



FACULTY OF JURIDICAL SCIENCES

COURSE: B.A.LL.B.

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SUBJECT: Alternative Dispute

Resolution

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NAME OF FACULTY: Mohammad Aqib

Lecture-27



LECTURE 27: History of Commercial Mediation and Domestic laws governing mediation

History of Commercial Mediation:-

Commercial mediation in India was given life in 1996 when the Indian parliament amended the Civil Procedure Code (CPC) and introduced section 89, which empowered courts to direct settlement of disputes by mediation amongst other means. This provision governs mediation in the court system in India. The year 1996 also saw the introduction of the Arbitration and Conciliation Act (ACA). The provisions of the ACA govern private mediation (conciliation) in India.

The primary mediation style is evaluative. Disputants seem to prefer having an authority figure as the mediator, and are more comfortable being led in the mediation rather than the mediator being more hands-off. This is a cultural trait quite common in Asia. The parties expect the mediator to give them his or her view of the weakness of their case, and to actively participate in finding solutions; indeed, they would be disappointed if they felt that the mediator was not fully engaged with them in resolving the dispute. Interests, as well as rights, are focused on. Some mediators prefer to be facilitative. Transformative mediation is rare.

However, it needs also to be said that most mediators will start off being facilitative, encouraging movement to come from the parties, and become evaluative later in the process when the interventionist skills become necessary to break an impasse and come up with solutions.

Domestic Laws governing Mediation:-

There are two principal enactments that deal with mediation in India- the CPC and the ACA. Section 89 of the CPC and the rules framed by various high courts under that section deal with court-annexed mediation while Part III of the ACA deals with private mediation. Part II of the Civil Procedure Alternate Dispute Resolution and Mediation Rules (the Mediation Rules) also provides for various rules relating to mediation.

Other legislation that covers mediation is the Commercial Courts Act 2015, whereby it is mandatory for parties to exhaust the remedy of pre-institution mediation under the Act before instituting a suit. The Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018 (the PIMS Rules) have been framed by the government under the Act.

These laws are not based on the UNCITRAL Model Law on International Commercial Conciliation.

How Mediation is encouraged?

Mediation is encouraged very strongly by the courts in India. Many high courts have set up mediation centres housed within the premises of the courts. The courts provide staff and facilities to the

mediation centres and also bear the expenses. A huge number of lawyers and others have been trained to become mediators, and the court also pays an honorarium to the mediators. The process is generally free for the parties.

A large number of cases are referred to mediation by the courts. Although consent of parties is invariably taken before referring a case for settlement by mediation, the court does have the power to direct parties to attend the mediation, if at least to get to know more about the process of mediation.

Judges, leading lawyers and policy makers speak very positively about mediation. However, mediation is yet to catch on significantly in the private field. With the success of court-annexed mediation in India, attention is now being focused on private commercial mediation. Leading business organisations and industrial leaders are getting involved for the same.

Sanctions for failure to mediate:-

No, there are no legal sanctions for ignoring or refusing a proposal for mediation. However, if a dispute has reached the stage of litigation, the courts can suggest mediation in the course of proceedings and, invariably, such suggestions are accepted by parties.

Comparison of Commercial Arbitration with Litigation:-

Commercial mediation is fairly new in India and, hence, litigation remains the most popular mode of settling disputes. Therefore, the percentage of commercial cases settled by mediation would be small in comparison to cases litigated.

Of the cases settled by mediation, cases that have been referred to mediation by the courts would be an overwhelming majority in comparison to cases where mediation has been attempted voluntarily by the parties.