentiality of the mediation process are separately highlighted. The following section has a detailed discussion of both of these.

The creation of possibilities must be distinguished from the mediator's interference in the negotiation of the ultimate settlement. In accordance with the guidelines established by the Delhi High Court, the mediator is not permitted to intervene by pressuring the parties to achieve a binding settlement. However, the mediator may aid in achieving a settlement by presenting one (or a mixture of many or many) possibilities.

f. Reaching a negotiated settlement:

This stage of the mediation procedure is the final stage and involves two steps, first the reaching of a settlement, secondly the summing up of the settlement. Once these two stages have been completed successfully, the process of implementation of the settlement begins.

This is the practically the most important part of the mediation process and thus care and caution have to be exercised in this process by the mediator. Although in this stage as well, there is no fixed procedure which must be followed in all circumstances, there are certain factors to be kept in mind by the parties as well as the mediator. First, the mediator must, through the use of options discussed earlier, direct the parties towards reaching a settlement which he believes will best satisfy their interests. Only then will the mediator succeed in securing the commitment of the parties to the mediation and the settlement reached. Next, once the settlement is reached, the mediator has to summarise the settlement and put it down in writing. This procedural requirement is critical because an essential requirement to secure compliance is that the parties both understand and are in agreement on the exact content of their settlement.

Therefore, to secure this objective, the mediator must record a synopsis of the settlement remembering to note all the material particulars which the parties reached an agreement upon and not ignoring matters of detail which are related to their interests either. This is also important because once this is complete the mediated settlement has the force of a binding contract and can be enforced by a court of law.

4. After the settlement is reached, as mentioned earlier, it has the power of a binding contract between the parties and can be enforced by a court of law. The Rules framed by the Delhi High Court state that on receiving the settlement, if the Court is satisfied that the parties have reached a settlement, it must pass a decree in accordance with the same. This is a welcome addition to the strength of the mediation process, since it makes settlement immediately capable of being executed and also exposes the other party to the

risk of civil contempt in the event that he does not show commitment to the implementation of the settlement³.

5. CONCLUSION

Because there are many different ways to get to an agreement during mediation, it is a useful tool for resolving disagreements. The mediator's temperament, the nature of the disagreement, the amount of time or resources available, and the hostility between the parties can all be taken into account while designing the mediation process. Thus, the process can reduce acrimony, expense, and resource usage. The parties can always turn to the courts or other methods of dispute settlement if it doesn't work. In summary, mediation is an effective tool for avoiding time, expense, and unfairness.



³ procedure to be followed during a mediation ,<https://vakilsearch.wordpress.com/2011/01/15/procedure-to-be-followed-during-a-mediation/>