



FACULTY OF JURIDICAL SCIENCES

COURSE: B.A.LL.B.

Semester: VIII

SUBJECT: Alternative Dispute

Resolution

SUBJECT CODE: BAL803

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Lecture-29



LECTURE 29: Procedural Rules of Mediation and Enforceability of Mediation Clause

In court-appointed mediation proceedings, the mediator is free to decide on the mediation procedure to be followed or to follow the Civil Procedure Mediation Rules. Some mediators request parties to file a brief statement of facts and issues prior to the first session. At the first session the process of mediation is explained fully, facts and issues are ascertained and (if they have not done so already) the mediators may request statements or summaries to be filed.

In private mediation, it is quite common for the mediator to require parties to submit a statement of facts and a summary of legal proceedings ahead of the mediation. Parties are requested to come to mediation prepared with the facts and with authority to settle the dispute. The mediator may also ask for further notes for additional information during the course of the mediation.

Mediation usually begins with a plenary (joint) session. The mediator will usually hold separate sessions with the parties during the course of mediation as and when he or she deems necessary.

Prior to the mediation, the following take place:

1. the mediator will ensure that he or she has no conflict of interest in the matter, and will withdraw if any exists;
2. the terms of engagement of the mediator (fees and expenses, etc) are made known and agreed to by the parties; and
3. the confidentiality agreement is signed between the parties and the mediator.

Steps (ii) and (iii) do not apply in court-referred mediations.

At the mediation proceedings, at the first joint session, the mediator will:

- ensure that all required are attending and have the requisite authority to do so, and make the necessary introductions;
- explain the concept of mediation and answer queries on the same;
- request parties to each make their opening statement;
- request the lawyers to make the supplementary statements on the law relevant to the matter;
- see if any further facts are needed, and determine how to ascertain them; and
- identify the issues that need to be resolved to arrive at a settlement.

Thereafter at the separate sessions the mediator will:

1. explore the long-term interests of the parties;
2. identify the weakness in their case, and the lack of good alternatives to settlement (in the evaluative mode);
3. encourage and engage with the parties in identifying options for settlement;
4. focus on possible settlement options and refine them; and
5. draft, or help draft, the written settlement agreement.

Steps (iii) to (v) may also take place in joint sessions.

As per the PIMS rules, the following is the prescribed procedure:

- At the beginning, the mediator shall explain the process to the parties. The time and date of each mediation sitting shall be fixed in consultation with the parties.
- The mediator may hold sessions jointly or separately with the parties as he or she deems fit.
- The parties may share their settlement proposals with the mediator with instructions as to what can be shared with the other party. The parties may also share settlement proposals with each other orally or in writing.
- Once a settlement is reached, it shall be reduced to writing, and signed by the parties and the mediator. The settlement shall be provided to all parties and a signed copy will be sent to the authority under the Commercial Courts Act.
- When no settlement is arrived at within the time limit allowed under the Act, or if the mediator is of the view that settlement is not possible, the mediator shall submit a report stating the same to the authority under the Act.

Enforceability of mediation clauses:--

A dispute resolution clause providing for mediation would be enforceable in India in the sense that if a suit is filed, then a court would most likely enforce the clause and send parties to mediation in pursuance of its power under section 89 of the CPC.

