Samarendra Nath Goswami gathers together pearls of wisdom which he has been passing on to mediation trainees and colleagues. His book is remarkably comprehensive , yet very easy to read. For a trainee or inexperienced mediator it will be absolutely invaluable. It affords the opportunity to experienced mediators to refresh, hone and acquire skills in a thoroughly enjoyable read which unhesitatingly recommended.

Mediation is a process that can be used to resolve conflict in many different dispute contexts. This book focuses on the essential skills and strategies needed by any mediator to be successful in their work.

Samarendra Nath Goswami Advocate Supreme Court of Bangladesh and co-author Ms. Iram Majid Advocate/mediator draws their extensive experience in the field of mediation to explain the range of skills and strategies that are commonly used, as well as why you would use different skills and when they best employed. They also provide the platform for the mediator to gather knowledge how mediation is evolving in different wake of life. The author shows how, by adopting these techniques, a mediator can manage challenging conflicts. It features the use of questioning skills and how they can be used effectively, as well as how to deal with high emotion and negative responses.

This book is essential for anyone who wants to improve their mediation skills, whether as a trainee, novice or experienced professional.

BLT

Definition of MEDIATION

Samarendra Nath Goswami
Iram Majid

Definition of MEDIATION

First Edition, 2018

The Bangladesh Law Times

BLT's

Definition of Mediation

By

Samarendra Nath Goswami
M.A (Edn), LL.B, B.Ed, LL.M
Advocate, Appellate Division
Supreme Court of Bangladesh

&

Iram Majid, LL.M
Advocate
Supreme Court of India
Accredited Mediator & Arbitrator (IIAM)
Trainer of BIMS

The
Bangladesh Law Times
24/1, Segunbagicha, Dhaka-1000
At Present: 9 Circuit House Road, Dhaka-1000

Published and Printed by

Samarendra Nath Goswami
Advocate, Bangladesh Supreme Court
24/1, Segunbagicha, At
Present, 9, Circuit House
Road, Dhaka-1000,
Bangladesh.

First Edition
September, 2018

Sales Center
Supreme Court Bar Building
3rd Floor, Room No-11
Dhaka-1000, Bangladesh.

Price: BDT: 150.00
US$: 2.00

Preface

The Bangladesh Law Times with great pleasure, is for the first time publishing a book namely "**Definition of Mediation**" written by Mr. S.N. Goswami, Advocate, Appellate Division, Supreme Court of Bangladesh & Ms. Iram Majid, Advocate, Supreme Court of India, Accredited Mediator and Arbitrator (IIAM). More so, she is the Regional Director (India) of Bangladesh International Mediation Society (BIMS).

In order to properly appreciate the nature and scope of the Mediation' developments, an attempt have been making to incorporate so far as definition of Mediation in this book. We extremely grateful to Ms. Asha Paresh Mahannt, Solicitor England, Accredited Mediator and Arbitrator (IIAM) for giving us her precious time.

I am grateful to Dr. Rajib Kumar Goswami for the pains taking by him in publishing of this book. The BLT authority gives their sincere and cordial thanks to all readers of BLT.

Any comment, suggestion or feedback regarding "**Definition of Mediation**" will be highly appreciated.

18th September, 2018
Dhaka, Bangladesh.

Bangladesh Law Times

Definition of Mediation

Contents

INTRODUCTION

Since the late 1970's mediation has become an institutionalized, officially endorsed and expanding mode of decision - making across many areas of social life. Mediation in family disputes, early on the scene, is now the approved pathway in the current landscape of family dispute resolution processes.

This book is intended to offer a straightforward, comprehensive collection of mediator skills and strategies. It is primarily aimed at mediators, including those at trainee and novice level, but will also be interest to experienced mediators and perhaps trainers, across a range of mediation contexts, who want to revisit and update awareness of their "tools of the trade". It is hoped that it will also be of interest to a wider range of practitioners, working within what can be described as the "people working business – for example, counsellors, managers, human resource professionals, social care.

Many of the core skills referred to in this book can be defined as good quality everyday human interpersonal communication qualities. Other skills and strategies described are more technically specific to mediation and dispute resolution practice. Nevertheless, whichever of these two categories is being applied strategically in a context of conflict resolution by the reader, it is assumed that practitioners will be using them in the context of their own

specific regulatory professional code of practice, principles and standards.

This book seeks to place those core ethical and professional principles at the center of effective practice. This approach developed mainly in relation to mediating issues arising from high conflict disputes in workplace, cross culture , divorce mediation and workmen compensation mediation applies to mediation of all aspects of decision – making arising from family separation and divorce, as well as to disputes arising in other areas. In addition , improved practice depends on how we mediators think about, as much as how we perform our role and function . So understanding what we do and why we do it essential for understanding how to work effectively. That is why such significance is accorded here to the classic texts that have informed understandings about mediation over the past century and which provide clarity in respect of the defining characteristics of mediation, observable across cultures and across times, in contrast to current complexities and contradictions.

It is a book that we hope will appeal not only to individuals who are interested in how to put mediation into everyday practice, but also to managers, human resource departments and ultimately those responsible for corporate or organizational strategy and grievance or conflict resolution policies.

CHAPTER I

DEFINITIONS AND CONCEPTS OF MEDIATION

Mediation is a free, voluntary and confidential service that helps people who have a dispute to reach their own settlement. Instead of asking a judge to make a decision in court, the people meet with a trained mediator who helps them make their own decision on how to settle the dispute.

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications

and negotiations, the parties always retain control over the outcome of the dispute.

Mediation is voluntary. The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self- determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and the therefore acceptable to them. The parties have ultimate control over the outcome of the mediation. Any party may withdraw from meditation proceedings at any stage before its termination and without assigning any reason.

Meditation is a party-Centered negotiation process. The parties, and not the neutral mediator is the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of the dispute. Though the mediator advocates and other participants also have active roles in mediation the parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interest, generate options for agreement and make a final decision regarding settlement.

Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/legal issues and the

underlying causes of a dispute. Thus, meditation is broadly focused on the facts, law and underlying interest of the parties, such as personal, business/commercial family, social and community interests. The goal of meditation is to find a mutually acceptable solutions that adequately and legitimately satisfies the needs, desires and interest of the parties.

Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation. In mediation the mediator assists the parties in resolving their dispute. The Mediator is a guide who helps the parties to find their own solution to the dispute. The Mediator personal preferences or perceptions do not have any bearing on the dispute resolution process.

Meditation is a private process which is not open to the public. Meditation is also confidential in nature, which means that statement made during meditation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. Any settlement made or information furnished by either of the parties and any document produced or prepared for / during meditation is inadmissible and non-discoverable in any proceeding. Any concession for admission made during meditation cannot be used in any proceeding. Further, any information given by a party to the mediator during meditation process, is not disclosed to the other party, unless specifically permitted by the first party. No record of what transpired during meditation is prepared.

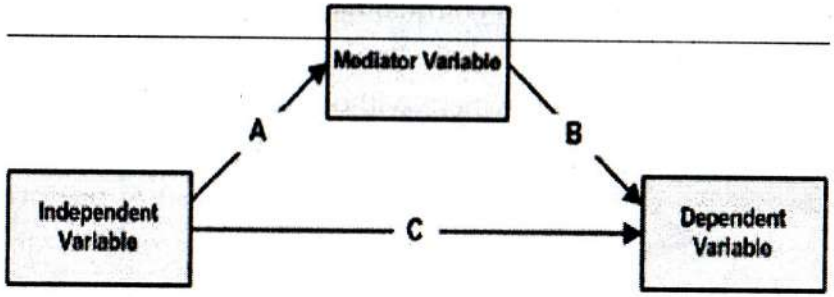
As Per Webster

The act or process of mediating; especially: intervention between conflicting parties to promote reconciliation, settlement, or compromise..... By Merriam Webster

Black Dictionary Mediation

Intervention; interposition; the act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute. In international law and diplomacy, the word denotes the friendly interference of a state in the controversies of others, for the purpose, by its influence and by adjusting their difficulties, of keeping the peace in the family of nations.

Mediation in Psychology



A mediator variable is the variable that causes mediation in the dependent and the independent variables. In other words, it explains the relationship between the dependent variable

and the independent variable. The process of complete mediation is defined as the complete intervention caused by the mediator variable.

Definition of media mediation

Similar to this, within media studies the central mediating factor of a given culture is the medium of communication itself. The popular conception of mediation refers to the reconciliation of two opposing parties by a third, and this is similar to its meaning in both Marxist theory and media studies.

Mediation in Marxism

In Marxism, the primary form of mediation is labor, which forms a dialectical relationship between a worker's body and nature. Labor thus mediates between humans and the natural world. Once labor becomes reified, or made into an abstraction that becomes a **commodity**, however, it becomes alienated from the worker who owns it and becomes exchangeable just like any other commodity. Once this occurs, capital becomes the mediating or determining factor, with the capitalist setting the wage rate or exchange-value of labor. The only thing the worker owns in this case, his or her **labor power** or ability to work, becomes the worker's sole means of subsistence. The worker must get as much value from his or her labor as is possible on the open market in order to survive.

CONFLICT RESOLUTION: WESTERN AND NON-WESTERN APPROACHES

Although conflict is a human universal, the nature of conflicts and the method of resolving conflict differ from one socio-cultural context to another. For instance, in contemporary North American contexts, conflict is commonly perceived to occur between two or more individuals acting as individuals, i.e., as free agents pursuing their own interests in various domains of life. Conflict is often perceived as a symptom of the need for change. While conflict can lead to separation, hostility, civil strife, terrorism and war, it can also stimulate dialogue, fairer and more socially just solutions. It can lead to stronger relationships and peace.

The basic assumption made by Western conflict resolution theorists is that conflict can and should be fully resolved. This philosophy, whereby virtually every conflict can be managed or resolved, clashes with other cultural approaches to conflict. Many conflicts, regardless of their nature, may be intractable, and can evolve through phases of escalation and confrontation as well as phases of calm and a return to the status quo ante of settlement and reconciliation in the Arab-Islamic tradition.

Communication skills are fundamental to conflict resolution. In many cultures, the art of listening is drowned out by arguments and the never-ending struggle to get one's point across first. The opposite of listening is not ignoring; rather, it

is preparing to respond. Mediators are trained to listen carefully to all parties involved in a dispute. Active listening is a method that ensures that the whole meaning of what was said is understood.

Mediation is another skill used by Western practitioners in conflict resolution. The mediator confronts two basic tasks when involved in settling a dispute. First, he or she has to encourage people to negotiate in such a way that there is an equitable outcome. Second, the mediator has to be completely neutral and place the expertise and power of decision-making in the hands of the conflicting individuals or groups themselves. In addition to mediation in conflict resolution, negotiation is another important tool in Western conflict resolution processes. "Interest-based" negotiation focuses on people's long-term interests, rather than on short-term perspectives, and does not encourage hard or soft types of bargaining (this is the case when one of the parties has to give in or compromise) which usually lead to unsatisfactory "positional" compromises.

RELIGIOUS FUSION FOR MEDIATION

Religion also plays a very important role in affecting the individual's life in both private and public interactions. Birthplace of the three monotheistic faiths--Judaism, Christianity and Islam--the Middle East is a part of the world where religion plays a crucial symbiotic role in the individual's and community's life. The socio-cultural and

historic environment that saw the birth and spread of these three religions encouraged a close relations hip between the private and public in the individual's life in the Middle East.

Christianity teachings for mediation

The Bible gives clear guidance in Matthew 18 on how to resolve disputes within the church. Only as a last resort should a Christian resort to filing a lawsuit to resolve any dispute.

A number of Scriptures and parables of Jesus warn about filing lawsuits, for example:

1. The Apostle Paul instructs Christians not to "go to law" to resolve disputes and that they should rather "accept wrong" and "let yourselves be cheated" rather than file a lawsuit against another believer. (1 Corinthians 6:7.)

2. Many Scriptures counsel Christians to love their enemies and give up rights for the good of another. Jesus discouraged lawsuits with the following remark: "If someone wants to sue you and take away your shirt let him have your coat as well". (Matt 5:40-41.)

The relevant passages from Matthew 18 are as follows:

If your brother sins against you, go and show him his fault, just between the two of you. If he listens to you, you have won your brother over. But if he will not listen, take one or two others along, so that every matter may be established by

the testimony of two or three witnesses. If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, treat him as you would a pagan or a tax collector. (Matthew 18:15-17)

Basically, the Bible lays out a four step process for seeking reconciliation between believers :

1. Go directly to the other person and work it out.
2. If the matter is not resolved, then take one or two to act as mediators.
3. If the matter is still not resolved, go to the church leaders for a binding decision.
4. Only as a last resort, treat the person as a non-believer and look for other legal ways to resolve the matter.

Go to the Other Person

The best, cheapest and most direct way to resolve a dispute is face-to face with the other person. This is the way most disputes are resolved between rationale people on a daily basis. As Christians, we are called to overlook many minor offenses. Proverbs 19:11 puts it nicely, "A man's wisdom gives him patience; it is to his glory to overlook an offense." Philippians 2:3 reads, "Let nothing be done through selfish ambition or conceit, but in lowliness of mind let each esteem others better than himself."

In cases where the relationship is paramount (e.g., in marriage) and the offense is relatively minor, it is usually wise to simply overlook it. If the matter cannot be overlooked, then the first priority is to bring glory to God. Micah 6:8 explains what God requires from his people: "... to do justice, to love mercy, and to walk humbly with your God." Godly resolution has three parts: (i) justice, (ii) mercy and (iii) humility. Biblical conflict resolution requires all three of these to parts to be met. Assuming the matter is not resolved through direct intervention, even after approaching it from the correct point of view and attitude, then move to the next step.

Find a Trained Mediator

A mediator is someone who intervenes between two or more parties to facilitate communication, clarify issues, and provide wise counsel to bring about resolution of an issue. Mediation is as old as the Bible. Over 3,000 years ago, Moses was a mediator between God and the Israelites. Jesus is described as a mediator between God and man. (1 Timothy 2:5)

Matthew 18:16 makes clear the second step of Biblical reconciliation is with the assistance of one or two neutral outside parties. The wisdom of this approach is apparent. The mediator has no personal stake in the outcome. Therefore, the mediator is truly a neutral party with nothing to gain or lose. The mediator is usually someone with specialized knowledge in the area of the dispute. Thus, the

mediator serves as a wise counselor who objectively evaluates strengths and weaknesses of the parties' positions. The mediator's training in communication skills and conflict resolution helps the parties to communicate more productively. Fourth, a mediator serves as a sounding board and reality agent to temper the expectations of the parties.

Go to Church Leaders

If mediation fails and no negotiated resolution is possible, then the next step for a Christian is to submit to the church's authority and guidance. In the world, authority is vested in the police or courts. In the church, authority is vested with the elders and pastors. The church may convene a hearing similar to an arbitration hearing, listen to evidence by both sides, and render a binding decision. The parties are expected to abide by the decision and allow the matter to be closed.

Mediation Always Comes First

The Bible gives clear guidance in Matthew 18 on how to resolve disputes within the church. Mediation is always the first step if the parties cannot resolve the dispute themselves. With God's help, mediators are able to accomplish seemingly impossible feats of peacemaking and bring healing to difficult situations. The Bible strongly discourages Christians from filing lawsuits to resolve disputes. Only if the process in Matthew 18 is followed should a Christian consider going outside the church to resolve their conflict in a lawsuit.

HINDU BELIEFS

During the transition from Vedic Religion to the formative stages of Hinduism, the mode of mediation between the lay religious patron and various supernatural beings, e.g., ancestors, shifted. While the carrier period was characterized by sacrifices into the ritual fire, the latter saw the emergence of gifting to individuals. This study of the Indian ancestral rite of sraddha demonstrates how Brahmin and Buddhist authors claimed religious expertise within this new mode of patronage as the social value large-scale sacrifice declined. One aspect of the newer model was the substitution of the Brahmin and Monk for the ritual employed in the ancestral rites. AS a part of larger argument about the Brahmanical and Buddhist intellectual discourse on the householder's ritual responsibilities, this paper describes the efforts of both traditions to establish their religious experts as the superior recipient of the religious giving, specifically for the offerings made in the sraddha.

Buddhists efforts to appropriate the role of mediator

The success of Buddhism, certainly follows from its success in finding a role to fill in the social milieu of its time. The central role for religious specialists in a ritual cultural was the role of the mediator and Masefield argues forcefully that the Buddhists made considerable effort to take on this role. The discursive material composed with this aim generally employs one or more of three tactics.

1. Devalue the Brahmin as an effective recipient.

2. Substitute the Buddha or the Saratha for the older mediator i.e. the fire
3. Set up the Saratha as an effective recipient.

The first is a general trend to undermine the authority of the Buddhists rivals, the intellectual elites among Brahmins who claim special knowledge and moral superiority and through those the role of the mediator. This effort operates on the same level as the Brahmanical effort to define the appropriate invitee that is the Buddhists engage the Brahmins in a character debate. The second tactic involves substituting the Buddha for Agni, as the Brahmins did with the learned Brahmin in the domestic rites to the ancestors. The third similarity involves a strategic use of language and metaphor to transform the power before associated with the fire to a human agent, especially for the Buddha - or the Saratha in his place.

ISLAMIC BELIEFS

Islam introduced the rule of law to solve disputes and ensure the smooth running of our worldly affairs, and it has encouraged and rewarded peaceful dispute and conflict settlement. In addition to texts in the Holy Qur'an, the Sunnah of Rasullulah (SAW), his Companions and their successors, Muslim jurists and administrators have consistently supported peaceful conflict settlement: within the Muslim community; between Muslim and non-Muslim communities; and between non-Muslim communities.

In Islamic law, peaceful conflict settlement is to be achieved either by means of conciliation (Sulh) or arbitration (Tahkim) or mediation (Wasaata). To have a clear understanding of these concepts, it is important to define them by their similarities and differences.

Mediation (Wasaatah)

'Wassatah' is the common term for mediation and is used in Islamic law. Nevertheless, the common word for mediation in Islamic law is (Al-Mashyu Bayna Al-Mutanaziinah); 'walking between the disputants'. Alshafaa, Al-jaryu and Husnu Al-Sifara are also terms used for mediation. As for the definition of mediation (wassatah), it is a benevolent and non-binding procedure to end a dispute. It is characterized by one or more persons intervening in a dispute either of their own initiative or at the request of one of the parties. The independent mediator must then seek to achieve an amicable settlement by proposing solutions to the parties.

Beside these verses Hadiths of the Prophet (SAAS) are loud in supporting peaceful settlement. The Prophet says: "

"Conciliation between Muslims is permissible, except for a conciliation that makes lawful unlawful and unlawful lawful".

The prophet also says:

"Intercede so you will be rewarded"

Islam did not merely encouraged peaceful conflict settlement, but introduced a systematic and time-space consideration approach to end conflicts, however, Islam while preserving the openness of Shari'ah law to the impact of time and space dimension, also protects it from the influence of contradictory norms and laws of non-Islamic provenance, or from the renunciation of fundamental of Islamic Law under the justification of time and space factor, or the pressure of globalization and international law.

AS PER BAHAI'S BELIEF

The capacity to meditate is a distinguishing feature of the human being. Indeed, human progress—spiritual, material, or social—would be impossible without reflection and contemplation. Bahá'u'lláh states: "The source of crafts, sciences and arts is the power of reflection."

The Bahá'í writings do not prescribe any fixed procedures for meditation. However, it is clear that whatever its form, it entails focused reflection. Through meditation, the individual is able to gain new and valuable insights into abstract and practical matters. Yet, placing too much emphasis on every idea that comes to mind during this process proves to be counter-productive.."

What Bahá'ís Believe The Life of the Spirit Devotion Mediation
What Bahá'ís Believe
Bahá'u'lláh and His Covenant

The Life of the Spirit
God and His Creation
Essential Relationships
Universal Peace

Legal Recognition of Mediation

Bangladesh Law for Mediation

[89A.(1) Except in a suit under the 2[Artha Rin Adalat Ain, 2003 (Act No. 8 of 2003)], after filing of written statement, if all the contesting parties are in attendance in the Court in person or by their respective pleaders, 3[the Court shall], by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit, or refer the dispute or disputes in the suit 4[to the concerned Legal Aid Officer appointed under the Legal Aid Act, 2000 (Act No. 6 of 2000), or] to the engaged pleaders of the parties, or to the party or parties, where no pleader or pleaders have been engaged, or to a mediator from the panel as may be prepared by the District Judge under sub-section (10), for undertaking efforts for settlement through mediation.

(2) When the reference under sub-section (1) is made through the pleaders, the pleaders shall, by their mutual agreement in consultation with their respective clients, appoint another pleader, not engaged by the parties in the suit, or a retired judge, or a mediator from the panel as may be prepared by the District Judge under sub-section (10), or any other person whom they may seem to be suitable, to act as a mediator for

settlement: Provided that, nothing in this sub-section shall be deemed to prohibit appointment of more than one person to act as mediator:

Provided further that, a person holding an office of profit in the service of the Republic shall not be eligible for appointment as mediator.

6[(3) While referring a dispute or disputes in the suit for mediation under sub-section (1), it shall be for the pleaders, their respective clients and the mediator to mutually agree on and determine the fees and the procedure to be followed for the purpose of settlement through mediation; and when the Court 7[or Legal Aid Officer] shall mediate, it shall determine the procedure to be followed, and shall not charge any fee for mediation:

Provided that if the pleaders, their respective clients and the mediator fail to determine the fees, the Court shall fix the fees and the fees so fixed shall be binding upon the parties.

8[(4) Within ten days from the date of reference under sub-section (1), the parties shall inform the Court in writing whom they have appointed as mediator, and if the parties fail to appoint the mediator during this time, the Court shall, within seven days, appoint a mediator from the panel as mentioned in sub-section (10) and the mediation under this section shall be concluded within 60 (sixty) days from the day on which

the Court is so informed, 9[or the dispute or disputes are referred to Legal Aid Officer, or a mediator is appointed by the Court], as the case may be, unless the Court of its own motion or upon a joint prayer of the parties, extends the time for a further period of not exceeding 30 (thirty) days.

10[(5) The 11[Legal Aid Officer or mediator, as the case may be,] shall, without violating the confidentiality of the parties to the mediation proceedings, submit to the court a report of result of the mediation proceedings; and if the result is of compromise of the dispute or disputes in the suit, the terms of such compromise shall be reduced into writing in the form of an agreement, bearing signatures or left thumb impressions of the parties as executants, and signatures of the pleaders, if any, and the 12[Legal Aid Officer or mediator, as the case may be,] as witnesses; and the Court shall, within seven days from receiving the said report, pass an order or a decree in accordance with relevant provisions of Order XXIII of the Code.

(6) When the Court itself mediates, it shall 13[prepare a report and pass an order in the manner] to that as stated in sub-section

(7) When the mediation fails to produce any compromise, the Court shall, subject to the provision of sub-section (9), proceed with hearing of the suit from the stage at which the suit stood before the decision to mediate or reference for

mediation under sub-section (1), and in accordance with provisions of the Code in a manner as if there had been no decision to mediate or reference for mediation as aforesaid.

(8) The proceedings of mediation under this section shall be confidential and any communication made, evidence adduced, admission, statement or comment made and conversation held between the parties, their pleaders, representatives 14[, Legal Aid Officer] and the mediator, shall be deemed privileged and shall not be referred to and admissible in evidence in any subsequent hearing of the same suit or any other proceeding.

(9) When a mediation initiative led by the Court itself fails to resolve the dispute or disputes in the suit, the same court shall not hear the suit, if the Court continues to be presided by the same judge who led the mediation initiative; and in that instance, the suit shall be heard by another court of competent jurisdiction.

(10) For the purposes of this section, the District Judge shall, in consultation with the President of the District Bar Association, prepare a panel of mediators (to be updated from time to time) consisting of pleaders, retired judges, persons known to be trained in the art of dispute resolution, and such other person or persons, except persons holding office of profit in the service of the Republic, as may be deemed appropriate for the purpose, and shall inform all the Civil

Courts under his administrative jurisdiction about the panel:

Provided that, a mediator under this sub-section, shall not act as a mediator between the parties, if he had ever been engaged by either of the parties as a pleader in any suit in any Court.

(11) Notwithstanding anything contained in the Court-fees Act, 1870 (Act No. VII of 1870), where a dispute or disputes in a suit are settled on compromise under this section, the Court shall issue a certificate directing refund of the court fees paid by the parties in respect of the plaint or written statement; and the parties shall be entitled to such refund within 60 (sixty) days of the issuance of the certificate.

(12) No appeal or revision shall lie against any order or decree passed by the Court in pursuance of settlement between the parties under this section.

(13) Nothing in this section shall be deemed to otherwise limit the option of the parties regarding withdrawal, adjustment and compromise of the suit under Order XXIII of the Code.

Explanation-(1) "Mediation" under this section shall mean flexible, informal, non-binding, confidential, non-adversarial and consensual dispute resolution process in which the mediator shall facilitate compromise of disputes in the suit

between the parties without directing or dictating the terms of such compromise.

(2) "Compromise" under this section shall include also compromise in part of the disputes in the suit.

Indian Law for Mediation

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 At was enacted in 1940 the provision for Arbitration originally contained in Section 89 of Civil Procedure Code was repealed. The Indian Legislature made headway by enacting The Legal Service Authorities Act, 1987 by constituting the National Legal Services Authority 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, arbitrations 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 dispute 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 od conciliator in assisting the parties negotiating settlement of disputes between the parties

Section 89 of the Code of Civil Procedure, 1908 embodies the legislative mandate to the court to refer sub judices disputes to various ADR mechanisms enunciated therein where it finds it appropriate to do so, in order to enable the parties to finally resolve their pending cases through well-established dispute resolution methods other than litigation. Section 89 CPC has therefore recognized the need and importance of ADR even at the post litigation stage.

In order to understand the niceties of section 89 CPC it is essential to refer to its text, which is as under:

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 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.

(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, 1987 (39 of 1987) 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 affect a compromise between the parties and shall follow such procedure as may be prescribed.

Thus, the court can refer the parties to arbitration, conciliation, mediation, lok adalat or judicial settlement in terms of section 89 of the Code of Civil Procedure, 1908 for resolution of their disputes at the post litigative stage. In fact,

the Delhi High Court has gone one step forward and held that there is no reason why Early Neutral Evaluation (ENE), which is a different form of ADR though similar to mediation, cannot be resorted to towards the object of a negotiated settlement in pursuance of Section 89 of the Code of Civil Procedure, 1908 specially when the parties volunteer for the same.

OBJECTIVE OF ENACTMENT OF SECTION 89 CPC

The Law Commission of India had recommended the introduction of the conciliation court system and had underlined the importance of conciliation/ mediation as a mode of ADR. The Malimath Committee had also advocated the need of an amendment in law for introduction of ADR mechanisms.

With a view to implement the 129th Report of the Law Commission of India and to make conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the section in which it was filed.

The Supreme Court has also stated that the intention of the legislature behind enacting Section 89 CPC is that where it

appears to the Court that there exist elements of 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 five ADR methods mentioned in section 89 CPC and if the parties do not agree, the court shall refer them to one or other of the said modes.

Section 89 CPC makes it obligatory for the courts to explore the possibility of resolution of the dispute by making reference to one of the several ADR mechanisms provided therein.

Section 89 CPC is an important step towards popularizing the employment of ADR methods for settlement of cases pending before courts. The reference to ADR mechanisms is mandatory in cases which are found to possess elements of settlement. The responsibility of deciding whether a case possesses elements of settlement has been put on the shoulders of the trial judge who is also referred to as the referral judge since it his on his orders that a case is referred to any one of the ADR mechanisms enunciated in section 89 CPC.

CONCILIATION

Section 89 CPC also provides for reference of a dispute in a *sub judice* matter to conciliation. The statute further provides that for conciliation the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for conciliation were referred for settlement

under the provisions of that Arbitration and Conciliation Act, 1996.

As in case of arbitration, the Arbitration and Conciliation Act, 1996 in relation to conciliation would apply only after the stage of refrence to c onciliatin. Thus, for conciliation also rules can be made under Part X of the Code of Civil Procedure, 1908 for the determining the procedure for opting for 'conciliation' and upto the stage of reference to conciliation. Further as in the case of arbitration, the court cannot refer the parties to conciliation under section 89 CPC, in the absence of express consent of all parties. However when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If the parties are not able to arrive at a final settlement during the conciliation the matter is returned back to the court.

MEDIATION

The court may also refer a pending dispute to mediation in terms of the provisions of section 89 CPC. The statute has undergone a sea change after the judgment of the Supreme Court in *Afcons* case and after the *Afcons* judgment, for mediation the dispute is to be referred to a suitable person or institution which is to be deemed to be a Lok Adalat. The reference to mediation in terms of section 89 CPC can also be made even without the consent of the parties.

Judicial Settlement in India

To implement the objectives of section 89 CPC under the directions of the Supreme Court in the *1st Salem Bar Association* Case a committee headed by Justice M. Jagannadha Rao was formed and the committee placed before the Supreme Court the Draft Civil Procedure - ADR and Mediation Rules, 2003 which were considered by the Supreme Court in the 2nd Salem Bar Association Case. The Supreme Court thereafter directed the respective High Courts to examine and finalise the said rules.

But the case of mediation stands on an entirely different footing. The mediation revolution which has stormed Delhi with the establishment of numerous mediation centers is an upshot of section 89 CPC only. The overall results peg mediation as the most efficient ADR mechanism under section 89

CPC both in terms of quality of disposal as well quantum of disposal and therefore mediation has emerged as the primary ADR process in courts in Delhi.

Be that as it may, even if the statistics are kept aside, section 89 CPC has given a massive boost to the ADR revolution in Delhi and has helped in developing a settlement culture which is the most important aspect to be taken care of as has been highlighted by none other than the Chief Justice of India.[76] The concept of employing ADR has undergone a sea

change with the insertion of section 89 CPC[77] and it has resulted in a paradigm shift. The journey so far has been good however there is still scope for improvement and definitely a need for progress.

U.S. Law For Mediation

Section 1. TITLE : This Act may be cited as the Uniform Mediation Act.

Section 2. DEFINITIONS : In this act

1) Mediation means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

2) Mediation communication means a statement whether oral or in a record or verbal or non verbal, that occurs during a mediation or is made for purposes of considering , conducting, participating in, initiating, continuing or recovering a mediation or retaining a mediator.

3) "Mediator " means an individual who conducts a mediation.

4) " Non party participant" means a person other than a party or mediator that participates in a mediation.

5) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

The model standards conduct 1994 for mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for conflict Resolution. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005. Both the original 1994 version and the 2005 revision have been approved by each participating organization.

Mediation is used to resolve a broad range of conflicts within a variety of settings. These standards are designed to serve as the fundamental ethical guidelines for persons mediating in al practice contexts. They serve three primary goals to guide the conduct of the mediators, to inform the mediating parties, and to promote public confidence in mediation as a process of resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.

Mediations serves various purposes including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess solutions , and reach mutually satisfactory agreements, when desired.

CHAPTER II

HISTORICAL BACKGROUND IN MEDIATION

Now I want to refer historical development in the area of mediation. Settlement of dispute in an amicable way is the hall mark of civilization. In ancient society mediation system has been prevalent in one form or the other. It has been continued to our villages and has also been preserved in its customary form in our tribal areas. So far as formal litigation system is concerned, mediation, along with other methods of Alternative Disputes Resolution, has been statutory recognized world wide

Facilitative Mediation

Apart from the aforementioned long-standing standard principles, there are a range of what might be more appropriately termed 'values' that are crucial to the practice

of what has come to be known as 'facilitative mediation'. This type of mediation was taught and practiced in the early days of the development of mediation during the 1960s and 1970s, particularly in Northern America. The facilitative mediator works through a number of stages of a process designed to assist the parties in dispute to reach a mutually acceptable resolution. Primarily through the use of open-ended questions, the mediator assists in the identification and clarification of the issues in dispute, helps the parties to explore the interests and needs underlying the positions they have adopted, and settlement. The facilitative mediator does not make recommendations to the parties, give personal advice or opinion as to options or settlement, nor predict what a likely outcome would be from litigation. The mediator is often described as the 'manager' of the process, while the parties retain full control of the content and the outcome settlement.

Facilitative mediators work to ensure that parties come to settlements based on their own knowledge and understanding of the issues that divide them. They predominantly hold joint sessions with all parties present so that the parties can hear and come to understand each other's points of view. In certain circumstances they may initiate 'side meeting' known as caucuses, or possibly undertake 'shuttle mediation' – for example, in cases of particularly high conflict or power imbalances.

Evaluation Mediation

Evaluative mediation evolved over time is a process modeled on settlement conferences held by judges. An evaluative mediator assists parties in reaching resolution by highlighting the particular strengths and weaknesses of each side's case and predicting what a judge or jury would be likely to do in such a case. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues. The process is also frequently referred to as 'normative mediation' in the sense that, based on aspects of case law, parties' legal rights and legal concepts of fairness, it defines what courts normally tend to decide in such cases.

Evaluative mediators may meet in caucus with the parties and their legal representatives, often practicing what is referred to as 'shuttle diplomacy'. The evaluative mediator structures the process, and substantially influences the outcome of the mediation. Because of their recognized knowledge and expertise, evaluative mediators commonly have a background in legal practice.

Indeed, reviews of the literature suggest that the practice of evaluative mediation appears to have become much more common and more formalized as an option in the USA.

Directive Mediation

Occupying the opposite end of the scale from facilitative mediation is the role of the directive mediator. There are a significant number of articles emerging on the internet

regarding the pros and cons of directive mediation in major international conflicts, but they are beyond the remit of this book to explore in detail. At its simplest, a lawyer colleague once expressed the view that, particularly with regard to financial disputes, if he knows the obvious solutions to clients settlements, then why should he not say what these solutions are- that is, "cut as the chase", tell them what to do and, by so doing, save his clients time and money.

Anecdotally, some supporters of this allegedly common sense style have also been known to refuse to support clients own preferred potentially unconventional settlement options, where they vary from normative court settlements, and indeed at times to threaten withdrawal from a case as legal advisor.

Facilitative mediators working in family mediation would commonly expect complex children's financial and property issues to take somewhere between three and six sessions. Such mediators would be working to the facilitative principles defined earlier and on the assumption that hitherto the parties had taken major responsibility for understanding deciding on and managing those important elements of daily life, and so are ideally placed (with some help from the impartial mediator) to resume that role and responsibility.

On the other hand some lawyer mediators, working to directive principles, regularly resolve all such family financial and property cases in one joint session, or at most two. How do they do that? They do it by having the parties submit all

financial data before the first session. The data are examined by the mediator prior to the first meeting. Typically such mediators then explain to the parties that, having studied the financial data, they are able to recommend the obvious optimum settlement. Words commonly used involve such legal terms as 'putting a charge on the property' and 'pension splitting'. The parties, knowing the legal background of the mediator, and frequently being caught up in the turmoil of separation and divorce, are often in no fit state to question the professional wisdom offered and therefore settle on that basis. Often at least one of the parties, commonly the 'leaver', has a wish to settle as quickly as possible and with the minimum costs.

The extent to which such behavior is right or wrong depends clearly on which positions we take on the values and philosophical underpinnings of practice referred to earlier. From my discussions with them, lawyers who favour this style clearly have no comprehension that this way of working might in any way be questionable. This is all the more concerning because commonly they are affiliated to professional associations that often, in their membership codes of practice, prohibit such advice giving.

My two chief concerns are first that, as yet, we do not know how many such settlements a year or so down the road will be seen by one or both parties as unfair or inequitable from their own perspective. 'Second', and of far greater concern, is that the parties are probably never informed as to the type of

mediation on offer or what the alternative options of mediator style might be.

By now you will have recognized my own personal affiliation to facilitative mediation. I have no problem with clients making an informed choice to opt for the alternative 'fast-track' style of mediation. The problem arises where the models and practice styles are covert. When this happens, particularly at times of psychological turmoil, it diminishes client-informed choice and feeds into primitive fears of the risk of financial loss, unless the mediator is also a lawyer.

Insofar as they connect strongly with the facilitative tradition in mediation, over the past decade or so, other styles worthy of further study are transformative mediation and narrative mediation.

Transformative mediation

In keeping with the traditions of the facilitative style, transformative mediation is based on the belief that the disputing parties are best able to decide whether and how to resolve their dispute. Empowerment and recognition are emphasized – that is, the mediation empowers the parties to express themselves effectively and encourages them to recognize the reasons for each others' actions. Transformative mediation was developed by Robert Baruch Bush and Joseph Folger as a theoretical and philosophical approach to the mediation process.

When these things occur in mediation [listed examples of empowerment], the party experiences a sense of self worth, security, self-determination and autonomy. Even if the external constraints of the party's circumstances still impose certain limits on her, within those limits she has exercised greater control over her own situation, and the self is strengthened as a result. When the mediator helps to bring about any of these things in the mediation session, the objective of empowerment has been achieved to some degree.

When these kinds of things occur in mediation [listed examples of recognition], the party realizes and enacts his capacity to acknowledge, consider, and be concerned for others. Though he is in the midst of difficulties of his own, he has chosen not to focus exclusively on his own needs and concerns but to strive consciously to understand the perspective and take of the concerns of the other party. As a result, he reaches beyond himself to relate to another person's common humanity in a concrete way. When the mediator helps to bring about any of these things in the mediation session, the objective of recognition has been achieved to some degree.

Narrative mediation

The narrative perception is that people tend to organize their experiences in story form. The narrative metaphor draws attention to the ways in which we use stories to make sense of

our lives and relationships .....Descriptions of problems are typically told in narrative terms. Such problem narratives have often been rehearsed and elaborated over and over again by participants in a conflict.

A key feature of the approach is described as:

One of the major tasks of the mediator is to destabilize the totalizing descriptions of conflict so as to undermine the rigid and negative motivations that the conflicted parties ascribe to each other. A variety of strategies can be employed by a mediator to loosen these negative attributions. These strategies help to create a context from which a preferred story line can be developed.

As a more general observation before concluding this section, recognition needs to be given to the influence of Western individualist cultures on the development of mediation within the UK.

CHAPTER III

MEDIATION, PROCESS AND PRACTICE

In mediation, an unbiased independent mediator facilitates a discussion between two or more parties who need to resolve an issue. The mediator is a knowledgeable, yet Neutral, process manager who can help the parties communicate and negotiate more efficiently and effectively. As a result parties can often resolve their issue or come to a mutually agreeable solution easier than on their own.

While the mediator is actively involved in the process of mediation, it is the responsibility of the parties to craft their own solutions and make their own decisions. The mediation process seeks to develop solutions that satisfy the interest of all parties.

Mediation Process and Practice

Mediation is a process in which an impartial third person assists those involved in conflict to communicate effectively with one another and to reach the their own agreed and informed decision concerning some, or, of the issue in dispute.

Essential principles

Voluntary participation

Participation in medication must always be voluntary. Participants should enter mediation of their own free will and, having done so, they and indeed the mediators(s) are free to withdraw at any time. To speak, as some have, of the potential benefits of 'mandatory mediation' is quite simply a contradiction in terms-you cannot make people mediate.

Neutrality

Mediator must at all times remain neutral as to the outcome of mediation. Mediators will commonly help participants to identify and explore the options available to them and the feasibility of those options and, where appropriate, they may offer information, but not advice as to what the parties may wish to explore outside of the mediation process-for example, financial and/ or legal advice. Despite the essential principle of neutrality, mediators are not neutral with regard to significant power imbalances or safety issues- for example, domestic and child abuse, threats of violence or intimidation. They should have received training in the appropriate

management of such issues should they become apparent, including, if necessary, the safe termination of mediation and the involvement of relevant authorities.

Impartiality

Mediators must at all times remain impartial towards participants. They must conduct the process in a fair and even-handed way.

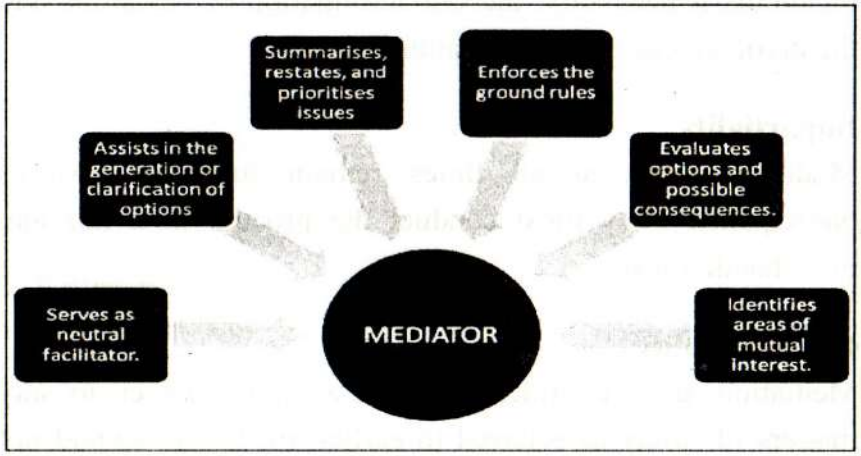
Confidentiality

Mediation is a confidential process and, subject to any matters of safety as referred to earlier, mediators should not disclose any information about or obtained in the course of, a mediation to anyone without the express consent of each participant.

Mediator attributes

So what are the qualities and attributes that characterize an effective mediator? As with a number of these important questions, the acid test is perhaps to ask what we personally might expect the attributes to be, were we in a situation that led us to consider approaching a mediator for help.

Anecdotally, responses to this question within training groups usually elicit responses such as intelligence, perseverance, patience, non-judge mentality, professionalism, even-handedness, ability to listen and understand complex issues, unshockability and an authoritative as opposed to authoritarian approach.



A scan of mainstream mediation literature reveals relatively little reference to this topic. Marian Roberts draws the same conclusions:

Very little has in fact been written about the qualities of the mediator. One reason for this is the weight that has long been attached to the personal rather than the processual aspects of the role. Personal qualities, often elusive and idiosyncratic, are not easily susceptible to analysis....In such studies [perspectives of the parties]

a list of preferred qualities was identified, for example:

- Originality of ideas,
- Sense of appropriate humour,
- Ability to act unobtrusively,
- The mediator as 'one of us',

- The mediator as respected authority (that is, personal prestige),
- Ability to understand quickly the complexities of a dispute,
- Accumulated knowledge,
- Control over feelings,
- Attitudes towards and persistence and patient effort invested in the work of mediator,
- Faith in voluntarism (in contrast to dictation),
- Physical endurance,
- The hide of rhinoceros,
- The wisdom of Solomon,
- The patience of Job,
- The capacity to appreciate the dynamics of the environment in which the dispute is occurring.

COMPONENT OF MEDIATION

1. THE MEDIATOR : The mediator must be someone whom parties can trust and be comfortable with. This Means
   - ➢ Someone impartial and neutral.
   - ➢ Someone capable of empathy who strives to understand .
   - ➢ Someone who speaks the language of the parties.
2. THE ENVIRONMENT : Mediation should be set in a neutral, private location that favours neither party. An informal environment works best.

3. THE PROCESS : Confidentiality of the process is vital for parties to give their honest best. It helps to have distinct roles, explicit ground rules, and a clear and simple process.

4. THE AUTHORITY : The mediator is primarily a facilitator, not a judge figure

5. COMMUNICATION : It is important to build a relationship first and then work up to the sensitive issues for problem solving. Communication, therefore is vital.

6. PROBLEM : Mediation helps problem solving in the following solving ways :
   - Deals with all aspects of the larger situation comprehensively.
   - Helps parties look at the strength and weaknesses of their respective cases.

7. CREATIVE SOLVING : A good solution does not solve the immediate problem. It takes away the underlying sources of friction. The solution should strive to :
   - Satisfy each party's long term interests
   - Employ creative new thinking to develop a good solutions.
   - Have each party give and take

8. HOLISTIC SOLUTIONS : Parties consider the conflict resolved when the solution.
   - Restore balance
   - Strike a bargain
   - Restore a relationship
   - Stops a violence, attacks and friction
   - Meets the party's real interest
   - Allow the parties to cooperate on future tasks

TYPES OF MEDIATION

1. COURT REFERRED MEDIATION - It applies to cases pending in court and which the court would refer to mediation under sec 89 of the code of civil procedure, 1908.

2. PRIVATE MEDIATION - in private mediation qualified mediators offer their services on a private, fee-for-service basis to the court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through meditation. Private mediation is used in connection with disputes pending in court and pre-litigation disputes.

ADVANTAGES OF MEDIATION

The parties have CONTROL over the mediation in terms of 1)its scope (i.e the terms of reference or issues can be Limited or expanded during the course of the proceedings) and 2) its

outcome (i.e. the right to decide whether to settle or not and terms of settlement)

1. Medication this PARTICIPATIVE parties get an opportunity to present their case in their own words and to directly participate in the negotiation.

2 The process is VOLUNTARY and any party can opt out of it any at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.

3 The procedure is SPEEDY, EFFICIENT AND ECONOMICAL.

4 The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day to day activities.

5 The process is conducted in an INFORMAL, CORDIAL and CONDUCIVE environment.

6 Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

7 The process is CONFIDENTIAL.

8 The process facilitates better and effective COMMUNIACTION between the parties which is crucial for a creative and meaningful negotiation.

9 Meditation helps to maintain/improve/restore relationships between the parties.

10 Meditation always takes into account the LONG TERM AND UNDERLYING INTEREST OF THE PARTY at each stage of the dispute resolution process in examining alternatives in generating and evaluating options and finally in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

11 In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICIAL SETTLEENT.

12 A mediation settlement often leads to the SETTLING OF RELATED/CONNECTED CASES between the parties.

13 Meditation allows CREATIVITY in dispute resolution. Parties can accept creative and nonconventional remedies which satisfy their underlying and long term interests.

14 When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

15 Meditation PROMOTES FINALITY. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

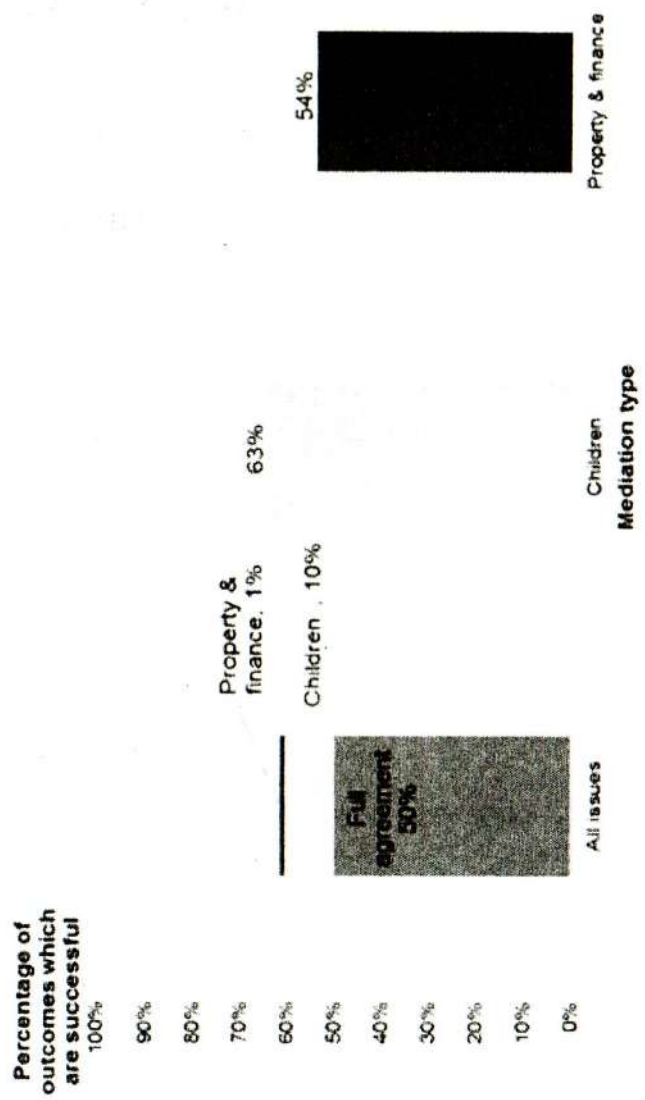
16 REFUND OF COURT FEES is permitted as per rules in the case of settlement in a court referred mediation.

Dispute Resolution Options

There are a number of options parties can choose from when confronted with a dispute or a difference of opinion.

• Informal discussion/ problem solving- parties work together informally to either reach a solution or agree to drop the matter.	• Direct negotiation – Formal unassisted negotiations directly between the affected parties.
• Mediation – A neutral third party helps parties develop a solution they can both agree on.	• Fact finding – A knowledgeable third party hears a summary of each party's best case and renders a non binding opinion of the likely outcome if the matter went to court or to a formal hearing.
• Tribunal/Courts – A public process where a judge or a hearing panel have the responsibility of arriving at a solution. Often a lawyer represents each party, addresses the judge or the panel and brings in evidence	• Arbitration – A private process which a third party renders a decision after hearing evidence from all involved. The decision is normally binding.

MEDIATION	TRIBUNAL/COURTS
LOW COST	HIGH COST
TIMELY	TIME CONSUMING
SCHEDULED QUICKLY	DEPENDENT ON COURT TIMES
DIRECT COMMUNICATION BETWEEN PARTIES	LAWYERS SPEAK TO DECISION MAKER
ENCOURAGES DIALOGUE	DISCOURAGES DIALOGUE
BUILDS RELATIONSHIP	DISCOURAGES RELATIONSHIPS
PARTIES DEVELOP SOLUTIONS	SOLUTION IMPOSED



The Mediation Process

The mediation process takes a mutual gains approach to bargaining it seeks to develop solutions that satisfy the interest of all parties it asks the parties to clarify the position they have taken order in an issue and determined the underlying interest that are at the core of an issue rather than take taking a hard wall approach mutual gains negotiations strive to ensure the interests of all are met.

THE MEDIATION PROCESS	
1	ASSESSMENT
2	• PREPARATION
3	CONVENING THE PARTIES – THE FIRST
4	IDENTIFYING THE ISSUES
5	UNDERSTANDING INTERESTS & GATHERING DATA
6	CREATING & EVALUATING OPTIONS
7	CRAFTING A SOLUTION
8	RATIFICATION

Step 1: Assessment - Is Mediation an option?

Medication is an effective option to resolving disputes or differences when all or some of the following conditions exist:

- the dispute has been characterized by poor communication and distrust between the parties;
- the sharing of information will lead to the possibility of a better understanding of the issues involved;
- all parties are in needed in order to implement Solution;
- the establishment of a trusting working relationship will have future interaction with the other parties;
- there is a likelihood that neither party would get what they want if the dispute went before a tribunal or courts;
- there are a broad range of related issues that an Administrative Tribunal are the codes might not have the ability to address; and
- there is room for collaboration and creativity;

Step 2: Preparation

Once the decision has been made to use radiation it is important that time we spent ensuring that the necessary conditions for a successful outcome are in place.

The mediator seeks to confirm that:

1. All the stakeholders are supportive of the process and willing and able to participate.

2. There in support for this process from the municipal councils involved.
3. All participants are willing to be involved in establishing and agreeing to the rules governing the process of mediation.
4. The participants have the basic communication skills needed to be effective negotiators.

When all parties are satisfied that they have chosen the right mediator will draw up "Agreement to Mediate". This document with outline the mediation process procedural guidelines and service fees and will need to be held by all the parties.

For mediator to be effective participants should:

- be effective listeners;
- be good communicators;
- be able to separate personalities from the problem to be solved;
- seek resolution that focuses on the bigger picture.
- be committed to an outcome that is mutually acceptable to all the parties;
- look for collaborative ways to get beyond the position each group takes;
- be imaginative in crafting solutions; and
- commit the necessary time to the process;

Before beginning, the selected mediator will spend time with each other we each of the material party very short that they are prepared for the directions instructions will include focusing on interest rather than positions and providing the participants with the rhythm better understanding of effective negotiation techniques.

- What are the options for the other parties?
- How important is an ongoing relationship?
- Who will represent us?
- Is there organizational support (including time and money) for this effort?
- What options are available if negotiations fail?

- Are the right parties involved?
- Is there an understanding by the parties of the issues/topics under discussion?
- Do the parties have a good understanding of negotiation strategies?
- Where is the most appropriate place to hold the negotiations?
- Is there a commitment from the parties for an initial meeting?

Step 3: Convening the Parties – The First Meeting During their first joint meeting with the mediator the parties finalize the mediation agreement. This is signed by all the participants and outlines:

- The timeframe;

- The agreement to mediate;
- Who the mediator(s) are;
- The rules of behaviour;
- The willingness of all parties to negotiate;
- The subject matter of the mediation; and
- A variety of other topics related to the process.

A separate contract may be signed with the mediators detailing rates, roles, etc.

At this stage, the parties should ask themselves	**At this stage, the mediator asks**
• What ground rules have to be in place for me to feel comfortable with this process? • Do all the parties and the mediator understand the time lines I am under? • Am I clear who in my organization has to approve any final agreement? • Who will represent us? • Is there organizational support (including time and money) for this effort? • What options are available if negotiations fail? • Do we agree with the selection of the mediator?	• The agreement to mediate is in place; involve? • Is there an understanding by the parties of the issues/topics under discussion? • Do the parties have a good understanding of negotiation strategies? • Where is the most appropriate place to hold the negotiation? •Is there commitment from the parties for an initial meeting?

Step 4 : Identifying the Issues

Once the "Agreement to Mediate" contract is finalized, the participants identify all the issues that need to be addressed to reach a final solution. These issues make up the agenda.

At this stage, the parties :	At this stage, the mediator asks:
• identify the issues that from their perspective will have to be addressed in order to resolve the dispute; and • ensure that all of these issues are on the table.	• Ensures that each party has had an opportunity to get their issues out on the table; and • collates the issues into one document, which becomes the group's working agenda.

Step 5: Understanding Interests & Gathering Data

Parties must identify the interests that support the position that they have taken on an issue. Having a clear understanding of the reasons that drive you to a position is critical to developing the final solution Before beginning, the selected mediator will spend time with each other we each of the material party very short that they are prepared for the directions instructions will include focusing on interest rather than positions and providing the participants with the rhythm better understanding of effective negotiation techniques.

At this stage, the parties :	At this stage, the mediator asks:
•Reflects on what is really important to them in this dispute; •articulate to the other parties what is important to them; •listen carefully and when necessary seek to clarify and get a better understanding of the interests of the other parties; •Identify what data they need ; and •agree on how the data will be obtained and who will be carrying out the required studies.	•Assists the parties in identifying their interests; •Allows each party uninterrupted time to articulate their interests •works to ensure that the parties have a clear understanding of each other's interests. •Ensures that each party has had an opportunity to get their issues out on the table; and •collates the issues into one document, which becomes the group' s working agenda.

Step 6: Creating and Evaluating options

The Tendency in any group is to immediately When you add options as they are put on the table while there is some married to doing and immediate check to see if there is an obvious solution available it is important to avoid doing anything that might reduce the creation of additional options if a solution is not available in the group should take the time needed to build strong and develop as many options as possible.

Once the list of options has been generated evaluate each option and do some reality testing. Ask yourself:

- How do you how do these options meet our interests?
- Can this option be sold to my Council and to our ratepayers?

When a preferred option is selected the mediator will often after parties to re-examine some of the listed options to determine if any elements can be added to enhance the preferred options.

At this stage, the parties should ask themselves	At this stage, the mediator asks
• What options exist? • What independent criteria can we use to evaluste the options? • Can this deal be sld to our constituents or ratepayers? • What can we do to help the other parties sell it to their ratepayes?	• Works with the parties to ensure that all the technical information is available; • assists the parties in identifying their interests; • Allow each party uninterrupted time to articulate their interests • works to ensure that the parties have a clear understanding of each other's interests. • Ensures that each party has had an opportunity to get their issues out on the table; and • collates the issues into one document, which becomes the group's working agenda. • Works with the parties to reassess the preferred option to see if it can be improved by adding elements from some of the rejected options.

Step 7: Crafting a solution

Once the group has ever evaluated all the options and ensured that their inches are and attach a file package is put together is present reflects the different interest of all the participants and includes;

1. the substantive substantiating components of the solution
2. an implementation plan; and
3. an alternate dispute resolution process for use if disagree disagreements arise during implementation and subsequent operations.

At this stage, the parties ask:	At this stage, the mediator :
• What requirenment do I have regarding implementation? • Does the implementation plan meet my interests?	• Works with the parties to develop an implementation strategy including who will do what when; and • works to ensure that the parties have a clear understanding of each other' s interests.

Step 8: Ratification

Once the negotiations are complete each party take the agreement back to the their Council for rectification process can involved either a joint presentation by both negotiating

teams to a joint meeting of all the council's involved or individual presentation made to individual houses in both of these cases from editor can be involved by working with the negotiating things to prepare their presentation materials and develop a production strategy.

At this stage, the parties ask :	At this stage, the mediator :
• Do the other parties clearly understand the requirements I have for ratification and what the timelines are? • Would a presentation by the entire negotiating team to a joint meeting of the councils involved be a good idea?	• Ensures that all the parties have clearly articulated their ratification process; and • Provides assistance to each of the parties as needed and agreed to by all.

CHAPTER IV

EVOLUTION OF MEDIATION IN SOCIETY

An evaluation of the usefulness of anything proposes an awareness of what is and the particular value that it has to offer. Though mediation is a process dispute resolution not new to any nation, in the changed social scenario an effective adaptation of the traditional methodology to the new conditions requires untiring efforts and devotion to be dutifully put into this mediation evolution process right from its inception to its culmination into an effective practice. Here in this chapter I discussed about the emerging trend in mediation to resolve a disputes like workplace , cross culture, divorce, workmen compensation amicably and how far mediation is upper hand over litigation.

I. Workplace Mediation

Mediation brings people together to proactively resolve their disputes.

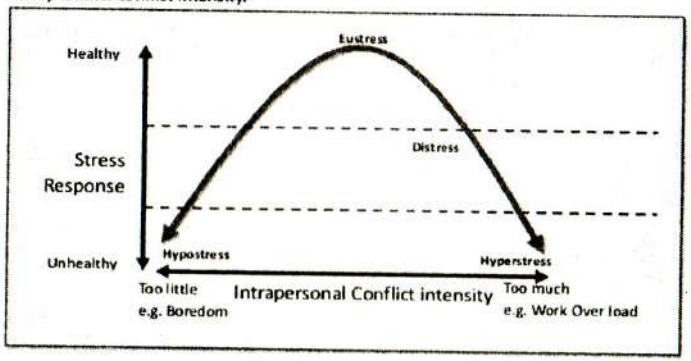
Mediation is a confidential, usually voluntary, process of shared decision making in which one or more impartial persons, called mediators, assist people, organizations and communities in conflict to work towards a variety of goals.

Mediation is a way to resolve disputes without filing a "formal complaint" or lawsuit. It can provide a non-public forum in which the disputing parties can discuss the dispute, feel that they are being heard, gain insight and understanding into the perspective of the other party, and work together in exploring and developing possible ways towards resolving the dispute.

DEFINITION : Workplace Mediation is a confidential, informal and voluntary process whereby an impartial mediator facilitates communication between those in dispute to assist them in developing mutually acceptable agreements to improve their future working relationship. Mediation can be effective in both union and non-union settings and at all levels of the organization

Workplace Stress

Stress responses can be healthy or unhealthy. In the diagram below it is related to intrapersonal conflict intensity.



When to Mediate? Mediation is more effective when conducted as early as possible after a problematic workplace relationship issue has arisen. It may be identified by one or both of the parties themselves, or by the parties' managers or HR personnel.

The best results are obtained when an adverse issue is in its early stages, when it can be "nipped in the bud" and before it:

- begins to make the employee dread coming to work each day;
- has a detrimental effect on the employee's emotional wellbeing;
- becomes toxic and chronic;
- leads to dysfunctional workplace behaviour that has an adverse effect on the employee's professional

performance – for their own sake and that of their employer;

- has a detrimental effect on other employees in the workplace;
- leads to behaviour that warrants disciplinary investigation and/or performance management;
- following the outcome of an internal or external workplace investigation;
- during the course of legal proceedings, eg the Fair Work Commission may order the parties to an application for an antibullying order to Mediate;

at the conclusion of legal proceedings, eg if an employee's application / law suit was not successful and the parties still need to work together. Mediation at any stage of workplace conflict is worthwhile because it facilitates a process of self-actualisation for each of the participants, and empowers them to express themselves, to be heard and understood, and to negotiate solutions on their own terms.

- **Recognition and Understanding :** When employees feel they are being heard and have the opportunity to hear and understand the other party's point of view, the chance for an amicable resolution is heightened.

- **Self-Empowerment :** The workplace is an environment in which employees feel they are normally being told what to do – mediation offers employees the opportunity to have input in the decision on how to resolve a situation.

- **Timeliness and Speed :** Mediation can take place quickly and within a short period of time (often just a few hours). In contrast, a formal complaint filed with a regulatory agency or court can take years to resolve.

- **Cost Effective :** Mediation is cost effective not only financially but also in human capital and time. Mediator fees are a fraction of the costs of the legal fees associated with a protracted conflict and litigation.

- **Confidential :** Once a lawsuit is filed it becomes a matter of public record while mediations, by their very nature and contract, are confidential, regardless if a mediation takes place prior to or after a lawsuit has been filed. In California, communications during mediation are inadmissible and are confidential as defined under the Evidence Code.

- **Durability of the Mediation Agreement :** Studies have shown that when disputing parties voluntarily enter into a mediation agreement they are far more likely to adhere to the terms of the mediation agreement since they helped draft and design the agreement rather than when a judgment is imposed by a court or regulatory agency

The role of the mediator

Conflict occurs not only because these parties have different perspectives but because they also haven't been able to communicate and resolve the conflict for themselves. So the mediator's role is to encourage each party to share their views but not to gain agreement around these views.

The mediator's role is also to help the parties find agreement about future workplace interactions and not past interactions. The mediator's role is to lead the parties to identify what changes in their interactions and behaviours are required that will support them to work safely, respectfully, professionally, and productively going forward together in the future

BENEFITS : Workplace Mediation offers important benefits to employers and employees alike. It provides fast, creative, mutually satisfactory resolutions. When a dispute is mediated shortly after it arises, the chances of optimal resolution are much greater: the parties' differences have not had a chance to fester, the situation is generally more fluid, and the parties have more resolution options available to them. Mediated resolutions work better and last longer than authoritatively imposed resolutions because everyone involved has a stake and buys into them. Moreover, mediation fosters mutual respect through improved communication, and can mend and preserve frayed working relationships even when the parties are extremely hurt and angry.

Mediation within the workplace generally looks very different from mediation within the context of litigation. The primary goal of workplace mediation is to leave the parties better able to work together. Traditional "settlement conferences," in which the mediator separates the parties and shuttles back and forth between them, often will not be adequate to this task; the parties will need to work through their differences together.

Many disputes arise out of a failure by either party or both parties to communicate, understand or consider the needs and interests of the other. People fix their attention on the question, "Who is right and who is wrong?" and become blind to the possibility that both may have a legitimate point of view. The mediator's task is to open communications between them about the reasons for the positions they have taken with each other, helping both parties to understand as fully as possible their own and the other's view of the situation. The mediator encourages both to look at the dispute through different lenses: What do they think will work as a practical matter? What do they think will be fair? What do they think will best honour and promote a good working relationship? As the parties gain an expanded understanding of the situation, their ability to work together toward resolution — and after resolution—increases.

The workplace mediation process

Because these parties in the workplace mediation haven't been able to resolve the conflict and communicate well with each other, the mediator may do well to hold pre-mediation phone call meetings with each person to be able to coach them around improved communication techniques and to coach them to see beyond their own perspectives and start to vision realistic, possible outcomes that they can put forward for discussion in the mediation.

Its best that any agreement reached is recorded and

documented and signed off by both parties. A workplace mediation may be held in the one meeting room with both parties sitting together opposite each other talking. Or it could be held in two separate rooms in a shuttle mediation with the mediator moving backward and forward between the parties delivering information from one to the other.

Importantly, workplace mediation is a voluntary process. Parties may choose not to participate or may start the process and then withdraw at any time. In addition, each party to a workplace mediation is entitled to have a support person present. Where participation in a facilitated discussion is the only reasonable & non adversarial process for resolution (for example to ensure parties are safe to work with each other, or to manage a low level bullying complaint or a performance management issue) then parties can be directed to attend a facilitated meeting and the process should not be referred to as 'mediation

TYPES OF WORKPLACE ISSUES WHERE MEDIATION CAN REALLY HELP :

Disputes between employees : Sometimes interpersonal differences prevent coworkers from functioning effectively together. If the company needs both employees and wants them working together harmoniously, mediation can be very effective. The employees are offered a controlled setting in which to air their differences, guidance in communicating effectively about them, and a chance to make agreements about how they will function together in the future.

Performance Issues : Employee performance can deteriorate for an array of reasons: communication style, personal interactions, misperceptions and misunderstanding regarding roles and responsibilities, etc. Mediation can offer an alternative, and likely more productive, forum in which to discuss these difficult issues outside of the standard performance review process.

Sexual harassment complaints: People often assume that parties to a sexual harassment complaint cannot work together to resolve the dispute. That assumption can do both parties a disservice. Many hostile environment complaints arise as a result of differences in perception about what is funny or flattering and what is offensive behavior, or they arise as a result of one person's failure to respect the other or to understand the effect of his or her behavior on the other. If the parties are willing to talk with each other, these complaints can be mediated to excellent conclusions. The employer can save its relationship with both employees and avoid an expensive and painful lawsuit.

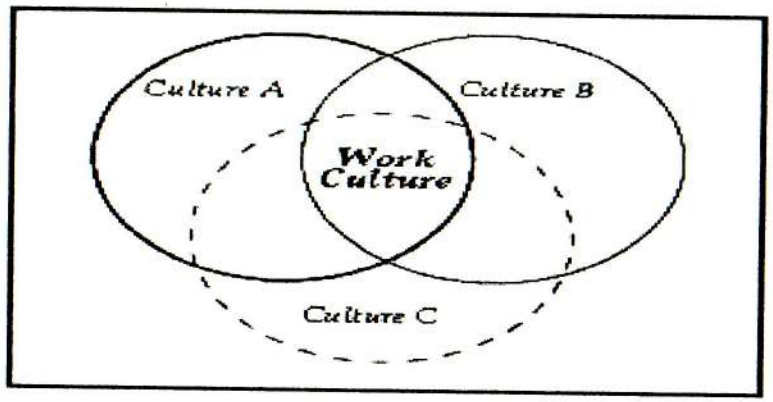
Terminations: When an employer chooses to terminate an employee even though the termination poses litigation risks, mediation on the terms of the separation can be very helpful. Through the mediation process, the employee has a chance to communicate severance needs and to affect the nature and quality of the severance package, while the employer has an opportunity to eliminate its litigation exposure. Mediation can also be beneficial emotionally: the employee may never agree

that the termination was warranted but will more likely feel that he or she had a fair hearing, and may come to understand the reasons for the employer's action. These realizations can make it easier for terminated employees to move ahead with their lives

II CROSS CULTURE MEDIATION

INTRODUCTION

As the use of mediation increases, mediators are more and more likely to be involved in a cross-cultural mediation. Even the most skilled and experienced mediator will face new challenges in a cross-cultural mediation. Although only a handful of mediators have the opportunity to mediate cross-border business disputes or international political conflicts, domestic mediators are increasingly likely to be involved in disputes between people who represent distinctly different ethnic, racial, or national origin cultures



When working with cultural differences, a natural starting point is to find a workable definition of "culture." Selecting a single definition of culture is difficult, as it has been suggested that there are over 400 definitions of "culture." One useful definition is, "Culture is the total accumulation of an identifiable group's beliefs, norms, activities, institutions, and communication patterns." Culture is both pervasive and yet largely invisible. Culture is like the water around the fish or the air around people. Because my approach to cultural negotiation and mediation relies heavily on the work of Geert Hofsted, I am influenced by Hofstede's definition of culture, "the collective programming of the mind that distinguishes the members of one group or category of people from others".

Defining culture is just the starting point. The real concern is how Cross-cultural differences impact mediation. Understanding cultural differences is critical to developing an approach to cross- cultural mediation. What are the major cross cultural differences that are likely to impact mediation? Like the multiple and plentiful definitions of culture there are dizzying array of lists of cultural differences.

Cross cultural issues in community mediation

Culture can be defined as, "A learned system of values, beliefs and/or norms among a group of people" . Broadly construed, culture includes ethnic background, nationality, gen der, disability, race, sexual orientation, and religion.

Culture af fects language, behaviors, and preferred conflict styles.

1. Mediators must be impartial;

2. The preferred way of dealing with conflict is through a rational, linear problem-solving process;

3. Conflicting parties should separate the people from the problem;

4. Power between parties must be relatively equal;

5. The parties can agree on objective standards for evaluat ing which solutions are fair or just.

Models basis in Cross Culture Mediation

Neutral and Impartial

One of the key assumptions of the predominant model of mediation is that the mediator is impartial. Impartiality is said to be important so that mediation participants will not be treated with bias. he mediator might be either religious or secular. A religious mediator might be viewed with skepticism by a secular client, whereas a secular mediator might be viewed with skepticism by a religious client. Accepting the perception that a mediator, despite training, might not be impartial, one alternative is to use co-mediators, one religious and one not. Another alternative is to use a single mediator, whether religious or not, who meets with both parties ahead of time and tries to establish neutrality with both parties, demonstrating that a mediator can be

impartial in spite of coming from a different background than one of the parties. A third alternative is to find a mediator who is not affiliated with either party's background or perspective.

Ethnic group

If both parties came from the same ethnic group or other common framework, they might decide that they want a mediator from their own background and may not be concerned about im partiality. For example, in Israel, if the conflictants are both Or thodox, they might ask an Orthodox rabbi to mediate their dis pute: the rabbi would be able to invoke values and principles from the framework of halakhah (Jewish law). (If the parties ask the rabbi to arbitrate the dispute and render a judgment, this is not the same as mediation, in which the parties reach an agreement themselves.

Rational and Linear

Another cultural issue is that the predominant model of media tion is a rational and linear decision-making process. The media tor guides the parties through a fixed series of problem-solving stages. While this model works well for some groups in society, other groups tend to operate best with different patterns of communication. People from disparate ethno-cultural backgrounds reflect dif ferent approaches. Some people are more comfortable going through a logical sequence of stages. In contrast, others tend to look at the whole of the conflict, comparing its structure to an in tricate spider's web, making it difficult to sort through issues one at a time. When a linear mediator tries to use step-by-step approaches. Different expressions of emotions is also an important factor. Different people have different ways of processing arguments, partially depending on the person's culture, gender, and other di versity factors (Tannen, 1998). In some cultures, displays of emo tion are discouraged and suppressed, while encouraging calm, col lected, and rational discussions. In contrast, other cultures view such behavior as either arrogance or apathy, while displays of frustration, anger, and excitement, expressed through shouting, gesticulating, and facial expressions are the norm. Mediators need to take these different styles into account.

Separate People from the Problem

The traditional model of conflict resolution is also problematic because it asks people to separate the people

from the problem. In many cross-cultural conflicts, people and problems are deeply in tertwined. One cannot separate them. For some groups, harmony is highly valued; they cannot have a conflict with others and still maintain a positive relationship (Duryea, 1993). The difference must be resolved in order to reconcile the relationship. Another problem with separating the person from the problem is that many cross-cultural disputes are identity-based conflicts; that is, each party sees the other through the prejudices, myths, and biases of his or her cultural group (Rothman, 1997). In order to resolve identity-based conflicts, mediation needs to confront the people problems as well as the substantive ones.

The difficulty of inter-group anxiety also challenges the no tion of separating the person from the problem. When people from different backgrounds are brought together, they may experience stress related to a number of factors: lack of knowledge or understanding of the other party, negative Cross-Cultural Issues in Community Mediation 89 stereotypes, or past negative experiences with people from the other's background. Once again, mediators need to address the people issues in order to deal with the substantive issues. If the parties are anxious about meeting one another, they will have dif ficulty focusing on the substance of their dispute and the means of resolving it. Interventions to help them establish trust at a per sonal level can serve to reduce anxiety and promote rational prob lem-solving.

Equal Balance of Power

The predominant model of mediation assumes a relatively equal balance of power between the parties. This may or may not hold true in cross-cultural conflicts. Significant power imbalances may exist, particularly between people from minority and major ity groups in society. The more powerful party may have greater influence because of greater financial resources, better negotia tion skills, better language skills, and so on. If the mediator tries to re-balance power in favor of the weaker party, the stronger party may object: how can the mediator redistribute power and still be impartial? Power imbalances are often related to gender differences. For instance, men and women tend to have different approaches to dealing with conflict (Tannen, 1998). Men are often socialized to be competitive negotiators, using strategies to try to win the dispute (e.g., withholding information, making threats, or focusing on satisfying his own needs). Women are often socialized to be accommodating, with a propensity to using appeasement strategies in which their own interests are sacrificed, in the effort to improve personal relationships. If the mediator does not do anything to equalize power (Leung and Chan, 1999), then dominant parties will be able to take advantage of weaker ones. If there is a history or potential for violence, then the mediator needs to take steps to ensure the party's safety. Ethically, a mediator must not remain neutral on the issues of violence or abuse (Coker, 1999). The challenge here is how to ensure the safety of parties who are most vulnerable.

Objective Standards for Fairness or Justice

Although mediators using the interest-based model encourage parties to use objective standards for fairness or justice, cross-cultural differences often mean that each party has a different sense of what is fair or just. In the Israeli context, for example, a religious person might emphasize the principles of Jewish law as the basis for decision-making, Each potential framework could lead to a radically different decision. At a normative level, people from diverse cultures have differ ent perspectives on what they view as desirable outcomes (Leung and Chan, 1999). An individualistic culture focuses on the rights of individuals. A collectivist culture focuses upon the rights of the community. Culture also shapes expectations in terms of types of goals, whether they be relational, instrumental, or identity based (Kopelman and Olekalns, 1999). While some parties to a dispute seek to maximize their individual outcomes, others focus on im proving the relationship, and the mediator must decide which goals to encourage. Norms, values, and expectations are difficult to change in a short-term process such as mediation (Leung and Chan, 1999).

Possible Frameworks for Solutions

Before applying mediation in cross-cultural conflict situations, mediators need to consider the assumptions underlying their model of mediation. Essentially, there are three possible responses: (1) apply one's generic model of mediation, but try to be sensitive to cultural issues; (2) adapt one's model to better meet the needs of the parties, given their

cultural backgrounds; and (3) develop new conflict resolution models grounded in the traditional norms and practices of the groups one is mediating (Lederach, 1986; 1995)

The first response, cultural sensitivity, preserves the main elements of the interest-based mediation process. The mediator, however, needs to become aware of cultural in different cultures: in some cultures, giving direct eye contact is a sign of respect; in others, direct eye contact in certain situations is offensive. The mediator can adjust eye contact accordingly. Similarly, the mediator tries to be sensitive to the participants' values, beliefs, and other factors and how they affect the mediation process. For example, eye contact varies norms of communication. The mediator may also use cultural interpreters in order to learn more about the culture.

cause indirect eye contact may be a norm within a culture, there are individual and situation-specific differences where more direct eye contact may be called for.

In the second approach, adapt-a-model, the mediator starts with the generic model of mediation and makes certain changes to accommodate the culture of the parties. If the conflictants are not used to having formal meetings in the offices of professionals, for instance, the mediator might establish a model where the meetings are less formal and take place in the homes of the parties.

The final model is an elicitive approach. Rather than impose a

generic model on people from all cultures, the conflict resolution professional (CRP) first learns about the culture, including its methods for dealing with conflict. The CRP works with people from the culture to support existing methods of conflict resolution or to create new models that build on existing strengths in the culture.

CONCLUSION

Cross-cultural mediations are more complex than domestic mediations because of cultural differences. However, mediators who find themselves in a cross-cultural mediations can apply some basic principles and strategies to improve the likelihood of success based upon the application of Cultural Dimension Interests (CDI's) to their mediation. The direct application of these ideas comprise a four staged approach for cross-cultural mediation.

III DIVORCE MEDIATION

In order to dissolve a marriage, a lawsuit must be filed, but it is no longer necessary to follow the traditional path of litigation in order to work out the terms of the divorce. Today many couples are turning to mediation to resolve their disputes and negotiate the terms of their divorce.

CONCEPT OF DIVORCE MEDIATION

In the last few years, there has been a dramatic increase in the number of couples opting for divorce mediation. This

increase in popularity is unsurprising when you consider that nearly 90% of mediated divorce cases have settled successfully. And, more than two-thirds of couples are satisfied with the process. Not bad for something that is usually associated with negative feelings!

Divorce Mediation

At its core, divorce mediation is about you and your soon to be ex-spouse deciding on an agreeable solution that is as cost-effective as possible.

And while it is important for you to end things on the best note you can, it is even more important for any children involved.

When two lives have become intertwined, there are many things to consider when pulling them apart. You'll need to think about the distribution of property, child custody, child support, retirement, and taxes to name a few.

Goals of Divorce Mediation

Whether divorce mediation is agreed to voluntarily by the parties, or is court-referred, the goals of the divorce mediation process are to:

- Create an equitable, legally sound, and mutually acceptable divorce agreement;
- Avoid the expense and trauma that often accompany litigation; and
- Minimize hostility and post-dissolution controversy.

Why Divorce Mediation?

As the number of divorces has increased, divorcing couples have frequently become frustrated with the excessive costs and delays associated with an overburdened, adversarial litigation system, and have sought ways to play a greater role in determining the details of their divorces. Likewise, the court system has recognized the importance of developing methods of handling disputes outside of the courtroom, and so court-related mediation programs have increased in popularity around the country.

Almost every state requires mediation of child custody disputes, and many states' court systems provide services such as early conflict intervention, conciliation services, community dispute resolution centers, education seminars for divorcing couples, mediation, and settlement conferences. Today, mediation, either voluntary or court mandated, is the predominant form of dispute resolution for divorcing couples.

The Divorce Mediation Process

In many states, divorce cases are either referred to mediation by the court, or they end up in mediation based on the parties' written agreement. If the court refers a case for mediation, it notifies the parties. In most states, the parties then have an opportunity to object to mediation if there is a reasonable basis, such as family violence.

Once the decision to mediate is made, it is necessary to find a mediator. Many counties have community-based or court-annexed mediation centers. If the mediation is court-ordered, the court may appoint a mediator, or will allow the parties to agree upon a qualified mediator. Both lawyers and non-lawyers serve as mediators. The fees charged vary from mediator to mediator and from case to case.

In general, mediators help the parties meet, explore options, and negotiate a mutual settlement to resolve their dispute. Mediators do not determine who is right or wrong. Instead, they help the parties reach a solution on their own that works for them. Parties should seek mediators with mediation training, experience, and specific knowledge of family law. It is also important to consider the mediator's style and mediation philosophy.

Mediation preparation is often limited, as there is no formal discovery. Frequently, mediation begins with a "general caucus" where the parties and the mediator meet in the same

room. The mediator establishes the ground rules in an "agreement to mediate." In court-mandated mediation, the court order will often contain or refer to the "rules of mediation." One of the most important mediation rules is the requirement for confidentiality. Typically, all matters disclosed or occurring during mediation, and any record made during the procedure, are confidential and generally may not be disclosed to anyone unless the parties agree to the disclosure. Additionally, state law may require that the mediator maintain confidentiality.

After the mediator covers the rules of mediation and insures that any necessary agreements to mediate are signed, the mediator explains the mediation process. The parties or their representative may then make opening statements to identify issues and clarify perceptions. Many mediators will encourage the parties to begin a conversation during general caucus.

If the parties are hostile or overly emotional, the mediator will separate the parties and shuttle back and forth between them in "private caucuses." A private caucus is a conference between the mediator and one party, without the other party being present. The mediator passes offers and demands between the parties. Conversations between a party and the mediator during private caucus are confidential unless a party authorizes the mediator to disclose information to the other side.

The parties in a mediation are not required to reach an

agreement, and sometimes they do not. Whether the case settles or reaches an impasse, the mediator usually meets with the parties together at the end of the session. If the case has neither settled nor reached an impasse, the mediator will likely encourage the parties to attend another mediation session. If the case does settle, the mediator will urge the parties to sign a settlement to memorialize the agreement. A written settlement agreement is a contract between the parties, which is generally enforceable in the same manner as any other written contract. Generally, there is no record of the mediation session, and the only document produced is the settlement (or mediation) agreement.

Divorce Mediation: Advantages

Mediation is a forum in which a neutral mediator facilitates communication between parties to promote reconciliation, understanding, and settlement. Mediation is particularly suited to divorces and other family law proceedings because there is likely to be a continuing relationship between the parties, especially if minor children are involved. Many divorcing couples find mediation allows them to avoid the high financial and emotional costs of a litigated divorce. Because settlement is generally quicker, costs are reduced.

Mediation also allows couples to avoid the risks of trial, protects confidentiality, and decreases stressful conflict.

If the story relayed above didn't convince you, let's take a

deeper dive into the benefits of mediation.As previously mentioned, it costs about 20-50% less than traditional legal proceedings.

Mediation also gives control to the parties in dispute, rather than relying on attorneys to make the decisions.
Being a collaborative effort, and having control over the speed of the process also means that it can be made much easier for any children involved.

Trying to save money by doing things on your own can involve the unneeded stress of trying to understand legal documents and procedures. Making use of mediation saves money while providing help with daunting paperwork.

Although viewing the other party as the enemy can be tempting, coming together to find the best mutual resolution takes far less emotional toll and is easier on both parties.

How to prepare your divorce mediation

- **Agree to mediate**

Mediation is a voluntary process in the United States, but taking advantage of it is to your benefit, so it is an option you'll want to carefully consider. That mediation does not mean that you and your spouse have to feel like best friends during the process. Disagreements are inevitable; that's why the mediator is there to help guide you through the process.

- **Get organized**

A mediator can't help you distribute possessions they don't know you have. So get organized and create lists of everything you can think of.

- **Make goals**

At this point, it's time to figure out your best case scenario. Think about what is most important to you, and what you might be able to live without.

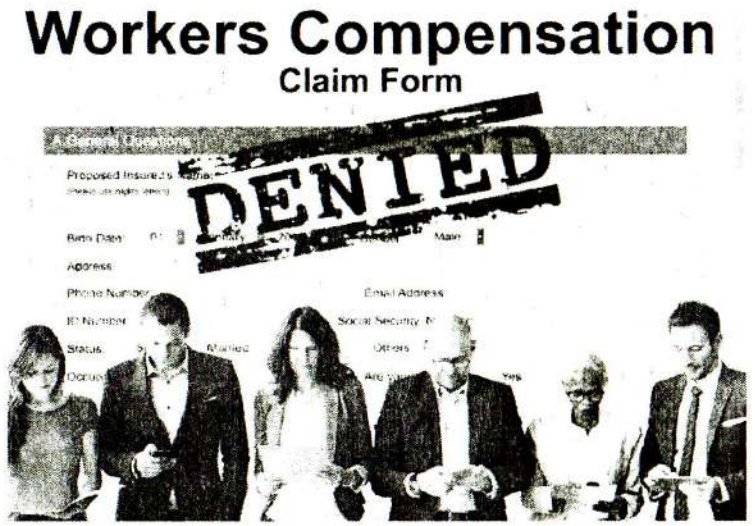
This part is likely going to be the most difficult, so create lists of what you want, and try to be as realistic as possible. If you have children to consider, try to keep decisions about them separate from these decisions.

- **Keep the kids in mind**

Divorce can be very tough for kids. Everything starts changing around them, and they don't really get a say in it. Try to keep this in mind as you communicate with them (in an age appropriate way) about what will change.

Keeping kids in the dark about what's going on can be an added stress. Your kids will need a lot of patience during this time, but they are resilient, and with clear communication and a strong effort to continue co-parenting, they will be ok.

IV WORKMAN COMPENSATION MEDIATION



Introduction to Workers' Compensation (WC)

According to the Bureau of Labor Statistics (BLS), in 2016, roughly 2.9 million nonfatal workplace injuries were reported by employers in private industries. That equates to 2.9 cases for every 100 full-time equivalent employees working at the time. Employers need to know what this means for their businesses. And employees need to know their rights.

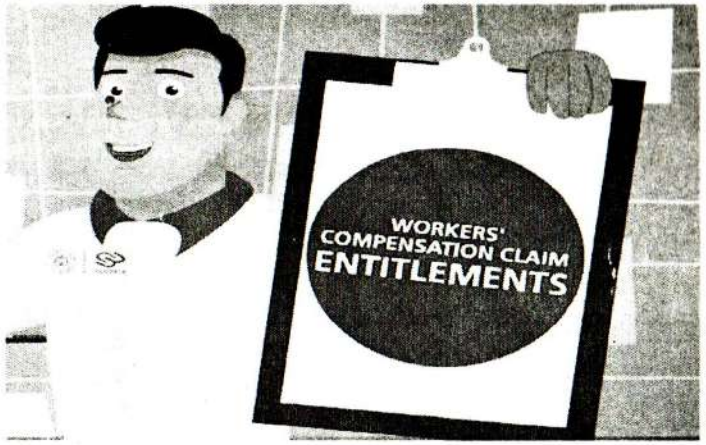
Employees who are injured or become ill as a direct result of their job are entitled to workers' compensation (WC), a special type of insurance that provides cash benefits and medical care. Employers must buy insurance or in certain

cases they can self-insure, but they cannot require an employee to contribute to the cost.

Injured employees will receive periodic payments according to rules set by the Workers' Compensation agency for their state. To receive benefits, an injury must be accepted by the insurance carrier and employer as industrial, i.e, work-related. If a claim is denied, the employee will have to litigate that issue, but the employee may be able to receive disability payments and/or medical care during the dispute.

Most WC claims are resolved relatively quickly, but some are not so easily resolved, and numerous administrative hearings may ensue. Unionized employees may be covered by an alternative dispute resolution process known as a carve-out, involving private arbitration and mediation. Whether the injury is governed by an alternative plan or state administrative law, mediation can help parties reach resolution without costly, time-consuming hearings.

Throughout your workers' compensation case, you will probably have several opportunities to settle your case. In addition to informal negotiations, through letters or phone conversations, many workers' comp cases have at least one in-person conference (usually called a "mediation") to facilitate settlement negotiations



Mediation Basics

A mediation is an informal meeting between you and the insurance company, where you try to reach a settlement of your workers' comp claim. Most states require the parties to attend mediation, or engage in some other form of dispute resolution, before the case can proceed to a workers' comp hearing.

The mediation is facilitated by a neutral third party called a "mediator," who is usually an attorney with workers' comp experience, a workers' comp judge, or another official of the state workers' compensation agency. The mediator does not work for either side; he or she is there to help the parties reach a mutually acceptable settlement. If the parties aren't able to reach a voluntary agreement, the case continues on to a hearing.

WC Mediation

WC is essentially a deal between employers and injured employees, sometimes called the "Grand Bargain." Employees receive wage replacement and medical benefits in return for relinquishing their rights to sue.

Most WC claims are based on orthopedic injuries, such as overextension, slips and falls, being struck by an object, machinery accidents, but any injury sustained in the scope and course of employment could be the basis for a claim.

These situations can be highly emotional, and when emotion runs high, it leaves room for dispute. If the dispute expands beyond a level the parties can handle on their own, mediation is a speedy and cost-effective means of getting help finding a resolution.

Mediation is a form of assisted negotiation, where a neutral third party (the mediator) helps two or more disputing parties reach agreement through a private, informal process. Among other benefits, channeling communication through the mediator decreases hostility, allowing parties to reach compromise.

Before Mediation

If there is a mediation scheduled in your case, there are a couple of things you can do to make the process go more smoothly. First, you should strongly consider consulting with

a workers' comp attorney if you have not already done so. A skilled attorney can make a mediation much more successful and easier to navigate. Although mediation is informal, you may be expected to answer questions, present a general summary of your position, and make and respond to settlement offers. An attorney will take on this role at the mediation and put you on equal footing with the insurance company, which is likely to have its own lawyer present.

Go with all preparation

Second, you should make sure that you've gathered all of the evidence that can lend support to your case. This is typically done through a process called "discovery," which you can use to collect documents, question witnesses, and ask the insurance company about the evidence it plans to use against you. This is another place where an attorney can be very helpful to your case.

During Mediation

Make sure to arrive at your mediation on time and dressed neatly (casual attire is usually fine, but your clothes should be clean and you should appear well groomed). At the start of your mediation, the mediator will introduce himself or herself and briefly explain the process. The mediator typically asks each side to make a short presentation, highlighting the facts in support of their cases. Your lawyer, if you have one, will present the facts and arguments in support of your case. However, he or she may ask you to make a short statement as well.

Process Of WorKmen Compensation

After both sides have made their presentations, the mediator will separate the parties into two different rooms. The mediator will then meet with both sides individually. During this meeting, the mediator may ask questions or point out what he or she sees as the strengths and weaknesses of each side. After one or more rounds of this, one party—usually the employee—will make an initial settlement offer. The mediator will present your offer to the insurance company, which will usually respond with a counteroffer. This process continues, with the mediator going back and forth between the two rooms, until you either agree on an amount or decide that a settlement can't be reached. This process usually takes at least an hour or so, but can be several hours, depending on the time allotted by the workers' comp agency.

Cases often settle at mediation, or shortly afterwards. However, if you're not able to settle, your case will continue on to the next step in the appeals process, which is typically a hearing before a workers' comp judge. For more about the workers' compensation appeal process, including what happens at a formal hearing, see How to Appeal a Workers' Compensation Denial.

If you've been injured as a result of your work, you should be able to collect workers compensation benefits. Here's how the settlements are determined.

The first thing to know about workers' compensation settlements is that they are purely voluntary. Your employer or its workers' comp insurance company does not have to agree to settle your claim, and you do not have to agree with a settlement offer proposed by your employer or its insurance company.

Advantages of Workmen Compensation

When considering settlement, it is important to know what workers' compensation benefits you are entitled to, and what rights you are relinquishing, as part of a proposed settlement agreement. Consider the following types of benefits and how they are often handled in workers' compensation settlements.

Permanent - Temporary Disability

If your work-related injuries resulted in some type of permanent impairment, but did not render you totally disabled, you are likely to be entitled to a monetary award to compensate for your permanent impairment. If you new work restrictions as a result of your injury that limit the work you can do, or you had surgery under your workers' compensation claim, or your body will never return to pre-injury state, you likely will be entitled to a permanent partial disability award.

Many employers will propose a settlement of the permanent partial disability issues by offering a dollar amount equivalent to, or slightly less than, the amount of your likely permanent partial disability award under your workers' compensation

claim. An important thing to remember is that you will be required to give up something for this money. You may be giving up the right to argue that you are permanently and totally disabled, or the right to argue that a specific medical condition was related to your workers' comp claim, or the right to any future medical care. If a lot of money is at stake, you'll want to talk to a workers' comp attorney about the implications of this type of settlement agreement.

Temporary Total Disability (Time Loss Compensation)

If your workplace injuries caused you not to be able to work for a period of time, you likely received partial or total temporary disability benefits, or time loss compensation benefits, during that time. Sometimes, for a variety of reasons, your employer or its insurance company may not have paid you these benefits when you should have received them, or paid you too little. Your employer may offer you a lump-sum amount for what you are owed, and your agreement to not pursue this compensation.

Types of Settlements

There are two primary types of settlement arrangements: lump-sum and structured settlements.

In a lump-sum settlement, you will sign a settlement agreement giving up certain rights in exchange for a one-time, lump-sum payment from your employer or its insurance

company. In a structured settlement, you will instead receive smaller payments over a period of time, such as one year, ten years, or more.

First, consider that a settlement is a guaranteed benefit. If you don't take the settlement and your claim proceeds to a hearing at the workers' comp appeals board or litigation at the state court level in your state, the judge may rule in your employer's favor, leaving you with little or no benefits. On the other hand, you may prevail and actually win more than the settlement offer. A settlement is a guarantee to provide you with certain benefits and takes out the risk associated with litigation.

A second consideration is that you will probably have to give up your right to future medical treatment for your injury (if your state allows you to give up this right). If you foresee yourself needing surgery, expensive medication, or lots of doctor visits, it's probably not in your best interests to settle.

A third consideration is that settlement is not permitted in every state at every point in a workers' compensation claim. This point is discussed further below, but you should speak to an attorney about your settlement options, particularly if your employer has proposed a specific settlement offer to you and a lot of money is at stake.

Prepare For WC Mediation

To give yourself the best chance of finding a resolution, one

need to spend time preparing for what to expect at a WC meditation.

There are several things to do or keep in mind going into mediation:

Mediation is the last option before heading to a hearing

Taking your WC case to trial is a big step. It means losing flexibility in determining a resolution, it means excessive costs, and it means prolonging an answer to the issue at hand. The best and last opportunity you have to avoid the pain of trial is mediation. Mediation allows you to retain power over the outcome, since the mediator is meant to facilitate rather than judge.

And for this reason, you should do everything in your power to ensure mediation goes smoothly.

Mediation is different from position bargaining

Getting exactly what you want is not the purpose of mediation. The purpose of mediation is to discuss the interests of both parties and use those motivations to reach an agreeable solution.

Know the details - prepare before the hearing

Learn as much as you can about your case and collect any relevant documents, such as treatment records. This step is crucial, because it's impossible for parties to negotiate what they don't know about.

It is equally important to do what you can to understand the other side's case and its strengths and weaknesses. This will allow you realistically to evaluate your options. If you're using an attorney to help you through this process, the attorney will help you understand the strengths of each case.

Ensure all participants have settlement authority

If possible, it's best to attend mediation sessions in person. Otherwise, the person who represents you should have settlement authority. While mediators can telephone individuals who cannot attend when unexpected solutions are posed or for clarification, it tends to disrupt the process and adds unnecessary time. Attending with your representative will streamline the process.

Statistics for Workmen Compensation

Evidence from across the country clearly shows the effectiveness of WC mediation.

In Florida, a 2013 study found a 74% success rate for the fiscal year (defined as either a partial or complete resolution of the issues).

A few years earlier, the Minnesota Department of Labor and Industry released a report showing between June 2007 and September 2008, the state's WC mediation success rate never dipped below 60%. In fact, four of those months had a success rate of 100%.

Litigation V/s Mediation

- Faster
- Private
- Easier to schedule
- Personal
- More flexible
- Less expensive
- A process that allows parties to retain control

When negotiations break down, mediation is a good option to get parties talking. It's usually a voluntary process, but there are some situations when mediation is mandatory.

Mediation is worthwhile, because it has a high success rate and can save time and money versus going to trial.

CHAPTER V

CONCLUSION

The issues in respect of mediation and its challenges are numerous and complex. It would be a mistake for a mediator to assume that all mediations are capable of being approached in the same way. Different models and approaches should be deployed to help the participants achieve the best outcome. 'Mediation does not create a new world; it can only attempt to use the best possible strategies to arrange existing building blocks into an acceptable structure for all concerned' (Stewart, 1998).

In terms of overcoming participant concerns with the mediation process, while there is "no right way" to mediate, there are key mediator skills mediator are essential. Compassion, patience and empathy are mediator traits visible to the participants. But mediators being human should also accept that natural attributes of being confused, voyeuristic (in a nice way), compulsive and marginal can be harnessed to good effect.

While mediation assists the decision making process to achieve a 'wise outcome', it does not lead to a perfect outcome but hopefully one that the participants can live with and preserves their relationship. As a process it is largely a balancing act (of participants need and interests).

How does one define "success" in mediation? Some might say it is all in the result; if the matter settled, then the mediation was a success. Some might use the familiar adage that mediation is a success "if both parties walk away a little bit unhappy." I, however, believe that the true measure of success in mediation lies not only in the end result, but also in conducting a mediation so that the parties feel respected and heard.

I believe being an effective mediator means being respectful, actively listening, and combining a mix of empathy with the reality of litigation so that the parties feel their positions have been considered, and that they have not just been forced into a settlement. For me, settling a matter alone is not the sign of

a successful mediation; if one or both of the parties reasonably feels that the system has failed them because they did not get heard, then I feel I have failed as a mediator. Perhaps that is why in the vast majority of my mediations, both parties walk away feeling happy that they settled, and thank me for helping to resolve their dispute.

In a successful mediation, the mediator will: Quickly analyse the main issues;

- Build rapport and credibility with attorneys and parties;
- Encourage participation in the process by the parties so that they have "buy-in" to the process;
- Not ridicule a party's claims or defences, or tell a party that their claims or defences are foolish or "stupid";
- Conceive creative, sometimes non-monetary solutions; and
- Convincingly explain, with the aid of experience, the problems with proceeding to trial.

We should all recognize that some parties, no matter what is said by the mediator, view the mediator as part of the judicial system. By striving to make the experience a "success," the mediator hopefully can produce a settlement, satisfied participants, and trust in the judicial system.

Mediation, as used in law, is a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party,

the mediator, assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community and family matters.

A great variety of disputes occur in the workplace, including disputes between staff members, allegations of harassment, contractual disputes and workers compensation claims. At large, workplace disputes are between people who have an ongoing working relationship within a closed system, which indicate that mediation or a workplace investigation would be appropriate as dispute resolution processes. However the complexity of relationships, involving hierarchy, job security and competitiveness can complicate mediation.

Intercultural competence is a range of cognitive, affective, and behavioural skills that lead to effective and appropriate communication with people of other cultures. Effective intercultural communication relates to behaviours that culminate with the accomplishment of the desired goals of the interaction and all parties involved in the situation. Appropriate intercultural communication includes behaviours that suit the expectations of a specific culture, the characteristics of the situation, and the level of the relationship between the parties involved in the situation.

Divorce mediation is an alternative to traditional divorce litigation. In a divorce mediation session, a mediator facilitates the discussion between the two parties by assisting with

communication and providing information and suggestions to help resolve differences. At the end of the mediation process, the separating parties have typically developed a tailored divorce agreement that can be submitted to the court. Mediation sessions can include either party's attorneys, a neutral attorney, or an attorney-mediator who can inform both parties of their legal rights, but does not provide advice to either, or can be conducted with the assistance of a facilitative or transformative mediator without attorneys present at all

Workers' compensation is a form of insurance providing wage replacement and medical benefits to employees injured in the course of employment in exchange for mandatory relinquishment of the employee's right to sue their employer for the tort of negligence. The trade-off between assured, limited coverage and lack of recourse outside the worker compensation system is known as "the compensation bargain". One of the problems that the compensation bargain solved is the problem of employers becoming insolvent as a result of high damage awards. The system of collective liability was created to prevent that, and thus to ensure security of compensation to the workers. Individual immunity is the necessary corollary to collective liability.

"Peace between countries must rest on the solid foundations of love between individuals" ***---Mahatma Gandhi***

REFERENCES

Aston M. (2008) The Asperger Couple's Workbook. London: Jessica Kingsley Publishers

Nora Doherty & Marcelas Guyler (2008) The essential guide to workplace mediation and conflict Resolution, published By Kogan Page Limited

Augsbuger, D.W. (1992) Conflict Mediation Across Cultures – Pathways and Patterns. Kentucky: Westminster/John Knox Press.

Guyler, MG (2007) Relational Management and the Co- entrepreneurial Business: Training Manuals, MGC and the the Human Business Limited

Mediation Training Module Of India by Mediation and Conciliation Committee, Supreme Court Of India, Delhi

Marian Roberts , Mediation in Family Disputes , fourth Edition, Routledge Taylor and Francis Group

Tony Whatling (2012), Mediation Skills and Strategies, A practical Guide, Jessica Kingsley Publishers

Bramwell, L. (2009) Book Review, College newsletter 5, September.

Available at

www.Collegeofmediators.co.uk/index.php.option=com_rokdownloads&view=file&Itemid=9&id=45: newsletter-issue-5, accessed on 15 November 2011

Haynes J.M. (1993) Alternative Dispute Resolution: Fundamentals of Family Mediation London: Old Bailey Press

Martin, M and Vaughn, B.E. (2007) Cultural Competence: The nuts and bolts of diversity and inclusion. "Strategic Diversity and Inclusion Management1, 1, 31-38

Peterson, B, (2004) Cultural Intelligence: A guide to working with people from Other Cultures. Boston. MA: Intercultural Press

Wright, W.A. (2000) Cultural Issues In Mediation Individuals and Collectivist Paradigm. Available at url : mediate.com /articles /Wright.cfm,accessed on 23 October 2001.

Kai Lucke and Aloys Rigaut, Cultural Issues in International Mediation url: nottinghamac.uk/research/...cultures/.../cultural-issues- mediation

John Barkai , What's A Cross – Culture Mediator To Do ? A low Context Solution for High Context Problem, url :papers.ssrn.com/sol3/papers.cfm?abstract_id=1434165

Alberta, Mediation Handbook
url : municipalaffairs.albertaca/documents/MDRS/Mediation

Apendix-01

MEDIATION *

Mediation, in law, is a type of intervention in which the disputing parties accept the offer of a third party to recommend a solution for their controversy. Mediation has long been a part of international law, frequently involving the use of an international commission, in a process known as by conciliation. Mediation differs from arbitration in being a diplomatic rather than a judicial procedure; thus, the parties to the dispute are not bound to accept the mediator's recommendation. Resort to mediation has become increasingly frequent, both for internal and international disputes. The Declaration of Paris (1856) expressed the hope that the signatories would ask for mediation in their disputes. At the Second Hague Conference (1907), the right of friendly powers to offer mediation was recognized. The Covenant of the League of Nations provided that the whole League, acting through the League Council, should offer conciliation, and the Charter of the United Nations requires all members to submit disputes to mediation on recommendation of the Security Council. Mediation has been successful in many cases of international conflict. The United States served as mediator between Bolivia and Chile (1882) and between Russia and Japan (1905). The United Nations served as a mediator in the conflict in Israel in 1948. In 1966, the Soviet Union mediated the border clashes between India and China.

The Secretary-General of the United Nations mediated successfully in several international disputes, particularly that over Netherlands New Guinea (see Papua). Mediation has become increasingly important for internal disagreements as well, particularly in labor disputes. In the United States, the Federal Mediation and Conciliation Service works toward a healthy relationship between labor and management, mediating disputes where necessary and promoting collective bargaining. Many state and local governments in the U.S. have similar organizations, each generally having the power to intervene when the public interest appears to be in jeopardy. National mediation services are also common in other nations, particularly among the Western democracies.

Mediation is a form of Alternative Dispute Resolution (ADR) which provides an alternative to adversarial litigation. About 90% of civil disputes are settled out of court using alternate means of dispute resolution. Mediation has certain advantages over traditional litigation, in that it is quick, accessible and affordable. While adversarial litigation focuses on individual rights, mediation attempts to uncover the current and future interests of the parties so that the outcomes can be tailored to suit the needs and interests of both the parties. Therefore, agreements reached in mediation are both voluntary and flexible. Parties enter mediation with conflicting views, and the mediator as an independent third party assists the parties to communicate in a rational, problem-solving manner, to identify the issues in dispute, account for available options,

and if possible, reach an agreement which is acceptable to all the participants.

In addition to remedying short-term problems, it has been suggested that mediation has deeper effects on people and relationships. Bush and Folger have stated that 'mediation's greatest value lies in its potential not only to find solutions to people's problems but to change people themselves for the better, in the very midst of conflict'. Mediation's primary strength is said to lie in its humanizing quality which prioritizes party self-determination, and creates an environment within which relationships are preserved and mutually satisfactory agreements are reached.

In India the terms 'Mediation' and 'Conciliation' are used synonymously. The difference between conciliation and mediation as given by International Labor Organization which is adopted by the Advisory, Conciliation and Arbitration Service reads as follows:- "Mediation may be regarded as a half way house between conciliation and arbitration. The role of the conciliator is to assist the parties to reach their own negotiated settlement and he may make suggestions as appropriate. The mediator proceeds by way of conciliation but, in addition, is prepared and expected to make his own formal proposals or recommendations which may be accepted."

Mediation defined:

Oxford English dictionary defines the term "Mediation" as "Intervention in a dispute in order to resolve it; arbitration".

According to the Wikipedia, the term "mediation", due to language as well as national legal standards and regulations is not identical in content in all countries but rather has specific connotations and there are quite some differences between Anglo-Saxon definitions and other countries, especially countries with a civil, statutory law tradition like Germany or Austria.

Mediation, according to West's Encyclopedia of American Law, means "a settlement of a dispute or controversy by setting up an independent person between two contending parties in order to aid them in the settlement of their disagreement".

Collins English Dictionary in International Law, mediation is an attempt to reconcile disputed matters arising between state s, especially by the friendly intervention of a neutral power. Mediation is a method of resolving an industrial dispute whereby a third party consults with those involved and recommends a solution which is not, however, binding on the parties

As per Webster's New World College Dictionary (4th Edition) Mediation is "an act or process of mediating;

friendly or diplomatic intervention, usually by consent or invitation, for settling differences between persons, nations, etc.

Bouvier's Law Dictionary (Revised 6th Edition) defines Mediation as "the act of some mutual friend of two contending parties, who brings them to agree, compromise or settle their disputes.

The term Mediation as per Black's Law Dictionary (2nd Edition) means "Intervention; interposition; the act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute. In international law and diplomacy, the word denotes the friendly interference of a state in the controversies of others, for the purpose, by its influence and by adjusting their difficulties, of keeping the peace in the family of nations."

According to Merriam-Webster Law Dictionary, mediation is defined as non-binding intervention between parties to promote resolution of a grievance, reconciliation, settlement, or compromise.

---

* Asha Paresh Mahannt, Solicitor England.

Apendix-02

MEDIATION *

[1]Mediation, in law, is a type of intervention in which the disputing parties accept the offer of a third party to recommend a solution for their controversy. Mediation has long been a part of international law, frequently involving the use of an international commission, in a process known as by conciliation. Mediation differs from arbitration in being a diplomatic rather than a judicial procedure; thus, the parties to the dispute are not bound to accept the mediator's recommendation. Resort to mediation has become increasingly frequent, both for internal and international disputes. The Declaration of Paris (1856) expressed the hope that the signatories would ask for mediation in their disputes. At the Second Hague Conference (1907), the right of friendly powers to offer mediation was recognized. The Covenant of the League of Nations provided that the whole League, acting through the League Council, should offer conciliation, and the Charter of the United Nations requires all members to submit disputes to mediation on recommendation of the Security Council. Mediation has been successful in many cases of international conflict. The United States served as mediator between Bolivia and Chile (1882) and between Russia and Japan (1905). The United Nations served as a mediator in the conflict in Israel in 1948. In 1966, the Soviet

[1] Columbia Encyclopedia (6th Edition)

Union mediated the border clashes between India and China. The Secretary-General of the United Nations mediated successfully in several international disputes, particularly that over Netherlands New Guinea (see Papua). Mediation has become increasingly important for internal disagreements as well, particularly in labor disputes. In the United States, the Federal Mediation and Conciliation Service works toward a healthy relationship between labor and management, mediating disputes where necessary and promoting collective bargaining. Many state and local governments in the U.S. have similar organizations, each generally having the power to intervene when the public interest appears to be in jeopardy. National mediation services are also common in other nations, particularly among the Western democracies.

Mediation is a form of Alternative Dispute Resolution (ADR) which provides an alternative to adversarial litigation[2]. About 90% of civil disputes are settled out of court using alternate means of dispute resolution[3]. Mediation has certain advantages over traditional litigation, in that it is quick, accessible and affordable. While adversarial litigation focuses on individual rights, mediation attempts to uncover the current and future interests of the parties so that the outcomes can be tailored to suit the needs and interests of both the parties. Therefore, agreements reached in mediation are both

[2] Bornali Borah, 'Being the Ladle in the Soup Pot: Working with the Dichotomy of Neutrality and Empowerment in Mediation Practice' (2017) 28 *Alternative Dispute Resolution Journal* 98, 98 ('Borah')
[3] Ibid

voluntary and flexible. Parties enter mediation with conflicting views, and the mediator as an independent third party assists the parties to communicate in a rational, problem-solving manner, to identify the issues in dispute, account for available options, and if possible, reach an agreement which is acceptable to all the participants[4].

In addition to remedying short-term problems, it has been suggested that mediation has deeper effects on people and relationships. Bush and Folger have stated that 'mediation's greatest value lies in its potential not only to find solutions to people's problems but to change people themselves for the better, in the very midst of conflict'[5]. Mediation's primary strength is said to lie in its humanizing quality which prioritizes party self-determination, and creates an environment within which relationships are preserved and mutually satisfactory agreements are reached[6].

In India, the terms 'Mediation' and 'Conciliation' are used synonymously[7]. The difference between conciliation and mediation as given by International Labor Organization which is adopted by the Advisory, Conciliation and

[4] Hin Hung, 'Neutrality and Impartiality in Mediation' (2002) 5(3) *ePublications@bond* < http://epublications.bond.edu.au/adr/vol5/iss3/7> 45 ('Hung')

[5] Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass, 1994), xv ('Baruch')

[6] Borah, above n 3, 99

[7] Supreme Court in Afcons Infrastructure Ltd v M/s Cherian Varkey Construction [2010] (7) SCALE 293

Arbitration Service reads as follows: "*Mediation may be regarded as a half way house between conciliation and arbitration. The role of the conciliator is to assist the parties to reach their own negotiated settlement and he may make suggestions as appropriate. The mediator proceeds by way of conciliation but, in addition, is prepared and expected to make his own formal proposals or recommendations which may be accepted*[8]."

Mediation as problem-solving requires three things:

(1) a willingness on the part of all the relevant stakeholders to work together to resolve the problem or deal with the situation;

(2) the availability of a trusted "neutral" with sufficient knowledge and skill to manage difficult conversations; and

(3) an agreement on procedural ground rules (i.e., confidentiality, timetable, agenda, good faith effort, etc.

MEDIATION DEFINED

Oxford English dictionary defines the term "Mediation" as "*Intervention in a dispute in order to resolve it; arbitration*". According to the Wikipedia[9], the term "mediation", due to language as well as national legal standards and regulations is

[8] Justice Dr. M. K. Sharma, *Conciliation and Mediation*, Delhi Mediation Centre

[9] (1) Trenczek, T & Loode, S.: Embedding Mediation and Dispute Resolution into Statutory Civil Law: The Example of Germany; in: Ian Macduff (ed.):

not identical in content in all countries but rather has specific connotations and there are quite some differences between Anglo-Saxon definitions and other countries, especially countries with a civil, statutory law tradition like Germany or Austria.

Mediation, according to West's Encyclopedia of American Law, means "*a settlement of a dispute or controversy by setting up an independent person between two contending parties in order to aid them in the settlement of their disagreement*".

As per Collins English Dictionary in International Law, Mediation is "*an attempt to reconcile disputed matters arising between states, especially by the friendly intervention of a neutral power. Mediation is a method of resolving an industrial dispute whereby a third party consults with those involved and recommends a solution which is not, however, binding on the parties*".

As per Webster's New World College Dictionary (4th Edition) Mediation is "*an act or process of mediating; friendly or diplomatic intervention, usually by consent or invitation, for settling differences between persons, nations, etc.*".

Essays on Mediation – Dealing with Disputes in the 21st Century; Alphen aan den Rijn 2016, chapter 12 (pp. 177 – 192) (2) Trenczek, T., Berning, D., Lenz, C. (2013) (in German) Mediation und Konfliktmanagement: Handbuch, Baden-Baden, Nomos Publishing House, p. 23

Bouvier's Law Dictionary (Revised 6th Edition) defines Mediation as "*the act of some mutual friend of two contending parties, who brings them to agree, compromise or settle their disputes*".

The term Mediation as per Black's Law Dictionary (2nd Edition) means "*Intervention; interposition; the act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute. In international law and diplomacy, the word denotes the friendly interference of a state in the controversies of others, for the purpose, by its influence and by adjusting their difficulties, of keeping the peace in the family of nations.*"

According to Merriam-Webster Law Dictionary, mediation is defined as "*non-binding intervention between parties to promote resolution of a grievance, reconciliation, settlement, or compromise*".

MEDIATION CASE LAWS

The concept of Mediation and other ADR processes although [not yet] compulsory in this jurisdiction has become an established alternative to court that should be tried and exhausted before finally resorting to a trial of the issues[10]. At the costs appeal hearing , Jackson LJ had to consider the effect of a settlement offer under Civil Procedure Rules Part

[10] Wright v. Michael Wright (Supplies) Ltd and anor.[2013] EWCA Civ 234

36 that had been withdrawn and the consequences of failure to mediate. Jackson LJ found that the trial judge was correct to take account of the parties' failure to mediate and place most, but not all, of the blame on the defendants. Both sides had initially expressed a willingness to mediate but, the claimants actively pursued mediation whilst the defendants dragged their feet. In the circumstances, Jackson LJ dismissed the defendant's appeal and upheld the costs penalty against them. *He made the following observations: (i) there was a real prospect that the Mediation would have achieved a result and avoided the trial (ii) the dispute was about money only; (iii) the parties were not far apart and (iv) their costs far exceeded the amount in issue. In a useful summary, Jackson LJ said: The message which this court sent out in PGF II SA v, OMFS [2013] EWCA (CIv) 1288 [2014] 1 WLR 1386 was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed*[11]. In another case the question which arose was whether the overall winner should be deprived of all or part of his costs for failing or refusing to an invitation to Mediate. Patten LJ stated that '*The judge said that he considered that the case raised quite complex questions of law which made it unsuitable for Mediation. His refusal to make an allowance on these grounds cannot in my view be wrong in principle*'[12]. The 'complex legal argument' in Gore

[11] Thakker v. Patel [2017] EWCA Civ 177
[12] Gore v Naheed & Anor [2017] EWCA

may distinguish it from other cases but notwithstanding, before rejecting Mediation the parties should proceed with caution in the certain belief that their decision is reasonable or otherwise risk costs sanctions. In this case the courts dismissed excuses that 'matter was too complex'[13]. In another case[14] the excuse that the 'parties are too far apart in their claim' was rejected. In one case the Defendant won at first instance and on appeal but the Court of Appeal refused to award the defendant costs of the appeal due to its failure to consider using mediation[15]. In a judgment[16] on a personal injury claim, Lord Justice Longmore said "*it was a 'great pity' that the defendant, Indesit, had spurned mediation when the claimant was given permission to appeal. This was despite Indesit having successfully defended the claim in the County Court*".

The perils of robustly ignoring mediation were shown in this case17[17]. The claimant proposed mediation on a number of occasions both before and after proceedings were issued. The Defendant refused; believing it had no case to answer. The Defendant went on to win at trial and one might be forgiven for thinking that this vindicated its position but the trial judge thought differently. The Court of Appeal confirmed that costs penalties may be appropriate where a party has unreasonably refused to mediate. *Dyson LJ identified six factors which may*

[13] Burchell and Bullard [2005] EWCA Civ358
[14] Garritt-Critchley and othrs v. Ronnan and anor [2014] EWHC 1774 (Ch)
[15] Dunnett -v- Railtrack [2002] 2 ALL ER 850
[16] Ali Ghaith - v- Indesit UK Ltd [2012] EWCA Civ 642 (17 May 2012)
[17] Halsey -v- Milton Keynes NHS Trust [2004] EWCA (Civ) 576

be relevant to the question whether a party had unreasonably refused to ADR as follows:

(i) The nature of the dispute

(ii) The merits of the case

(iii)The extent to which other settlement methods had been attempted

(iv) Whether ADR costs would be disproportionately high

(v) Would delay in setting up ADR have been prejudicial

(vi) Whether the mediation had reasonable prospects of success

In yet another case Re *Leicester Circuits Limited -v- Coates Brothers PLC* LJ Judge commented: '*the whole point of having mediation, and once you have agreed to it, proceeding with it, is that the most difficult problems can sometimes, indeed often are resolved.....having agreed to mediation it hardly lies in the mouths of those who agree to it to assert that there is no realistic prospects of success*'. The court went on to penalise Coates in costs.

---

* Asha Paresh Mahannt, Solicitor England.

Apendix-3

বাংলাদেশ গেজেট

অতিরিক্ত সংখ্যা

কর্তৃপক্ষ কর্তৃক প্রকাশিত

বৃহস্পতিবার, সেপ্টেম্বর ২১, ২০১৭

বাংলাদেশ জাতীয় সংসদ

ঢাকা, ০৬ আশ্বিন, ১৪২৪/২১ সেপ্টেম্বর,২০১৭

সংসদ কর্তৃক গৃহীত নিম্নলিখিত আইনটি ০৬ আশ্বিন, ১৪২৪ মোতাবেক ২১ সেপ্টেম্বর, ২০১৭ তারিখে রাষ্ট্রপতির সম্মতিলাভ করিয়াছে এবং এতদ্বারা এই আইনটি সর্বসাধারনের অবগতির জন্য প্রকাশ করা যাইতেছে:-

২০১৭ সনের ২০ নং আইন

Code of Civil Procedure, 1908 এর অধিকতর সংশোধনকল্পে প্রণীত আইন

যেহেতু নিম্নবর্নিত উদ্দেশ্যসমূহ পূরনকল্পে Code of Civil Procedure, 1908 (Act No.V of 1908) এর অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহতেু এতদ্বারা নিম্নরুপ আইন করা হইল:-

১। সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।- (১) এই আইন Code of Civil Procedure (Amendment) Act, 2017 নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। Act No. V of 1908 এর Section 89A এর সংশোধন।- Code of Civil Procedure, 1908 (Act No.V of 1908) এর Section 89A এর-

(ক) sub-section (1) এর "or refer the dispute or disputes in the suit" শব্দগুলির পর "to the concerned Legal Aid Officer appointed under the Legal Aid Act, 2000 (Act No.6 of 2000), or" শব্দগুলি, কমাগুলি, সংখ্যাগুলি ও বন্ধনীগুলি সন্নিবেশিত হইবে;

(খ) Sub-section (3) এ উল্লিখিত "when the Court" শব্দগুলির পর "or Legal Aid Officer" শব্দগুলি সন্নিবেশিত হইবে;

(গ) Sub-section (4) এ উল্লিখিত "or a mediator is appointed by the Court" শব্দগুলির পরিবর্তে "or the dispute or disputes are referred to legal Aid officer, or a mediator is appointed by the Court" শব্দগুলি ও কমা প্রতিস্থাপিত হইবে;

(ঘ) Sub-section (5) এ দুইবার উল্লিখিত "mediator" শব্দের পরিবর্তে উভয় স্থানে "Legal Aid Officer or meditor, as the case may be" শব্দগুলি ও কমাগুলি প্রতিস্থাপিত হইবে; এবং

(ঙ) Sub-section (8) এ উল্লিখিত "representatives" শব্দের পর "Legal Aid Officer" কমা ও শব্দগুলি সন্নিবেশিত হইবে।

ড. মোঃ আবদুর রব হাওলাদার
সিনিয়র সচিব।