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CHAPTER - 1

INTRODUCTION TO MEDIATION
HISTORY / DEVELOPMENT

1.1 **CONFLICT** - has been defined as 'contradictions, variance, or opposition ; disagreement or clash of interest', while **DISPUTE** has been defined as 'to engage in argument or debate, to argue vehemently; quarrel or fight about ; contest, to strive against; a debate, or controversy'. Hence, a dispute is a manifestation of conflict.

1.2 All conflicts DO NOT develop immediately into disputes but could slowly simmer into disputes in course of time. For example, the human emotion of hatred could manifest itself over a period of time into a dispute. Litigation may be the result.

1.3 Conflict and harmony cannot co-exist. Cosequently, when disputes alone are resolved without addressing the underlying conflict, harmony remains elusive / distrubed. Therefore, it is critical for the Trainer to understand and explain the distinction between **'Conflict'** and **'Dispute'**, and exmphasize the object of mediation viz., conflict resolution.

1.4 **Judicial Process and Alternative Dispute Resolution (ADR) Options** in a judicial process:

- A dispute is adjudicated.
- The underlying conflict may not necessarily be resolved.
- The aggrieved party is entitled to prefer an appeal which is time consuming and expensive.
- The parties have no control over the outcome of the case.

- Uncertainty of judgment causes anxiety, discomfort and worry for both parties.

1.5 Recourse to litigation has been considered a civilized way to resolve disputes. However, as Courts are overburdened, disposal of cases is delayed. Resultantly, the public is disappointed with the present system of justice dispensation. These factors inspired the development of ALTERNATIVE DISPUTE RESOLUTION (ADR) methods. Some of the globally recognized Alternative Dispute Resolution Methods are:

(a) Negotiation

(b) Mediation

(c) Conciliation

(d) Judicial settlement like Lok Adalat.

(e) Arbitration.

(Note the progression of ADR processes from least coercive to most coercive)

1.6 Mediation is widely used to resolve a variety of disputes - divorce cases, money suits, injunction suits, suit for damages, partition suit, IPR related claims etc. Mediation has been used to resolve complex public policy problems and international conflicts. Mediation is often the answer to long-running, deep-rooted conflicts. In mediation the effort is to resolve ALL issues. However, it is poosible that in some cases all issues may not be resolved. Such issues may have to be resolved by recourse to other forms of dispute resolution, including litigation. Mediation can be effective in any conflict / dispute where the parties wish to negotiate an agreement. The effectiveness of Mediation is not limited by the subject matter, the amount in controversy or the nature of a dispute.

1.7 Throughtout history, most societies have developed and used informal mechanisms for resolving disputes. In India the system of resolving disputes by the Village Panchayats has been in existence for centuries. The modern mediation process has its origin in ancient Phoenicia and Greece and was developed by the Romans. However, owing to various cultural reasons, the practice of mediation was restricted during the Middle Ages. In modern times, various religious and ethnic groups have used extra-judicial mediation to resolve disputes among members of their groups.

1.8 It is generally recognized that the contemporary use of mediation on a wide-scale originated from the Rescoe Pound Conference in the USA in 1976. The Roscoe Pound Conference was a symposium of legal scholars, judges, lawyers and lay people and it was convened for the purpose of examining the current state of the legal system, to address the problems of delay in disposal of cases and denial of acccess to justice due to the high cost of litigation. The American legal system had come under severe criticism for a huge backlog of cases. The Conference paved the way for introduction of mediation as an Alternative Dispute Resolution mechanism in U.S.A. Rule 16 of Federal Rule of Civil Procedure was amended recognizing Mediation as critical legal practice.

1.9 Mediation has now been accepted as an effective dispute resolution mechanism. In many countries private mediation is also popular. Today, specific academic courses in mediation are offered by universities, law schools, private organizations and Courts. Training in Mediation is offered by various groups and individulas. The International Mediation Institute, Hague, founded in 2007, is a non-profit organization promoted by the American Arbitrators Association, the Singapore Mediation Centre and serveral other Mediation Centers of other advanced countries. This Institute has specified acceptable standards for training Mediators.

1.10 In India, several factors, including the disproportionate ratio of Judges to population have contributed to a huge backlog of cases. Even though the Indian judicial system has an otherwise impressive record, the need for alternative dispute resolution methods has been widely recognized. The Arbitration and Conciliation Act, 1996, was a significant step. It was followed by the insertion of Section 89 and Order X Rules IA, 1B and 1C in the Code of Civil Procedure through the amendment Act 46 of 1999 (brought into force with effect from 01-07-2002) providing for Arbitration, Conciliation, Judicial settlement including settlement through Lok Adalat on Mediation. Thus, where it appears to a court that there exits elements of a settlement which may be acceptable to the parties in dispute, the court is statutorily bound to refer the case to one of the above mentioned ADR processes. Mediation being the least coercive ADR process, is expected to become most popular in the days to come.

CHAPTER - II

MEDIATION - CONCEPT AND FEATURES

CONCEPT

2.1 Mediation is an alternative process of dispute in resolution in which a Mediator helps the parties to negotiate a settlement of their dispute. It is voluntary as parties retain the right to decide for themselves whether or not to settle a dispute as also the terms of settlement. Mediation may be mandatory (as in Court referred cases) but the final decision to settle or not always remains with the parties. This right of self-determination is an essential element of the mediation process. As parties at dispute evolve a solution through a facilitating process provided by the Mediator they retain control over the outcome of the dispute. Though Mediation may be initiated by consent of the disputing parties or by Court Order or pursuant to a compulsory mediation clause in a contract, the parties retain the right to decide whether to settle their dispute and also the terms of any settlement. If a settlement is reached through mediation in a pending litigation it is enforceable according to the terms of a judicial decree passed by the Court. A settlement reached at a pre-litigation stage is a contract and can be enforce by the parties through the Court.

2.2 The Mediator works with parties to facilitate the dispute resolution process and not to judge or act an authority or a parental figure. A Mediator's role is both facilitative and evaluative. A Mediator **facilitates** when he manages the interaction between parties, encourages and promotes communication between parties and manages interruptions and outbursts by parties. A Mediator **evaluates** when he analyzes the merits of claim/defence, assesses the available evidence, provides an opinion about the value of a claim and projects the possible outcome of the trail.

2.3 Mediation attempts to resolve larger issues of conflict, which manifest as disputes, to ensure a happier, litigation free life for all parties to a litigation/ dispute.

2.4 In the Mediation process, the APPROACH to the problem is informal. However, the process itself is structured and formalized. It is not an extemporaneous or casual process but has clearly identified stages.

2.5 Mediation provides an opportunity for all parties to a dispute to find a way out with dignity.

2.6 Any party may terminate the mediation proceeding at any time and for any reason. In this manner, the parties have ultimate control over the process of mediation and the outcome. If any party suspects the Mediator of being biased, or of being partial, or of being unduly influenced by any party/Advocate, including a suspicion of corruption, that party may withdraw from the mediation without penalty or prejudice. He/She may also withdraw without disclosing the reason for withdrawal.

2.7 Thus, Mediation is a structured, party-centered negotiation process where a neutral third party assists the disputing parties in resolving their conflict by using specialized communication and negotiation techniques.

DIFFERENCES BETWEEN MEDIATION AND OTHER FORMS OF DISPUTE RESOLUTION

2.8 LITIGATION	MEDIATION
(a) Litigation is an adjudicatory process where a third party (Judge, Authority) decides the outcome.	Not an adjudicatory process, but a negotiation process. No Judge or Authority is involved. Parties decide outcome of the case and participate directly in the resolution of their dispute.
(b) Decision is governed, restricated and controlled by procedures and provisions of Statutes.	Not restricted by statutory provisions or procedures allowing for greater freedom of options/alternatives
(c) Adversarial in nature, as focus is on determination of RIGHTS of parties.	Non-adversarial as focus is on resolution of disputes by mutual consent of parties.
(d) Right of appearance and pleading only to legal practitioners (in rare cases to parties)	Right of appearance, pleading, participation is primarily of parties. Advocates and others whom the parties desire are also entitled to participate.
(e) Involves payment of Court Fees.	No payment of Court Fees. If the case is settled at mediation the Court Fees already paid would be Refunded, in full
(f) It is judicial proceeding.	A structured, consultative, non-judicial proceeding.

(g) Appeals possible against orders.	No Appeals, Finality of settlement.
(h) Minimal opportunity for parties to communicate directly with each other.	Optimum opportunity for parties to communicate directly with each other in the presence of the Mediator which is likely to result in a positive change in relationship.

2.9 ARBITRATION	MEDIATION
(a) Arbitration is an adjudicatory process where a third party acceptable to both parties decides the outcome.	Not an adjudicatory process, but a negotiation process. No Judge or Authority is involved. Parties decide outcome of dispute. Parties participate directly in resolution of their dispute.
(b) Decision is governed, restricted and controlled by procedures and provisions of the Arbitration & Conciliation Act, 1996.	Not restricted by statutory provisions or procedures allowing for greater freedom of options/alternatives.
(c) Adversarial in nature as focus is on determination of rights of parties.	Non-adversarial as focus is on resolution of disputes by mutual consent of parties.
(d) Prominence to Advocates representing contesting parties.	Prominence to parties in resolving disputes and identifying solutions.
(e) It is a quasi-judicial proceeding.	It is a structured, consultative, non-judicial and non quasi-judicial proceeding.
(f) Minimal opportunity for parties to communicate directly with each other.	Optimum opportunity for parties to communicate directly with each other likely to result in a positive change in relationship.

CONCILIATION UNDER STATUTES OTHER THAN ARBITRATION AND CONCILIATION ACT

2.10 STATUTES	MEDIATION
(a) Is a process under which resolution is limited to the claims stated or reliefs claimed by the parties in relevant pleadings.	Not restricted or limited to reliefs claimed in pleadings. Larger and comprehensive reliefs are possible as it is a negotiation process.
(b) Options for settlement originate from the Conciliation Officer.	Options for settlement generally originate from parties and are developed by them. Parties participate directly in resolution of their disputes.
(c) As Conciliators are usually sitting Judges of a Court, the proceedings retain elements of a judicial proceeding.	Non-Judges are Mediators. Even if Judges act as Mediators, the proceedings cannot be and are not judicial in nature.

2.11 LOK ADALAT	MEDIATION
(a) Is headed by Judicial Officers along with one/two Advocates assisting them.	Usually a Mediator is a non-judicial officer. Advocates are selected for their skills and trained to modify their adjudicatory skills to mediate.
(b) Resolution of dispute is strictly within the claims stated or reliefs claimed in pleadings.	Not restricted or limited to reliefs claimed in pleadings. The terms of agreement may include traditional monetary damages, but such terms may also include innovative, non-traditional, creative remedies as determined by the needs of parties.
(c) Settlement is based upon applying judicially stated norms e.g., multiplier factor in motor vehicle cases.	Settlement is based on mutually acceptable terms.
(d) Most often dialogue/ representation is by Advocates representing parties.	Dialogue, representation and participation is essentially by parties, while Mediator facilitates. Parties participate directly in the process of dispute resolution.
(e) Greater emphasis is on determination of rights of parties, while formulating compromise proposals.	Focus is on resolution of disputes with proposals being evolved or formulated by parties.

2.12 PANCHAYATS	MEDIATION
(a) Is an adjudicatory process where a third party viz., group of people determine outcome.	Non-adjudicatory process. No Judge or Authority is involved. Parties decide outcome. It is a negotiation process.
(b) Outcome is usually governed by social norms as perceived by members of the group deciding the dispute (collective wisdom).	Outcome is determined by the interests and needs of parties themselves and is not dependent upon others. Parties participate directly in resolution of their dispute.
(c) Is adversarial in nature as focus is on determination of rights of parties.	Non-adversarial in nature as focus is on resolution of disputes by mutual consent.
(d) Compliance with decision is dependent upon volition of parties and, therefore, not enforceable in a Court.	Settlement recorded in mediation is legally enforceable when decree/order is passed by Court in terms of settlement.
(e) Process not created under any statute, but under the concept of 'Dharma'	Mediation process created under provisions of the Code of Civil Procedure.

2.13 FEATURES OF MEDIATION

(a) Mediation is a voluntary process and consent of parties is essential.

(b) Participation in Mediation can be terminated at any time by either party without assigning any reason.

(c) Non-adjudicatory in nature. No determination of rights by a third party or any statutory authority. Parties decide for themselves whether or not to settle the dispute and the terms of settlement. It is a negotiation process.

(d) Not bound by rigidity of Statutes or the system.

(e) Prominence is to the parties to the dispute. They participate directly in resolution of their dispute.

(f) Freedom to traverse beyond pleadings and raise and resolve connected / additional issues or disputes.

(g) Terms of settlement need not be restricted to those claimed in Court. Hence, CREATIVE SOLUTIONS are possible.

(h) Process is confidential. Confidential information revealed to the Mediator during Mediation cannot be disclosed unless permitted by parties. Statements made during Mediation and documents produced at or prepared for Mediation are confidential.

(i) Absence of bias or prejudice in proceedings as the Mediator is a neutral person who maintains a detached perspective.

(j) Is a time bound process (currently 60 days) after which the case is returned to the Court.

(k) It is a WIN-WIN situation for both parties to the dispute.

(l) Solutions are not imposed upon parties.

(m) Settlements are final and no Appeal is permitted under Law.

(n) Proceedings are structured but also informal in nature.

(o) Parties evolve their own acceptable solutions to disputes and thereby retain control over outcome of the disputes.

(p) Founded on trust and confidence of parties in the Mediator.

(q) Is a process where the Mediator facilitates communication between parties and promotes a settlement using communication and negotiation skills.

2.14 MODELS OF MEDIATION

Different forms of mediation exist and are applied in connection with specific types of disputes. The following list, while not exhaustive, reflects several different models of mediation currently in use.

(a) **Community Mediation** is characterized by an emphasis on restoring communication and, where desired, the relationship between the parties through the use of joint problem-solving. This model is often used in disputes where relationship issues predominate, such as neighbor disputes, family disputes, divorce, etc. In community mediation the parties generally remain in joint session throughout the course of mediation (unless a private caucus becomes necessary). The mediator helps the parties reach agreement through a series of guided questions and comments.

(b) **Commercial Mediation** is characterized by the regular use of private caucus where the parties talk separately to the Mediator, often used in disputes where substantive legal issue predominate, including litigated issues, business, contract, and personal injury disputes.

(c) **Restorative Justice Mediation** is used in criminal cases to promote a reconciliation between the victim and offender, along with a restitution agreement for compensation.

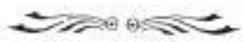
(d) **Peer Mediation** where student Mediators, under supervision, use Mediation in schools to mediate issues such as bullying, teasing, name-calling, fighting, stealing or pushing.

(e) **Family Mediation** is used in family disputes and divorce cases, often multisession, due to complex property issues and lengthy interpersonal history that is involved.

(f) **Pre-litigation Mediation** where certified Mediators are appointed by parties at dispute, either directly or through their Counsel, to mediate and resolve conflicts/disputes, even before parties approach the Courts for relief.

(g) **Court - Annexed Mediation** applies to cases pending in Court and referred by the Court for mediation, with the consent of both parties, under Sec 89 of the Civil Procedure Code. This is the model being followed at the Bangalore Mediation Centre.

(h) **Private Mediation** is where qualified Mediators offer their services on a private fee-for-service basis to members of the public, to members of the commercial sector, and also to the governmental sector to resolve disputes through mediation.



CHAPTER - III

THE UNLEARNING PROCESS

(Applicable only when Trainees are Advocates)

3.00 Advocates are predisposed (as the profession demands) to focus on RIGHTS of clients. Litigation is generally perceived as the only viable option to vindicate such rights. Consequently, most often, Advocates focus on **'winning'** a case rather than **resolving** a dispute. Therefore, it is useful to preface the training by alerting Advocate Trainees to the following factors :

(a) The Mediation process is not to be equated with the litigation process.

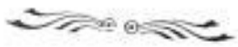
(b) The Mediator is not a Judge and proceedings are not Court proceedings.

(c) Skills / attributes of an Advocate enumerated below should be consciously kept OUT OF FOCUS so that entry into mediation training is with a completely OPEN, UNPREJUDICED, UNBASED, FREE and RECEPTIVE MIND"-

- evaluating a case exclusively in the context of a party winning the case.
- gathering information selectively in support of the client's case.
- critically examining and evaluating the possible legal defences of the opposite party, with intent to counter such defence.
- evaluating in a legalistic manner the applicable legal and statutory provisions to the best advantage of the client's case.
- Examining only such facts that are relevant to the case without reference to peripheral or incidental facts and issues.
- Identifying with precision 'issues' that would constitute basis for Court adjudication as 'issues' in mediation have a different connotation.

- Formulating pleadings with precision and accuracy focusing on facts favourable to the client.
- Examining each fact of the case with reference to the Evidence Act and the Code of Civil Procedure and evaluating the same.

(d) A 'legalistic' approach and 'legalese' would be undesirable in mediation proceedings.



CHAPTER - IV

STAGES OF THE MEDIATION PROCESS

4. The stages of the mediation process may be divided into :

I. Seating of parties, Counsel and Mediator in the Mediation room.

II. Introduction of parties/Counsel.

III. Introduction of Mediator.

IV. Opening Statement.

V. Joint Session.

VI. Private Caucus.

VII. Settlement and Conclusion.

4.1 SEATING PLAN IN THE MEDIATION ROOM

There is no specific or prescribed plan for seating. However, it is important that the seating arrangements achieve the following :

- Convey that the Mediator is in control.
- Ensue that the parties with their Counsel are grouped together.
- All members present feel comfortable, at ease and safe.
- Convey Mediator's impartiality.

4.2 INTRODUCTION OF PARTIES AND COUNSEL

- The Mediator will request each party to introduce himself/herself. The Mediator can elicit more information about the parties, occupation, residence and other similar issues, to put parties at ease.

- The Mediator will request Counsel to introduce themselves. If junior Counsel is present, elicit information about the Senior Advocate he is working for and enquire if he is authorised to represent the client.
- Ensure body language is relaxed and denotes comfort.
- Maintain a positive and happy demeanour.
- Maintain eye contact with all parties.
- Use clear, simple language for parties to understand.

4.3 INTRODUCTION OF THE MEDIATOR

(a) The Mediator begins by introducing himself and provides information such as name, areas and number of years of practice; his appointment as Mediator; his being allotted this case for mediation; his having successfully mediated in similar cases in the past and expresses hope that this case too would be happily resolved. This creates confidence in the parties about the Mediator's competence.

(b) The Mediator ascertains if the parties and / or Counsel have had any previous mediation experience.

(c) There is no structured or pre-determined format for speech. It would depend upon the Mediator's individual style and imagination and the background of the parties.

4.4 OPENING STATEMENT

The opening statement is the critical and initial stage of the Mediation process. It is intended to explain the process of Mediation to the parties and Counsel. It should convey the credibility of the process. It is intended to gain confidence and trust of the parties in the process of Mediation and the Mediator. It should establish a rapport between the Mediator and the entire

group. The statement should effectively convey, in a language and manner understood by the parties and Counsel, the following points:

A. **PROCESS AND STRUCTURE OF MEDIATION**

(a) Mediation is voluntary and is based on the consent of parties.

(b) Either party is entitled to terminate the process at any time and withdraw from mediation without assigning any reason.

(c) The process is required to be completed in 60 days.

(d) The process is confidential.

(e) It offers an excellent opportunity for early resolution of disputes whereby substantial legal costs, expenses, trauma and tensions for both parties is avoided.

(f) The process helps in restoring goodwill, trust and faith in each other to mutual advantage.

(g) The process is non-adjudicatory. It is negotiation based and no judgement is passed.

(h) The focus is on finding a permanent solution rather than determination of 'rights'.

(i) The process is not constricted by the rigidity of the law or the legal system.

(j) The process results in a **WIN-WIN** situation for both parties as it would resolve the dispute in a manner beneficial to both parties and without apportioning blame.

(k) Solutions need not necessarily be restricted to those claimed in the legal proceedings. Creative solutions are possible.

(l) A solution would not be imposed. Parties would evolve solutions acceptable to them.

(m) Prominence is accorded to parties.

(n) Counsel's assistance is required and used for ascertaining the applicable law and its effect upon the issues in dispute.

(o) In the first instance a joint session would be held.

(p) It would be followed by private sessions with each of the parties and their respective Counsel.

(q) The Decree / Order would be final and no Appeal would be permissible.

B. ROLE OF PARTIES

Parties are required to narrate their respective cases, explain their claims, and pro-actively generate ideas, suggestions, proposals for mutually beneficial and advantageous resolution of the dispute.

C. ROLE OF ADVOCATES

DISCUSSED IN CHAPTER XIII

D. ROLE OF THE MEDIATOR

(a) The Mediator is a neutral intervener and does not represent either party.

(b) The Mediator is a facilitator who promotes productive communication between parties; helps define issues with clarity; assists parties in understanding their interests and facilities development of options.

(c) The Mediator tries to re-establish communication between the parties.

(d) The Mediator conveys information from one party to the other in a manner that the communication is transmitted and (wherever needed) translated appropriately.

(e) The Mediator is an agent of reality, helping parties to clarify facts and alter unrealistic expectations and flawed assessments.

(f) The Mediator helps parties to distinguish their real interests and underlying needs from the positions taken in the litigation.

(g) The Mediator is not a Judge and does not decide the dispute.

(h) The Mediator will not be involved as a Judge, Witness, Counsellor or Advocate in connection with any matter arising in the case.

(i) The Mediator will not offer legal advice but will ensure that the agreement, if any, is in accordance with law.

(j) The Mediator will communicate proposals for settlement from one party to the other until a mutually acceptable settlement is reached.

(k) The Mediator assists parties in evolving options for settlement and will offer a proposal for settlement only as a last resort.

(l) The Mediator helps the parties to find their own resolution of their dispute and has no power to make decisions for them.

E. GROUND RULES IN MEDIATION

(a) Anything to be stated by parties / Counsel will be to the Mediator.

(b) No interruptions while one person is speaking

(c) No direct confrontation by one party with the other.

(d) No unparliamentary or abusive or objectionable or vulgar language to be used.

(e) Mobile phones to be switched off.

(f) The mediation process is to be respected by all present.

(g) If an agreement is reached, the terms of such agreement are reduced to writing in the form of a prescribed settlement which is signed by the parties and their Counsel and thereafter sent to the referral Court which passes a final non-appealable decree in terms of the settlement.

(h) The Mediator will confirm that the parties attending mediation are authorised to conclude a settlement.

(i) If a settlement is not reached the case is sent back to the referral Court for disposal.

4.5 JOINT SESSION

At a joint session the parties and their respective Counsel are present. The purpose is to ensue that both parties are made aware of each other's case and facts. The intent is to gather information and obtain clarifications about the background of a dispute, including the facts, legal issues, and interests and needs of each party. The cardinal rule during a joint session is that parties and counsel are allowed to speak WITHOUT BEING INTERRUPTED a the joint session:

(a) The plaintiff / petitioner should be permitted to explain or state his/her case/claim in his/ her own words.

(b) Counsel would therafter present the case and state the legal issues involved in the case.

(c) Defendant / Respondent would explain his / her case / claim in his / her own words.

(d) Counsel for Defendant / Respondent would thereafter present the case and state the legal issues involved in the case.

(e) The Mediator may ask questions, elicit additional information when she/he finds that facts of the case and perspectives have not been clearly

identified and understood by all present. Generally, the Mediator should restrict questions during the joint session to simple and clarificatory questions. Other questions about legal issues, interests, etc. should be reserved for the private caucus.

(f) Where appropriate, the Mediator would then briefly summarize the facts, as understood by him / her, to each of the parties to demonstrate that the Mediator has understood the case of both parties by having actively listened to them.

(g) Either of the parties may convey the need to talk to the Mediator in private without the other party's presence. The Mediator should immediately accede to the request and move into a private session after explaining to the other party that the same opportunity would be afforded to him/her also. During the joint session, the Mediator may sense the need to talk to the parties in private. This could happen if the Mediator feels that the session is no longer being productive or when either or both parties are remaining silent or when he/she feels the session is no longer in his/her control or if the parties are getting repetitive. In such situations, the Mediator proceeds to conduct a private session or caucus.

(h) Before moving into a private session the Mediator may thank the parties for providing information about the background of the case and suggest that it would be productive to meet separately and privately with the parties to discuss the issues in further detail.

(i) The Mediator could revert to joint session at any stage of the process if he/she feels the need to do so.

(j) The Mediator should be in control of the proceedings and process and must ensuer that parties do not 'take over' the session by aggressive behavior, interruptions or any other similar conduct.

4.6 PRIVATE CAUCUS

Upon completion of the joint sesseion, the Mediator would suggest that he/she would meet each of the parties with their Counsel separately. This is known as a private session or private caucus. The purpose of a private caucus includes : gathering further information about the dispute, allowing / encouraging the parties to vent their emotions in a productive manner, identifying the interests of the parties, exposing unrealistic expectations, shifting from a discussion of the past to problem-solving, encouraging the parties to invent options for settlement and conveying offers and counter-offers for negotiation.

The main objects of a private caucus are :

A. Instilling Confidence

During the private caucus each of the parties and their respective Counsel would talk to the Mediator in confidence. The Mediator should begin by reaffirming principles of confidentiality and assuring parties that under the Rules of Mediation, a Mediator cannot testify concerning the Mediation; that the discussions at Mediation are not admissible as evidence; that any documents or records given in confidence during the Mediation cannot be used against the party in any legal proceedings and that any information given in confidence by one side will not be disclosed to the other side. The Mediator thereby gains confidence of the parties and consequently the parties may express their views openly and disclose documents hitherto not disclosed to the Court or to the opposite party. The Mediator helps the parties to understand and identify their fears, apprehensions and concerns relating to the dispute or any incidental issues. The mediator can then, through skillful communication, elicit the true issues of controversy or dispute and facilitate proposals for possible negotiation with the opposite party.

B. Gathering Information

The private caucus provides a better opportunity for the mediator to gather information. In this stage of the process :-

(1) Parties vent personal feelings of pain, hurt, anger etc.

(2) The Mediator identifies emotional factors and acknowledges them.

(3) The Mediator explores sensitive and embarrassing issues.

(4) The Mediator distinguishes between **positions** taken by parties and the **interests** they seek to protect.

(5) The Mediator identifies why these positions are being taken (need, concern).

(6) The Mediator identifies areas of dispute between parties and what they have previously agreed upon.

(7) Common interests are identified.

(8) The Mediator identifies each party's differential priorities on the different aspects of the disputes (priorities and goals) and the possibility of any trade off is ascertained.

(9) The Mediator formulates issues for resolution at mediation.

C. Reality Testing

After gathering information and allowing the parties to vent their emotions, the Mediator makes a judgement whether it is necessary to challenge or test the conclusions and perceptions of the parties and to open their minds. The mediator can then, in order to move the process forward, do a REALITY

TEST. In a reality test the Mediator exposes unrealistic expectations and flawed assessments of the parties and explains the realities of litigation.

Reality Testing is done by : (1) asking effective questions; (2) helping parties understand the strength and weakness of their case; and using (3) BATNA/WATNA/MLATNA.

(1) Effective questions : Mediator may ask parties questions that can clarify facts and alter perceptions with regard to unrealistic expectations and flawed assessments of the case.

Examples of effective questions :

- ***Open-ended questions*** *like "Tell me more about the circumstances leading up to the signing of the contract". "Help me understand your relationship with the other party at the time you entered the business." "What were your reasons for including that term in the contract?"*
- *Closed questions which are specific and concrete that bring specific information. For example, "it is my understanding that the other driver was going at 60 kilometers per hour at the time of the accident, is that right?" "What date was the contract signed?" "Who are the contractors who built this building?"*
- ***Questions that bring out facts:*** *"Tell me about the background of this matter." "What happened next?"*
- ***Questions that bring out positions :*** *"What are your legal claims?" "What are the damages?" "What are their defences?"*
- ***Question that bring out interests:*** *"What are your concerns under the circumstances?" "What really matters to you?" "From a business / personal / family perspective, what is most important to you?" "Why do you want the divorce?"*

(2) The Mediator may ask the parties or counsel for their ideas about the **strengths and weaknesses** of their case and the other side's case. The Mediator may ask questions such as, *'How do you think your conduct will be viewed by a Judge?' or 'Is it possible that a judge may see the situation differently?' or 'I understand the strength of your case, what do you think are the weak points in terms of evidence?' or 'How much time will this case take to get a final decision in court?' Or 'How much money will it take in legal fees and expenses in court?*

(3) BATNA/WATNA/MLATNA ANALYSIS

BATNA : Best Alternative to Negotiated Agreement.

WATNA : Worst Alternative to Negotiated Agreement.

MLATNA : Most likely Alternative to Negotiated Agreement.

(BATNA / WATNA / MLATNA ARE DISCUSSED IN DETAIL IN CHAPTER VI.)

(4) In the context of negotiation, "alternatives" are the consequences of not settling (e.g., the outcome at trial, what will happen if the employer does not give the employee the requested salary increase, what will happen if the two merchants cannot work out their differences concerning the terms of their contract etc.).

As part of reality - testing, it is helpful for the Mediator to work through these possible alternative outcomes by discussing them with the parties / Advocates during private caucus. While the parties may wish to focus on favourable outcomes if the dispute is not settled, it is important to consider and discuss the best, worst and most probable outcomes also. Usually, the Mediator solicits the viewpoints of the Advocate / party prior to giving his own opinion about the alternative outcomes. Often, the Advocate / party will enquire with the Mediator about his own independent assessment of the

possible alternative outcomes. Even when the parties do not specifically request the Mediator's opinion, it may be productive for the Mediator to indicate his or her opinion at the appropriate time.

D. Creating options for Settlement

By using the above techniques, the Mediator assists the parties to understand the reality of their case, give up their rigid positions, identify their genuine interests and needs, and shift their focus to problem solving. The parties are then encouraged to invent several creative options for settlement.

E. Negotiation

The Mediator carries the options generated by the parties from one party to the other. The parties negotiate through the Mediator until a mutually acceptable settlement is reached. However, if negotiations fail and a settlement cannot be reached the case is sent back to the referral Court.

Negotiation techniques are discussed in detail in Chapter V

4.7 SETTLEMENT AND CONCLUSION

(a) A successful mediation implies that the disputing parties have been able to settle their conflicts and disputes upon terms that are acceptable to them. Once the parties have agreed upon the terms of settlement they are reduced to writing by the parties / their Advocates with the assistance of the Mediator. The agreement should be signed by all parties to the litigation and their respective Counsel. Thereafter, a copy of the agreement would be furnished to the parties while the original would be sent to the referral Court for drawing up a decree in accordance with the agreement.

(b) The agreement should :

- clearly specify the terms agreed to.
- be drafted in precise and unambiguous language.

- ensure that neither of the parties feels that he or she has 'lost'.
- be sufficiently clear and definite in its terms to ensure that the terms of the agreement are executable in accordance with law.
- include definite dates for performance by the parties.
- be complete in its recitation of the terms.

(c) The Mediator need not and should not sign the settlement / agreement.

(d) Compliance with mediated settlements are high as the terms ae created by the parties themselves, with a mediator's assistance.

(e) After the agreement is signed the Mediator should in a closing statement thank the parties and their counsel for participating in the process and for having brought the mediation proceedings to a positive conclusion.

(f) If a settlement between the parties **could not** be reached the case would be returned to the referral court simply reporting failure of mediation. The report will not assign any reason for such failure or fix responsibility on any one for the failure. The deliberations during the mediation will remain confidential.

(g) Even if a settlement **could not** be reached the Mediator should in a closing statement thank the parties and their counsel for their participation and efforts for settlement.

CIRCULAR

No.- 01 /R&S. **Dated, Ranchi the 31st January, 2012**

In view of the direction issued by the Hon'ble Supreme Court in the case of ***Afcons Infrastructure Ltd. V. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCO 24***, the Hon'ble the Chief Justice has been pleased to order that while adjudicating the cases as mentioned hereinafter all the Subordinate Courts are directed to abide by the following guidelines in connection with ADR process:-

"Every court shall form an opinion for a case that whether it is one that is capable of being referred to and settled through ADR process or not. Having regard to the tenor of provisions of Rule 1-A 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 processes, 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. After completion of pleadings, to consider recourse to ADR process under Section 89 of the Code, is mandatory. However, 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 cases reference to ADR process is a must.

The following categories of cases are normally considered suitable for ADR process in the light of the aforesaid decision of the Hon'ble Supreme Court:-

(i) All cases relating to trade, commerce and contract, 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/coparceners/co-owners; and
- disputes relating to partnership among partners

(iii) All cases where there is a need for continuation of the preexisting 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

(v) 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.

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 the Government.

(vi) Cases involving prosecution for criminal offences.

The above enumeration of "suitable" and "unsuitable" categorisation of case 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."

All the Principal District Judges of Jharkhand including the Principal Judicial Commissioner, Ranchi are hereby directed to ensure the adherence of aforesaid direction and communicate ail the Judicial Officers posted in the concerned judgeship. They shall follow the decision of the Hon'ble Supreme Court and the cases which are suitable for ADR process be necessarily referred to Mediation Centres of the concerned districts as per section 89 of the Code of Civil Procedure.

The Principal District Judges including the Principal Judicial Commissioner, Ranchi shall also ensure the sending of Quarterly statement to this court with regard to making reference and settlement of cases, in separate sheet, along with the quarterly statement of statistics. Be it noted that such reference and disposal by the Judicial Officer will be reflected in the Annual Confidential Report of the officer.

By order,
Sd/- P.R.Dash
Registrar General

Memo no. 303 - 36 R&S **Dated, Ranchi the 31st Jan., 2012.**

Copy forwarded to the all the Principal District and Sessions Judges, Jharkhand / the Principal Judicial Commissioner, Ranchi / Secretary, Law (Judl.) Department, Govt. of Jharkhand, Ranchi / The Director, Judicial Academy, Jharkhand, Ranchi / The Member Secretary, JHALSA, Ranchi/ The Office of the Registrar General/ The Registrar (Admn.)/The Registrar (Estab.)/ The Registrar (Vigilance)/ The Joint Registrar, List & Computer/The Joint Registrar-cum-P.P.S. to Hon'ble the Chief Justice/ The Assistant Registrar (Judl.)/The Section Officer, Vigilance Cell/The Section Officer, Administrative (Appointment) Section Jharkhand High Court, Ranchi for kind information and needful.

Registrar General

CHAPTER - V

NEGOTIATION

5.1 The purpose of 'Negotiation' in mediation is to help the parties to arrive at an agreement which is as satisfactory as possible to both parties.

5.2 Any negotiation that is based on merits and the interests of both the parties is **principled negotiation** and can result in a fair agreement, preserving and enhancing the relationship between the parties.

5.3 The Mediator carries the proposals from one party to the other until a mutually acceptable settlement is found. This is called **'shuttle diplomacy'**.

5.4 ELEMENTS OF PRINCIPLED NEGOTIATION

(a) Separate people from the problem

> *Example : If Aparna has been consistently late to work for the past 2 weeks a perception may develop that "The problem is Aparna". Viewed in this manner the only way to get rid of the problem is to get rid of (dismiss, transfer etc.) Aparna.*

This is an example of merging the people with the problem and illustrates how it limits the range of options that are available for resolving the problem.

To separate people from the problem, the key is to focus on the problem itself, independent of the person. In the above example, the employer might frame the problem as lack of punctuality. The employer can ask Aparna about her record of being on time for many years and the reasons for the recent two weeks of late arrival enquiring specifically whether there are circumstances that are resulting in Aparna's late arrivals. She may answer that she was involved in a motor vehicle accident recently and her vehicle repairs will be completed shortly. She might say that she has to change the route to work due to road repair, or she might say that she has to ride in a car pool to work and the driver has a temporary problem that causes the delay.

By focusing on the problem itself, the boss has opened the door to understanding the root of the problem, which may lead to various options for handling it.

(b) Be hard on the issues and soft on the people

In being hard on the issues, the Mediator will request documentation on damages, verify the accuracy of numbers and confirm the evidence provided by both parties. At the same time, the mediator will encourage the parties to be polite and cordial with each other and the mediator will demonstrate those same qualities during mediation.

(c) Focus on interest

The most powerful interest of every person are his/her basic human needs and the mediator is required to focus on these:

- Security
- Economic well being
- Sense of belonging / recognition
- Control over one's life
- Respect
- The need to be taken seriously
- Equality
- Business interest
- Family interest
- Relationship interest
- Dignity

(d) Create variety of options

The Mediator is required to ensure that the parties are not looking for a single answer. Several options may be generated and tried.

(e) Rely on objective criteria

An external standard, independent of each person's perception e.g. expert's opinion, valuation report, assessor's report, scientific data, etc.

5.5 BARGAINING TECHNIQUES USED IN NEGOTIATION

Negotiation involves different types of bargaining. By understanding the different types of bargaining techniques, Mediators become aware of the different methods that could be used during negotiation. Most negotiations involve several of the bargaining methods described below, either by themselves or in combination with other types of bargaining.

- Distributive Bargaining :

  Positional Bargaining.

  Rights-based Bargaining.

- Integrative Bargaining.
- Interest based Bargaining.

5.6 **Distributive Bargaining :** is a customary, traditional method of bargaining where the parties are dividing or allocating a fixed resource (i.e., property, money, assets, company holdings, marital estate, probate estate, etc.,) While distributive bargaining is traditional and customary, it can often lead to an impasse because the parties may not necessarily understand their own or the other's true needs, priorities or goals and, therefore, do not explore creative solutions for agreement. It also often leads to a win-lose result or a compromise where neither party is particularly satisfied with the outcome. The two forms of distributive bargaining are :

(a) Positional Bargaining: Positional Bargaining, is characterized by the primary focus of the parties on their positions (i.e., offers and counter-offers). In this form of bargaining, the parties simply trade positions, without discussion their underlying interests or exploring additional possibilities for trade-offs and terms. This is the most basic pattern of negotiation and is often the first method people adopt. Each side take a position and argues for it and makes concessions to reach a compromise. **You vs Me OR I win / You lose.** This is a competitive negotiation strategy.

Example : Varun and Vivek are quarrelling in a room. Varun wants window open Vivek wants it shut. they continue to argue about how much to leave open a crack, halfway, three quarter way.

In many cases, they will never agree or if they agree to compromise, neither of them will be satisfied with the terms of the compromise.

(b) Rights-Based Bargaining : This form of bargaining, commonly used by lawyers, focuses on the rights of parties as the basis for negotiation. The emphasis is on who is right and who is wrong. For example, *"Your client was negligent. Therefore, she/he owes my client compensation." "Your client breached the contract. Therefore, my client is entitled to contract damages."*

Rights-based bargaining plays an important role in many negotiations as it analyses and defines obligations of the parties. It is often used in combination with Positional Bargaining *(e.g., "Your client was negligent, so she/he owes my client X amount in compensation.")* Rights-Based Bargaining can lead to an impasse when the parties differ in the interpretation of their respective obligations.

5.7 Negative consequences of Distributive Bargaining are :

(a) By taking rigid stands the relationship is often lost.

(b) Creative solutions are not explored and the interest / need of both parties are not fully met.

(c) Takes time.

(d) Both parties take extreme positions.

5.8 **Interest - Based Bargaining :** a mutually beneficial agreement is developed based on the facts, law and interests of both parties. Interests include needs, desires, goals and priorities. This is a collaborative negotiation strategy that can lead to mutual gain for all parties, viz., "win-win". It has the potential to combine the interests of parties, creating joint value or enlarging the pie. It preserves or enhances relationships. It has all the elements of principled negotiation and is advised in cases where the parties have on-going relationships and/or interests they want to preserve.

Example : The story of two sisters quarelling over one Orange. They decide to cut the orange in half and share it, although both are not happy as it would not adequately satisfy their interest. The mother comes in to enquire what is the real interest of each one. One says that she needs the juice of one orange and the other says that she needs the peel of one orange. The same orange could satisfy the interest of both parties. Both sisters go away happy.

Relief expands in interest based bargaining

There are three essential steps to using interest-based bargaining. To begin with, the Mediator (along with the parties) must determine whether the dispute is appropriate for interest-based bargaining (or if distributive bargaining is more appropriate). After making that determination, the three steps are :

(a) Identifying the interests of parties

(b) Prioritizing the parties' interests

(c) Helping the parties develop terms of agreement / settlement that meets their most important interests.

5.9 **Integrative Bargaining :** Integrative bargaining is a form of bargaining where the parties "expand the pie" by exploring additional options and possible terms of settlement. The parties think creatively to figure out ways to "sweeten the pot", by adding or changing the terms of the negotiation.

To continue the earlier example of Varun and Vivek quarrelling in the room. Ashok comes into the room and enquires about the quarrel. Vivek says that the cold air blowing on his face is making him uncomfortable. Varun says that the lack of air circulation is making the room stuffy and he is uncomfortable. Ashok opens the window in the next room. Both parties are happy. The cold air is not directly blowing into Varun's face and Vivek is comfortable as there is adequate air circulation in the room.

As the interests and needs of both parties have been identified, it is easier to find a mutually acceptable solution.

Another example of integrative bargaining : A car salesman may reach an impasse with a customer on the issue of the price of a new car. Instead of losing the deal, the car sales man will offer to throw in fancy leather seats as part of the deal while maintaining the price on the car. If necessary the sales man may also agree to help the customer to sell his old car at a good price.

The fancy leather seats and to offer to help in the sale of the old car are integrative terms because they result from an exploration of whether additional terms or trade-offs could be of interest to the customer. Similarly, the Mediator can help parties avoid or overcome an impasse by actively exploring the possibility and desirability of additional terms and trade-offs.

5.10 Other techniques for negotiation

(a) Value Additions :

Create additional resources so that both parties can achieve their goal.

(b) Alternative Concessions :

One party gets what they want on one issue while the other is compensated on another issue.

(c) Prioritization :

Each party makes concessions on low priority issues in exchange for concessions on issues that it values more highly.

(d) Cost cutting :

One party gets what it wants and the costs to the other are reduced or eliminated.

(e) Bridging :

Neither party gets its initial demands but new options that satisfy the major interests of both parties are developed during negotiation.

(f) Generating Momentum towards settlement :

The Mediator can generate momentum towards settlement in a number of ways : (1) set the agenda by focusing on and resolving the simple issues first and then moving toward the complicated issues (2) being positive, supportive, and optimistic without making false promises or assurances (3) reminding the parties of the progress they have made during a negotiation.

(g) Splitting the Difference :

If the parties are at a stalemate towards the end of a negotiation and the difference in their positions is relatively small, the Mediator may enquire whether they would be willing to split the difference.

(h) Mediator's Proposal :

If the parties are at an impasse, they or the Mediator may suggest a Mediator's proposal, whereby the Mediator, orally or in writing, suggests a settlement. The parties are not bound by the proposal and may

accept it, reject it, or use it as a basis for further discussions. The mediator's proposal must be the last resort in the negotiation process.

(i) Re-visit Issues :

It is often helpful to re-visit issues that were previously put to rest as a method for breaking a deadlock.

CHAPTER -VI

BATNA / WATNA / MLATNA

(A negotiating technique)

6.1 Meaning of **BATNA** is : **Best Alternative to a Negotiated Agreement.**

Meaning of **WATNA** is : **Work Alternative to a Negotiated Agreement.**

Meaning of **MLATNA** is: **Most Likely Alternative to a Negotiated Agreement.**

6.2 **CONCEPT**

The expressions **BATNA, WATNA,** and **MLATNA** refer to the best, worst, and most likely outcomes if a dispute is not resolved through negotiation in mediation.

The technique involves an examination of the specific consequences that will result for each party in the event of non-settlement.

Most often parties believe that litigation (recourse to a Court) is the only and best option to secure their interests. In pursuance of such a belief, cases are filed and opposing parties are committed to contradictory stands.

It is helpful if parties are encouraged to compare the results of litigation with results achievable if alternate paths of dispute resolution were adopted.

In some cases, a party may reject a proposal even though the alternative is less attractive, in which case such decision is to be respected as a party has opted to reject inspite of being aware of its consequences.

While explaining concepts of **BATNA, WATNA** and **MLATNA** the probabilities of winning or losing the case are to be clinically enumerated and recognized.

6.3 **The following need to the encumerarted / emphasized / explained:**

(a) Any result, best, worst, or most likely, has costs and expenses, both monetary and non-monetary, which can be estimated.

(b) BATNA, WATNA, and MLATNA can be conveyed by a simple statement suggesting that it may be helpful to the parties to examine their alternatives outside of mediation (specifically litigation) so as to compare them to options available at mediation. This can be stated without using the terms BATNA, WATNA, and MLATNA which are likely to be unfamiliar and, therefore, confusing to the parties.

(c) The analysis of **BATNA/WATNA/MLATNA** or suggestion to consider it may be carried out during the private caucus after the joint session and prior to commencement of bargaining. The ideal stage to introduce **BATNA/WATNA/MLATNA** is the private caucus as, in a private caucus, parties and Counsel tend to be more forthcoming and realistic about the case, its outcome, possibilities of success and failure.

(d) If the parties appear to be reaching an interest based resolution with relative ease, a **BATNA/WATNA/MLATNA** analysis need not be resorted to.

(e) If parties are difficulties at negotiation and the Mediator anticipates hard bargaining or adamant stands, **BATNA/WATNA/MLATNA** analysis may be introduced.

(f) If conducted prior to formulation of initial proposals and counter-offers, the analysis would help parties to recognize reality and thereby formulate realistic and workable propocals.

(g) Caution must be exercised and it should never be assumed that parties or Counsel have been completely forthcoming about their alternatives analysis, even when stated in a private caucus.

(h) When focus is on **BATNA/WATNA/MLATNA** and the result of litigation, Counsel would be the best and ideal source of information as they would have prepared the brief and would be representing parties in Court.

(i) Even if Counsel are less knowledgeable than the Mediator might expect, they should be consulted as it would create confidence in the process and the Mediator.

(j) During BATNA/WATNA/MLATNA the Mediator may ask questions and request clarifications to ensure that the Counsel's analysis is not based upon incorrect/inaccurate legal provisions or inapplicable Statute or that the parties are not being misled.

(k) The BATNA/WATNA/MLATNA analysis must be specific, accurate and comprehensible to the parties. Mediators should try and improve the quality of analysis by taking steps, as necessary, to educate the parties and their representatives regarding the analysis.

(l) The Mediator can also guide the parties through the contents of the analysis during private sessions so as to ensure that it is done thoroughly.

(m) If parties refuse to accept or understand the analysis, despite the efforts of their Counsel and intervention by the Mediator, the Mediator should explore the reasons behind the refusal so as to understand the reasons for such resistance. If these reasons are discovered, the Mediator may be able to convince the parties about the analysis.

(n) BATNA/WATNA/MLATNA may be used by the Mediator to help parties make a more realistic assessment of their case so that decision making becomes easier for them.

(o) Mediator should seek permission of one party to share with the other party any information gained during the analysis in the private caucus with a party which the Mediator believes will help the other party to understand the case and the party better.