### 2. COMPARISON BETWEEN JUDICIAL PROCESS AND VARIOUS ADR PROCESSES

<table>
<thead>
<tr>
<th>JUDICIAL PROCESS</th>
<th>ARBITRATION</th>
<th>MEDIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Judicial process is an adjudicatory process where a third party (judge/other authority) decides the outcome.</td>
<td>Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.</td>
<td>Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.</td>
</tr>
<tr>
<td>2. Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.</td>
<td>Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration &amp; Conciliation Act, 1996.</td>
<td>Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.</td>
</tr>
<tr>
<td>3. The decision is binding on the parties.</td>
<td>The award in an arbitration is binding on the parties.</td>
<td>A binding settlement is reached only if parties arrive at a mutually acceptable agreement.</td>
</tr>
<tr>
<td>4. Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.</td>
<td>Adversarial in nature as focus is on determination of rights and liabilities of parties.</td>
<td>Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.</td>
</tr>
<tr>
<td>5. Personal appearance or active participation of parties is not always required.</td>
<td>Personal appearance or active participation of parties is not always required.</td>
<td>Personal appearance and active participation of the parties are required.</td>
</tr>
<tr>
<td>6. A formal proceeding held in public and follows strict procedural stages.</td>
<td>A formal proceeding held in private following strict procedural stages.</td>
<td>A non-judicial and informal proceeding held in private with flexible procedural stages.</td>
</tr>
<tr>
<td>JUDICIAL PROCESS</td>
<td>ARBITRATION</td>
<td>MEDIATION</td>
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<tr>
<td>7.</td>
<td>Decision is appealable.</td>
<td>Award is subject to challenge on specified grounds.</td>
</tr>
<tr>
<td>8</td>
<td>No opportunity for parties to communicate directly with each other.</td>
<td>No opportunity for parties to communicate directly with each other.</td>
</tr>
<tr>
<td>9</td>
<td>Involves payment of court fees.</td>
<td>Does not involve payment of court fees.</td>
</tr>
</tbody>
</table>
Mediation is a non-adjudicatory process.

Conciliation is a non-adjudicatory process.

Lok Adalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.

2. Voluntary process.

Voluntary process.

Voluntary process.

3. Mediator is a neutral third party.

Conciliator is a neutral third party.

Presiding officer is a neutral third party.

4. Service of lawyer is available.

Service of lawyer is available.

Service of lawyer is available.

5. Mediation is party centred negotiation.

Conciliation is party centred negotiation.

In Lok Adalat, the scope of negotiation is limited.

6. The function of the Mediator is mainly facilitative.

The function of the conciliator is more active than the facilitative function of the mediator.

The function of the Presiding Officer is persuasive.

7. Involves payment of court fees.

Does not involve payment of court fees.

In case of settlement, in a court-annexed mediation the court fee already paid is refundable as per the Rules.

<table>
<thead>
<tr>
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<th>CONCILIATION</th>
<th>LOK ADALAT</th>
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<td>8. The consent of the parties is not mandatory for referring a case to mediation.</td>
<td>The consent of the parties is mandatory for referring a case to conciliation.</td>
<td>The consent of the parties is not mandatory for referring a case to Lok Adalat.</td>
</tr>
<tr>
<td>9. The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.</td>
<td>In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.</td>
<td>The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.</td>
</tr>
<tr>
<td>11. The focus in mediation is on the present and the future.</td>
<td>The focus in conciliation is on the present and the future.</td>
<td>The focus in Lok Adalat is on the past and the present.</td>
</tr>
<tr>
<td>12. Mediation is a</td>
<td>Conciliation also is a</td>
<td>The process of Lok Adalat</td>
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<tr>
<td></td>
<td>structured process having different stages.</td>
<td>structured process having different stages.</td>
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<tr>
<td>13.</td>
<td>In mediation, parties are actively and directly involved.</td>
<td>In conciliation, parties are actively and directly involved.</td>
</tr>
<tr>
<td>14.</td>
<td>Confidentiality is the essence of mediation.</td>
<td>Confidentiality is the essence of conciliation.</td>
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MEDIATION AND CONCILIATION: 1. INTRODUCTION, UNDERSTANDING CONFLICT AND CONCEPT OF MEDIATION

Introduction

Arbitration, mediation and conciliation are the main Alternative Dispute Resolution Mechanism which is generally adopted by the people to resolve their disputes in an informal manner. They try to reach a solution by settlement or negotiation with the assistance of a third neutral party and have turned out to be an effective alternative to the litigation process.

What is alternative dispute resolution?

When the method of resolution of the dispute chosen by the parties is other than the arbitration, in the form of mediation, negotiation, conciliation, Lok Adalat, online arbitration, then it is Alternative Dispute Resolution (herein referred to as ADR). ADR opens the way in the field of business and tends to solve the matter more efficiently and effectively. It is basically a dispute settlement through negotiations. In the arbitration, a dispute is decided by imposing an award, but ADR is more likely to find a solution to the dispute by negotiating between both the parties. The purpose of ADR is more than merely giving a remedy to the parties. It aims to ensure that the contract operates properly.

Conciliation as an ADR mechanism

Conciliation is a type of ADR where the settlement is made out of court. There is no involvement of the court in the whole arbitral proceedings. The dispute is settled by a neutral third party, who is the conciliator. The conciliation process is voluntary as it is on the mutual discretion of the parties to choose conciliation as a method of resolving their dispute with the assistance of the conciliator, also the proposal is not binding upon the parties. They are free to follow or not follow the proposal given by the conciliator. It presides over litigation because the parties do not have to go through the technical procedures and formalities of litigation, instead, conciliation allows parties for a friendly search to reach an amicable solution.

The adoption of conciliation process in India

The adoption of conciliation process was first recommended by the Law Commission of India in 77th and 131st report and in the conference of chief ministers and chief justices in their resolution of 1993. Whereas, the Himachal Pradesh High Court evolved pre-trial, in-trial and post-trial conciliation project in the subordinate court in Himachal Pradesh in the year 1984. The Calcutta resolution which was
adopted in 1994, also stated the recommendation of conciliation courts to be constituted in the other states.

With the adoption of conciliation rules, 1980 by the UNCITRAL, the Parliament of India also find it expedient and enacted Arbitration and Conciliation Act, 1996 which gave statutory recognition to conciliation. With this, the post-litigation conciliation was recognised as ADR with the incorporation of section 89 of Code of Civil Procedure, 1908[2] providing an option for reference of sub judice matters to conciliation with the consent of the parties.

Issues in post-litigation conciliation

The main issue in post-litigation conciliation is the preference of judiciary towards mediation over conciliation. Since mediation and conciliation are almost the same, the publicity of mediation and its recognition as a mode of court-annexed mediation has been preferable than conciliation. Due to this, it is not utilized to its full potential. Under section 89 of the CPC, the courts can refer any dispute for judicial determination to any of the ADR mechanism namely, arbitration, conciliation, mediation etc. Among them, mediation and Lok Adalats are mostly used, which lacks chance for conciliation to grow potentially at the post-litigation stage.

Mediation in the dispute resolution mechanism

Mediation has grown as the most advanced form of ADR mechanism. It is one of the methods for handling human relationships in a positive manner, mainly for the good of the people involved and for the betterment of the community.[3]

Mediation encourages a search for the solution by the parties themselves, involved in the dispute. The basic motive of mediation is to provide opportunities to parties to negotiate and come to a final solution catering the needs of both sides. It is an assisted negotiation and an informal process in which parties are aided by a third impartial person, who is the mediator, possessing specialized skills, requisite training and sufficient experience necessary to assist the disputed parties for reaching a negotiated settlement.

Role of the mediator

The role of the mediator is only to assist the parties. He does not have to decide who is right or wrong and also does not have authority to impose a settlement on the parties. Instead, it provides a forum for principled negotiations. Parties come to recognise their true rights and needs, instead of reiteration of their rights and they also come to realise that solution can be reached by satisfying each other’s needs. It
is often said that mediation is the best way of imparting justice through self-mediation of the parties. Mediator empowers the parties to communicate and decide the outcome on their own by providing various options suitable as per the dispute and has to think of alternative solutions favouring a mix of benefits to both parties.

In brief, Mediation is all about facilitating or assisting negotiation between the parties. Mediation works between the parties because it gives chance to the parties to come to a settlement where both parties do not have to compromise their rights instead leads to a better solution.

Growth of mediation centres in India and Its impact on ADR mechanism

In India, mediation as a mode of ADR mechanism has been accepted in its fundamental and generic form. It has been widely utilized in Delhi, which has indeed been one of the pioneers in institutionalizing mediation. In India, mediation got legislative recognition for the first time in 1947, through Industrial Disputes Act, 1947. The enactment of section 89 of CPC was focused by the judiciary to popularize and propagate mediation as an ADR mechanism.

In furtherance of this, the judiciary also prepared a “National Plan for Mediated Settlement of Dispute” for developing training of mediators, development of mediation manuals, setting up of mediation centres in court complexes and spreading awareness about mediation against litigants so as to popularize mediation.[4]

Also, various mediation centres have been established in Delhi for resolution of disputes in pending cases. The growth of mediation centres in Delhi can be seen through the institutional as well as ad-hoc private mediation in Delhi which is always available and open for the parties to take recourse to mediation for settlement of their disputes outside the court-annexed mediation centres before they invoke the jurisdiction of courts.

There are various institutions available in Delhi offering professional mediation services at the pre-litigation as well as the post-litigation stage. The Indian Legislature also enacted The Legal Services Authority Act, 1987 by constituting National Legal Service Authority as a central authority vesting with various duties like encouraging for the settlement of disputes by way of negotiation, arbitration and conciliation, etc.

Court-annexed mediation

When the cases are solved with the help of court accredited mediators, that is often referred to as court-
annexed mediation. The mediation services are viewed as part and parcel of the same judicial system, instead of a separate court-referred mediation, where court refer the cases to private mediators so that no one would feel that the case is separated from the court system. ADR services under the control and guidance of judicial system would ensure smooth functioning, authenticity and acceptance from the public. It would ensure the mediation in coordination with the courts and not be viewed as competition to the courts.

How mediation is helpful for the courts?

With the cooperation of mediation services, courts can easily refer the cases to mediators and deal with the cases which are more important for public matter without wasting time on small petty cases, which can ensure in reducing the loads and pending of cases at a manageable level. And also, the mediators will have a positive feeling from the support of the judges and make the process more expeditious and harmonized. It would lead to faster settlements and public confidence and would ensure a feeling that the mediation is working hand in hand with the same system.

This is not as easy as we think because the general public is not always willing to accept the new change about which they are not properly aware of. It is a new idea which is introduced in India and we cannot in any circumstance expect from the public to adapt to the new change quickly. Here arises the problem for court annexed-mediation.

Obstacles in the implementation of this mechanism

- the unavailability of sufficient funds to introduce this machinery in the country.

- Second, in a country like India, where we have an established judicial system the court is seen as the place to go when disputes arise and cannot be viewed as a mechanism where it can be sorted out by the parties themselves.[5]

Thus, the public at large refuses to accept where the court is not directly involved. They only accept when they see that it has the stamp of approval of the court because then they do not have any fear as they are already accustomed to the court system.

Why you should choose mediation?

Mediation is confidential, non-binding and parties get to choose an alternative provided by the mediator. The mediator guides for reaching an amicable solution for both the parties. No strict procedures are followed by the parties which makes the whole proceedings more informal and comfortable.
Why is ADR preferred more than litigation?

ADR has gained a rapid popularity over the years. The business disputes are resolved more by the arbitration process than the litigation. The reason for acceptance of arbitration over litigation is due to many reasons.

1. Arbitration is more cost-effective. The cost of the process involved in the dispute is much less than the cost involved in the litigation.
2. The process is more informal as compared to the litigation process. There are no lengthy procedures as that is present in the court.
3. ADR process is flexible. The parties can withdraw their case anytime they want which, is not possible in the court process.
4. The dispute is resolved more quickly with the assistance of a third person, who advises the parties according to their needs and suitability. This is not same in the case of the court process. The judges do not give judgment according to the suitability of the parties.
5. The resolution of the dispute is made faster. On the other hand, filing cases in the court take years and years to resolve one case.
6. In ADR, an approach is made to balance the interest of both the parties. Whereas, in the litigation, the other party loses the case.
7. Discussions of the proceedings in ADR is confidential and no public record is to be maintained. The discussions in the court involve knowledge of the public.
8. The venue and schedule are according to the convenience of the parties as they have the power to choose the arbitrator, the place of the proceedings etc.

How arbitration, mediation and conciliation are different from each other?

Mediation and conciliation both are an informal process. Whereas, arbitration is more formal as compared to them. In mediation, the mediator generally sets out alternatives for the parties to reach out an agreement. The main advantage of the mediation is that the settlement is made by the parties themselves rather than a third party. It is not legally binding on the parties.

Arbitration is a process where the parties submit their case to a neutral third party who on the basis of discussion determine the dispute and comes to a solution.

Dispute resolution through conciliation involves the assistance of a neutral third party who plays an
advisory role in reaching an agreement. The process adopted by all the three are different but, the main purpose is to resolve the dispute in a way where the interest of the parties is balanced.

Conclusion

Arbitration, mediation and conciliation are considered as the main alternative dispute resolution mechanism to litigation. Business people prefer these mechanisms more convenient because it does not require a lot of lengthy procedures like courts. Here, dispute resolution is more informal as compared to litigation in courts. Over the recent years, they have turned out to be more effective than the litigation process. Access to justice is there without the involvement of the court. Parties are more comfortable as they can freely express their own views, needs and interest.

References


Judges who refer the cases for settlement through any of the ADR methods are known as referral judges. The role of a Referral Judge is of great significance in court-referred mediation. All cases are not suitable for mediation. Only appropriate cases which are suitable for mediation should be referred for mediation. Success of mediation will depend on the proper selection and reference of only suitable cases by referral judges.

Reference to ADR and statutory requirement

Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908 require the court to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok Adalat or mediation. While making such reference the court shall take into account the option if any exercised by the parties and the suitability of the case for the particular ADR method. In the light of judicial pronouncements a referral judge is not required to formulate the terms of settlement or to make them available to the parties for their
observations. The referral judge is required to acquaint himself with the facts of the case and the nature of the dispute between the parties and to make an objective assessment to the suitability of the case for reference to ADR.

Stage of Reference
The appropriate stage for considering reference to ADR processes in civil suits is after the completion of pleadings and before framing the issues. If for any reason, the court did not refer the case to ADR process before framing issues, nothing prevents the court from considering reference even at a later stage. However, considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent. An order referring the dispute to ADR processes may be passed only in the presence of the parties and/or their authorized representatives.

Consent
Under section 89 CPC, consent of all the parties to the suit is necessary for referring the suit for arbitration where there is no pre-existing arbitration agreement between the parties. Similarly, the court can refer the case for conciliation under section 89 CPC only with the consent of all the parties. However, in terms of Section 89 CPC and the judicial pronouncements, consent of the parties is not mandatory for referring a case for Mediation, Lok Adalat or Judicial Settlement. The absence of consent for reference does not affect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation.

Avoiding delay of trial

In order to prevent any misuse of the provision for mediation by causing delay in the trial of the case, the referral judge, while referring the case for mediation, shall post the case for further proceedings on a specific date, granting time to complete the mediation process as provided under the Rules or such reasonable time as found necessary.

Choice of Cases for reference

As held by the Supreme Court of India in Afcons Infrastructure
their nature, the following categories of cases are normally considered unsuitable for ADR process.
i. (i) Representative suits under Order I Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court.
ii. Disputes relating to election to public offices.
iii. Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
iv. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.
v. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.
vi. Cases involving prosecution for criminal offences.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:
i) All cases relating to trade, commerce and contracts, including
-disputes arising out of contracts (including all money suits);
- disputes relating to specific performance;
- disputes between suppliers and customers;
- disputes between bankers and customers;
- disputes between developers/builders and customers;
- disputes between landlords and tenants/licensor and licensees;
- disputes between insurer and insured

ii) All cases arising from strained or soured relationships, including
- disputes relating to matrimonial causes, maintenance, custody of children;
- disputes relating to partition/division among family members/coparceners/co-owners;
- disputes relating to partnership among partners.

iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
- disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.);
- disputes between employers and employees;
- disputes among members of societies/associations/apartment owners' associations;

iv) All cases relating to tortious liability, including
- claims for compensation in motor accidents/other accidents; and
v) All consumer disputes, including disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of "suitable" and "unsuitable" categorisation of cases is not exhaustive or rigid. They are illustrative which can be subjected to just exceptions or addition by the courts/tribunals exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

In spite of the categorization mentioned above, a referral judge must independently consider the suitability of each case with reference to its facts and circumstances.

Motivating and preparing the parties for Mediation

The referral judge plays the most crucial role in motivating the parties to resolve their disputes through mediation. Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade and motivate them for mediation. The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the
parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation.

Referral Order

The mediation process is initiated through a referral order. The referral judge should understand the importance of a referral order in the mediation process and should not have a casual approach in passing the order. The referral order is the foundation of a court-referred mediation. An ideal referral order should contain among other things details like name of the referral judge, case number, name of the parties, date and year of institution of the case, stage of trial, nature of the dispute, the statutory provision under which the reference is made, next date of hearing before the referral court, whether the parties have consented for mediation, name of the institution/mediator to whom the case is referred for mediation, the date and time for the parties to report before the institution/mediator, the time limit for completing the mediation, quantum of fee/remuneration if payable and contact address and telephone numbers of the parties and their
advocates.

**Role after conclusion of mediation**

The referral judge plays a crucial role even after the conclusion of mediation. Even though the dispute was referred for mediation the court retains its control and jurisdiction over the matter and the result of mediation will have to be placed before the court for passing consequential orders. Before considering the report of the mediator the referral judge shall ensure the presence of the parties or their authorized representative in the court. If there is no settlement between the parties, the court proceedings shall continue in accordance with law. In order to ensure that the confidentiality of the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement. Nor should the referral judge allow the parties or their counsel to disclose such reasons to the court. However, it is open to the referral judge to explore the possibility of a settlement between the parties. To protect confidentiality of the mediation process, there should not be any communication between the referral judge and the mediator regarding the mediation during or after the process of
If the dispute has been settled in mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable. If the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the referral judge should desist from acting upon such agreement. If the agreement is found to be lawful and enforceable, the referral judge should act upon the terms and conditions of the agreement and pass consequential orders. To overcome any technical or procedural difficulty in implementing the settlement between the parties, it is open to the referral judge to modify or amend the terms of settlement with the consent of the parties.
4. SETTLEMENT OF DISPUTES OUTSIDE THE COURT, FIRST HEARING

An out-of-court settlement occurs when the two parties make an agreement on any claim without having a judge come to a decision in the case. Generally, an out-of-court settlement allows one party to pay a sum of money to the other and in return the other party will close their lawsuit. Mainly, a settlement is a lawfully binding agreement which ends the case exclusive of going to court. The best ways to record an out of court settlement is to enter into an agreement that is binding on both parties detailing the terms of settlement. This agreement must be carefully drafted.

It is also possible to do an out of court settlement even when a court case is going on.

However, the most common way to reach a solution in a dispute without having to go to court, which in India is expensive and can take decades to come to a conclusion, is “Alternative Dispute Resolution” (ADR).

- **Alternative Dispute Resolution** (ADR) mainly refers to dispute resolution outside of the courtroom which mainly includes arbitration, mediation or mini-trials. ADR techniques can be applied in some categories of disputes, especially, civil, commercial, industrial and family disputes.

- **Alternative Dispute Resolution** is a term used to express several different modes of resolving lawful disputes. It is practiced by the business world with common men because it is impossible for many people to file lawsuits and get appropriate justice on time. To resolve this problem of unsettled justice, ADR method has been developed in answer to thereof.

- **Alternative Dispute Resolution is generally less official, less expensive and less time-consuming than a usual trial.** It provides people additional opportunity to settle on when and how their dispute will be determined. The key reasons that the parties may prefer ADR procedures are often two-way and let the parties to recognize each other’s positions.

- **It also allows the parties to come out with more innovative solutions that a court may not be legally permitted to enforce.** Using Alternative Dispute Resolution (ADR) method to resolve disputes can save time, money, provide more control over the case and on the outcome.
Types Of Alternative Dispute Resolution

The most common types of ADRs are –

1. Arbitration
2. Conciliation
3. Mediation
4. Neutral Evaluation
5. Settlement Conferences

Halsbury’s Laws of England has defined arbitration as “a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved with binding effect by a person or persons acting in a judicial manner in private rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it.”

Arbitration is a form of alternative dispute resolution that provides a final and binding outcome to litigation which does not require recourse to the Courts. It is a consensual process in the sense that it will only apply if the parties agree it should.

Generally regarded as an alternative to court litigation, the existence of a valid agreement to arbitrate should mean that state courts refuse to hear disputes falling within the scope of that agreement.

In arbitration, the parties submit a dispute to an appointed decision-maker (arbitrator), or panel of arbitrators (the tribunal). This is typically done by providing for arbitration in the contract (the arbitration agreement).

The agreement should also cover the number of arbitrators, the location (also known as the seat) of the arbitration, and the procedural rules that will govern the arbitration. The tribunal will generally give its decision (the award) following a hearing during which each party will have the opportunity to present its position.

If appropriate, arbitrations can be conducted on paper only, for example, where the sums or issues in dispute do not justify a hearing. Generally, the tribunal will decide the dispute in accordance with the law governing the relevant contract.

The General Principles Were –
1. The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

2. The parties should be free to have the same opinion on how their disputes are resolved, subject only to such safeguard as are compulsory for the public interest and

3. Court intervention should be restricted.

- **A conciliation is the form of alternative dispute resolution process where the parties to a dispute make use of a conciliator, who meets with the parties individually in order to determine their differences.** They do this by lowering tensions, improving interactions, interpreting issues, providing & exploring possible solutions for the settlement.

- Conciliation is a voluntary process where the parties concerned are open to having the same opinion and attempt to the resolution of the dispute by conciliation.

- It is flexible, allowing parties to define the time, constitution and content of the conciliation procedures. These proceedings are not often public. It involves discussions between the parties and the conciliator with an intend to explore sustainable resolutions by a look into the existing issues concerned in the dispute and creating options for an arrangement that are suitable for all the parties. The conciliator does not make a decision for the parties but tries to sustain them in generating options in order to find a resolution that is well-suited to both parties. It is risk-free and not obligatory on the parties till they agree & sign the agreement.

- Formerly a resolution is reached among the disputing parties prior to a conciliator, the agreement had the outcome of an arbitration award and is lawfully acceptable in any court in the country.

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In neutral evaluation, both the parties get an opportunity to present the case to a neutral person (an evaluator). The evaluator hears shortened arguments, reviews the strength and weakness of each party and offers an assessment of possible court outcomes in an attempt to promote settlement. The evaluator is skilled in the subject matter of the dispute.

Even though the evaluator’s view is not binding, the parties usually use it as a source for trying to discuss a resolution of the dispute. The evaluator may also give case planning regulation and settlement support with the consent of the parties. The neutral evaluation may be most suitable in cases where there are technical issues that need special skill to resolve the issue in the case is the amount of compensation.

It may be either compulsory or voluntary. In settlement conferences, the parties, and their attorneys meet up with a judge (or a neutral person), called a settlement officer, to talk about the possible resolution of their dispute. The settlement officer does not make a resolution in the case although, assists the parties in evaluating the strengths and weaknesses of the case and in negotiating a resolution. These are appropriate in any case where a resolution is an option.

India being a developing nation is going through major economic reforms within the frame of the law, where for the resolution of disputes and to decrease the burden on the courts, alternative dispute resolution (ADR) is introduced. Indian courts experience a serious accumulation of cases which is mostly due to less number of judges and the lack of infrastructure which is incapable of handling the caseload.

Section 89 of the Code of Civil Procedure, which gives importance to mediation, conciliation, and
arbitration, makes it compulsory on the part of the Court to refer the matter for resolution.

It has become a global phenomenon to resolve commercial disputes through arbitration. Alternative Dispute Resolution is comparatively low-cost in comparison with the usual legal procedure. It helps litigants who are incapable of meeting the expenses involved in the ordinary process of dispute resolution through Courts.

The government has to play a pro-active role in this direction. Overall, in order to make Alternative Dispute Reform mechanisms more successful then, there must be the restricted area of application and wide in the area of its procedure.
5. SIGNIFICANCE OF SECTION 89 , ORDER X, XI, XII, AND ETC., OF CODE OF CIVIL PROCEDURE

The Supreme Court in Afcons Infrastructure Ltd. Vs. Cherian Varkey Construction Co. (P) Ltd. has discussed, in great detail, the provisions of Section 89 of the Code of Civil Procedure, 1908 which casts a duty on the courts to encourage parties for settlement of their disputes by means of alternate dispute resolution. The Court while examining the various aspects of the said provision has laid down guidelines for courts to follow for the effective implementation of Section 89 of the Code. The relevant extracts from the judgment are reproduced hereinbelow;

5. On the contentions urged, two questions arise for consideration:

(i) What is the procedure to be followed by a court in implementing section 89 and Order 10 Rule 1A of the Code?

(ii) Whether consent of all parties to the suit is necessary for reference to arbitration under section 89 of the Code?

6. To find answers to the said questions, we have to analyse the object, purpose, scope and tenor of the said provisions. The said provisions are extracted below:

"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 reformulate 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 effect a compromise between the parties and shall follow such procedure as may be prescribed."

Order 10 Rule 1A. Direction of the Court to opt for any one mode of alternative dispute resolution.--After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties. Order 10 Rule 1B. Appearance before the conciliatory forum or authority.--Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit. Order 10 Rule 1C. Appearance before the Court consequent to the failure of efforts of conciliation.--Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it."

7. If section 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2). In spite of these defects, the object behind section 89 is laudable and sound. Resort to alternative disputes resolution (for short `ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce Section 89 and Rules 1-A to 1-C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits. In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in Salem Advocate Bar Association v. Union of India reported in [2003 (1) SCC 49 - for short, Salem Bar - (I)] but referred to a Committee, as it was hoped that section 89 could be implemented by ironing the creases. In Salem Advocate Bar Association v. Union of India [2005 (6) SCC 344 - for short, Salem Bar-(II)], this Court applied the principle of purposive construction in an attempt to make it workable. What is wrong with section 89 of the Code?
8. The first anomaly is the mixing up of the definitions of 'mediation' and 'judicial settlement' under clauses (c) and (d) of sub-section (2) of section 89 of the Code. Clause (c) says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in clause (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as "judicial settlement", as is done in clause (c). "Judicial settlement" is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute. "Mediation" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term 'conciliation'. (See: Black's Law Dictionary, 7th Edition, Pages 1377 and 996). When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in section 89 with interchanged meanings has led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms "judicial settlement" and "mediation" in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word "mediation" in clause (d) and the words "judicial settlement" in clause (c) are interchanged, we find that the said clauses make perfect sense.

9. The second anomaly is that sub-section (1) of section 89 imports the final stage of conciliation referred to in section 73(1) of the AC Act into the pre-ADR reference stage under section 89 of the Code. Sub-section (1) of section 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms of a possible settlement and then refer the same for any one of the ADR processes. If sub-section (1) of Section 89 is to be literally followed, every Trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or
mediator and holds detailed discussions and negotiations running into hours.

10. Section 73 of AC Act shows that formulation and reformulation of terms of settlement is a process carried out at the final stage of a conciliation process, when the settlement is being arrived at. What is required to be done at the final stage of conciliation by a conciliator is borrowed lock, stock and barrel into section 89 and the court is wrongly required to formulate the terms of settlement and reformulate them at a stage prior to reference to an ADR process. This becomes evident by a comparison of the wording of the two provisions. Section 73(1) of Arbitration and Conciliation Section 89(1) of Code of Civil Procedure Act, 1996 relating to the final stage of relating to a stage before reference to an settlement process in conciliation. ADR process. When it appears to the conciliator that there exist elements of a settlement which may exist elements of a settlement which may be acceptable to the parties, he shall be acceptable to the parties, the Court shall formulate the terms of a possible settlement formulate the terms of settlement and give and submit them to the parties for their them to the parties for their observations observations. After receiving the and after receiving the observations of the observations of the parties, the conciliator parties, the Court may reformulate the may reformulate the terms of a possible terms of a possible settlement and refer the settlement in the light of such observations. same for (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through Lok Adalat; or (d) mediation. Formulation and re-formulation of terms of settlement by the court is therefore wholly out of place at the stage of pre ADR reference. It is not possible for courts to perform these acts at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process.

11. If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award. If the reference is to conciliation/mediation/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok Adalat, after going through the entire process of conciliation/ mediation. Thus, the terms of settlement drawn up by the court will be totally useless in any subsequent ADR process. Why then the courts should be burdened with the onerous and virtually impossible, but redundant, task of formulating terms of settlement at pre-reference stage?

12. It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court
formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing section 89 of the Code. This Court therefore diluted this anomaly in Salem Bar (II) by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a 'summary of disputes' and not 'terms of settlement'. How should section 89 be interpreted?

13. The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation will pose a great risk as the changes may not be what the Legislature intended or desired. Legislative wisdom cannot be replaced by the Judge's views. As observed by this Court in somewhat different context:

"When a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, the Judges cannot afford to be wiser." (See: Shri Mandir Sita Ramji vs. Lt. Governor of Delhi - (1975) 4 SCC 298).

There is however an exception to this general rule. Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provisions, the courts may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the Legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible, or absurd or so impractical as to defeat the very object of the provision. We may also mention purposive interpretation to avoid absurdity and irrationality is more readily and easily employed in relation to procedural provisions than with reference to substantive provisions.

(13.1) Maxwell on Interpretation of Statutes (12th Edn., page 228), under the caption 'modification of the language to meet the intention' in the chapter dealing with 'Exceptional Construction' states the position succinctly:
"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

This Court in *Tirath Singh v. Bachittar Singh* [AIR 1955 SC 830] approved and adopted the said approach.

(13.2) In *Shamrao V.Parulekar v. District Magistrate, Thana, Bombay* [AIR 1952 SC 324], this Court reiterated the principle from Maxwell:

".....if one construction will lead to an absurdity while another will give effect to what commonsense would show was obviously intended, the construction which would defeat the ends of the Act must be rejected even if the same words used in the same section, and even the same sentence, have to be construed differently. Indeed, the law goes so far as to require the Courts sometimes even to modify the grammatical and ordinary sense of the words if by doing so absurdity and inconsistency can be avoided."

(13.3) In *Molar Mal vs. Kay Iron Works (P) Ltd.* - 2004 (4) SCC 285, this Court while reiterating that courts will have to follow the rule of literal construction, which enjoins the court to take the words as used by the Legislature and to give it the meaning which naturally implies, held that there is an exception to that rule. This Court observed:

"That exception comes into play when application of literal construction of the words in the statute leads to absurdity, inconsistency or when it is shown that the legal context in which the words are used or by reading the statute as a whole, it requires a different meaning."

(13.4) In *Mangin v. Inland Revenue Commission* [1971 (1) All.ER 179], the Privy Council held:

"......The object of the construction of a statute, be it to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was
intended. If, therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted."

(13.5) A classic example of correcting an error committed by the draftsman in legislative drafting is the substitution of the words 'defendant's witnesses' by this Court for the words 'plaintiff's witnesses' occurring in Order VII Rule 14(4) of the Code, in *Salem Bar- II*. We extract below the relevant portion of the said decision:

"Order VII relates to the production of documents by the plaintiff whereas Order VIII relates to production of documents by the defendant. Under Order VIII Rule 1A(4) a document not produced by defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of 'defendant's witnesses', the words 'plaintiff's witnesses' have been mentioned in Order VII Rule (4). To avoid any confusion, we direct that till the legislature corrects the mistake, the words 'plaintiff's witnesses, would be read as 'defendant's witnesses' in Order VII Rule 4. We, however, hope that the mistake would be expeditiously corrected by the legislature."

(13.6) Justice G.P. Singh extracts four conditions that should be present to justify departure from the plain words of the Statute, in his treatise *Principles of Statutory Interpretation* (12th Edn. - 2010, Lexis Nexis - page 144) from the decision of the *House of Lords in Stock v. Frank Jones (Tipton) Ltd.*, [1978 (1) All ER 948]:

"......a court would only be justified in departing from the plain words of the statute when it is satisfied that (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such a legislative objective; and (4) the language of the statute is susceptible of the modification required to obviate the anomaly."

14. All the aforesaid four conditions justifying departure from the literal rule, exist with reference to section 89 of the Code. Therefore, in *Salem Bar -II*, by judicial interpretation the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-section (1) of section 89, is excluded or done away with by stating that the said provision merely requires formulating a summary of disputes. Further, this Court in *Salem Bar-II*, adopted the following definition of 'mediation'
suggested in the model mediation rules, in spite of a different definition in section 89(2)(d):

"Settlement by `mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them."

All over the country the courts have been referring cases under section 89 to mediation by assuming and understanding `mediation' to mean a dispute resolution process by negotiated settlement with the assistance of a neutral third party. Judicial settlement is understood as referring to a compromise entered by the parties with the assistance of the court adjudicating the matter, or another Judge to whom the court had referred the dispute.

15. Section 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

16. In view of the foregoing, it has to be concluded that proper interpretation of section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of `judicial settlement' and `mediation' in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of section 89(2) of the Code will read as under when the two terms are
interchanged: (c) for "mediation", 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 "judicial settlement", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that section 89 is not rendered meaningless and infructuous. Whether the reference to ADR Process is mandatory?

17. Section 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred under section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.

18. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences.

19. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes:

(i) All cases relating to trade, commerce and contracts, including - disputes arising out of contracts (including all money claims); - disputes relating to specific performance; - disputes between suppliers and customers; - disputes between bankers and customers; - disputes between developers/builders and customers; - disputes between landlords and tenants/licensor and licensees; - disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including - disputes relating to matrimonial causes, maintenance, custody of children; - disputes relating to partition/division among family members/co-parceners/co-owners; and - disputes relating to partnership among partners.

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including - disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.); - disputes between employers and employees; - disputes among members of societies/associations/Apartment owners Associations;

(iv) All cases relating to tortious liability including - claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes including - disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity. The above enumeration of `suitable' and `unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process. How to decide the appropriate ADR process under section 89?
20. Section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes - conciliation, mediation, judicial settlement and Lok Adalat settlement. The object of section 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither section 89 nor Rule 1A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987. On the other hand, section 89 of the Code makes it clear that two of the ADR processes - Arbitration and Conciliation, will be governed by the provisions of the AC Act and two other ADR Processes - Lok Adalat Settlement and Mediation (See : amended definition in para 18 above), will be governed by the Legal Services Authorities Act. As for the last of the ADR processes - judicial settlement (See : amended definition in para 18 above), section 89 makes it clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed (by appropriate rules).

21. Rule 1A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but a joint option or consensus about the choice of the ADR process. On the other hand, section 89 vests the choice of reference to the court. There is of course no inconsistency. Section 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1A to IC of Order 10 lay down the manner in which the said jurisdiction is to be exercised. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.

22. Let us next consider which of the ADR processes require mutual consent of the parties and which of them do not require the consent of parties.
Whenever any case is to be sent to mediation, the following steps are followed:

Step 1: Convening the Mediation Process

The convening of the mediation is often the most difficult and challenging part of the mediation process. It involves a varied range of procedures:

- **Reference to ADR by the Court**

The court is required to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok Adalat or mediation under Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908.

The Court must consider the option exercised by the parties and the suitability of the particular case for the option chosen. The judge making the reference, known as the referral judge, is required to acquaint himself with the facts and the nature of the dispute, and objectively assess the suitability of ADR.

This appropriate stage for making the reference in civil cases is after the completion of pleadings and before framing the issues, while in cases pertaining to family law, the appropriate time for making the reference would be immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent.

Even if the court did not refer the cases to ADR at these times, nothing prevents it from referring to it at a later stage.

- **Preparation for Mediation**

The referral judge then has the crucial job of bringing the parties together and motivating them to
resolve their disputes through mediation. This involves finding the reasons for any disinclination on behalf of the parties to enter into mediation, along with explaining the concept, process and advantages of mediation.

While the consent of parties is required for mediation, the court can also apply external pressure to induce the parties to enter the mediation, to the extent of ordering or forcing them to do so.

- **Referral Order**

A referral order issued by the referral judge initiates the process of mediation and sets the foundation of a court-referred mediation. An ideal referral order contains details like name of the referral judge, case number, name of the parties, date and year of institution of the case, stage of trial, nature of the dispute, the statutory provision under which the reference is made, next date of hearing before the referral court, whether the parties have consented for mediation, name of the institution/mediator to whom the case is referred for mediation, the date and time for the parties to report before the institution/mediator, the time limit for completing the mediation, quantum of fee/remuneration if payable and contact address and telephone numbers of the parties and their advocates.

**Step 2: Initiation of the Mediation Process**

The mediator has to ensure that the parties and their counsels are present at the commencement of the mediation process.

**Introduction and Opening Statement**

**Introduction**

- The mediator gives an introduction with his qualifications, establishes his neutrality and reposes faith in the mediation process.

- The mediator requests the parties to introduce themselves, attempts to develop a rapport with them and gain their confidence and trust.

- The motive is to create a constructive environment conducive to negotiations and motivate the parties for an amicable resolution of disputes.

- The mediator establishes control over the mediation process.
• There is no standard set of rules that have to be followed, making the mediation procedure flexible.

Opening Statements

• The mediator’s opening statement is intended to explain to the parties-
  • the concepts, processes and stages of mediation,
  • the role of the mediator, advocates and parties and
  • the advantages and ground rules of mediation.

• The mediator confirms that the parties have understood the process and gives them the opportunity to get any doubts clarified.

• Statements are also sought from the negotiators. The parties articulate their positions, enabling the other party to understand what they want.

• This is followed by a restatement of the problem by the mediator where an attempt is made to incorporate the differing perspectives.

Step 3: Setting the Agenda

• Setting the agenda is an important duty imparted on the mediator in order to shed clarity on the mediation proceedings and remove vagueness.

• It involves setting down the order in which negotiation is to proceed and gives the parties a standard using which they can individually evaluate the progress of the negotiations.

• The mediator may mention the time and venues for the negotiation sessions, along with the issues before the parties, to be discussed sequentially.

Step 4: Facilitation of Negotiation and Generation of Options

Joint Session

The purpose of the joint session is to gather information. The mediator provides an opportunity for the
parties to hear and understand each other’s perspectives, relationships and feelings.

- The petitioner is allowed to explain their case in their own words, followed by the presentation of the case by their counsel and the statement of the legal issues. Similarly, the defendant is allowed to explain their case, followed by the presentation of the case and statement of the legal issues involved by the defendant’s counsel.

- The mediator attempts to understand the facts, issues, obstacles and possibilities and ensures that each participant feels heard.

- The mediator encourages communication and asks questions to elicit information.

- At the completion of the joint session, the mediator may also suggest meeting each party with their counsel separately.

**Separate Sessions**

- The separate sessions are meant for the mediator to understand the dispute at a deeper level.

- It provides the parties with a forum to further vent their feelings and disclose confidential information they do not wish to share with the other parties.

- It helps the mediator to understand the underlying interests of the parties, the positions taken by them and the reasons for these positions, identify areas of dispute, differential priorities and common interests, and to shift the parties to a mood of finding mutually-acceptable solutions.

- The mediator is supposed to reaffirm confidentiality, gather further information and challenge and test the perceptions and conclusions of the parties in order to open their minds to different possibilities. This is to be done by asking effective questions and helping the parties understand the strengths and weaknesses of their cases.

- The mediator offers options which he feels bests satisfies the underlying interests of the parties.
Step 5: Reaching a Settlement

- By helping parties to understand the reality of their situation and give up rigid positions, the mediator creates creative options for settlement.

- The mediator can conduct as many separate sessions as necessary and may even conduct sessions with groups on the same side with diverging interests.

- The parties negotiate through the mediator until a solution mutually acceptable to all the parties involved. The mediator directs the parties to a solution which he believes will satisfy the underlying interests of the parties.

- In case negotiations fail, the case is sent back to the referral court.

Step 6: Closing

- There is no fixed procedure that must be followed.

- Once the terms of the settlement have been agreed to, the parties are reassembled.

- The mediator orally confirms the terms the terms of the settlement as a procedural requirement.

- The parties, with the mediator’s aid, write down the terms of the settlement and sign the agreement.

- The settlement has the binding nature of a contract and is enforceable in a court of law.

- In his closing comment, the mediator thanks the parties for their help and participation in the mediation process.

In case no settlement is reached between the parties, the case is returned to the referral court stating failure to settle. The proceedings of the mediation are kept confidential and cannot be revealed even to the court.

The mediator provides an opportunity for the parties to hear and understand each other’s perspectives, relationships and feelings.
• The petitioner is allowed to explain their case in their own words, followed by the presentation of the case by their counsel and the statement of the legal issues. Similarly, the defendant is allowed to explain their case, followed by the presentation of the case and statement of the legal issues involved by the defendant’s counsel.

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• It provides the parties with a forum to further vent their feelings and disclose confidential information they do not wish to share with the other parties.

• It helps the mediator to understand the underlying interests of the parties, the positions taken by them and the reasons for these positions, identify areas of dispute, differential priorities and common interests, and to shift the parties to a mood of finding mutually-acceptable solutions.

• The mediator is supposed to reaffirm confidentiality, gather further information and challenge and test the perceptions and conclusions of the parties in order to open their minds to different possibilities. This is to be done by asking effective questions and helping the parties understand the strengths and weaknesses of their cases.

• The mediator offers options which he feels best satisfies the underlying interests of the parties.

**Step 5: Reaching a Settlement**

• By helping parties to understand the reality of their situation and give up rigid positions, the mediator creates creative options for settlement.
• The mediator can conduct as many separate sessions as necessary and may even conduct sessions with groups on the same side with diverging interests.

• The parties negotiate through the mediator until a solution mutually acceptable to all the parties involved. The mediator directs the parties to a solution which he believes will satisfy the underlying interests of the parties.

• In case negotiations fail, the case is sent back to the referral court.

Step 6: Closing

• There is no fixed procedure that must be followed.

• Once the terms of the settlement have been agreed to, the parties are reassembled.

• The mediator orally confirms the terms of the settlement as a procedural requirement.

• The parties, with the mediator’s aid, write down the terms of the settlement and sign the agreement.

• The settlement has the binding nature of a contract and is enforceable in a court of law.

• In his closing comment, the mediator thanks the parties for their help and participation in the mediation process.

In case no settlement is reached between the parties, the case is returned to the referral court stating failure to settle. The proceedings of the mediation are kept confidential and cannot be revealed even to the court.

Eight Steps for Better Communication for Mediation & Negotiation

There are many pieces to a successful negotiation or mediation but a critical one is communication. You need to effectively communicate your client’s goals and positions
and take steps to try to get the other party to see things your way. Part of that communication is also effectively listening to the other party, understanding what the person is communicating verbally and non-verbally. *Inc. magazine* had a recent article listing steps which could improve your communication skills.

1. **Speak to groups as individuals.**

   Develop a level of intimacy that makes each person feel as if you’re speaking directly to him or her. Eliminate the distractions of the crowd so you can deliver your message as if you were talking to a single person. Be emotionally genuine and show the same feelings, energy and attention that you would if speaking just to one person.

2. **Talk so others will listen.**

   Read your audience so you aren’t wasting your time with a message that they aren’t ready to hear. Adjust your message to stay with your audience. Going on and on so you’ve said what you wanted to say won’t do you any good. You need to engage people in a meaningful exchange of ideas so your message has a better chance of sticking with them. If good questions are asked you’re on the right track.

3. **Listen so people will talk.**

   Effective communication is not a one-way street. Others need an opportunity to speak their minds. When they do speak stop everything else and listen fully until the other person has finished. Stay in the moment, pick up on the verbal and physical cues the other person is sending and make it clear that you are hearing what is being said.

4. **Connect emotionally.**

   Whatever you say won’t have much of an impact if people don’t connect with it on an emotional level. Don’t try to project a certain image. Be transparent. Show them what drives you and what you care about. Expressing feelings openly may result in an emotional connection with the audience.

5. **Read body language.**
A wealth of information is contained in body language. The body communicates nonstop, unconsciously and is a source of information. Watch body language during meetings and conversations.

6. **Prepare your intent.**

A little preparation can go a long way to having a conversation that achieves your intended impact. Develop an understanding of what you want the focus of a conversation to be and how you will accomplish this. You will be more persuasive and on point if you prepare ahead of time.

7. **Skip the jargon.**

Jargon in an industry is so over used as to be meaningless. It can alienate listeners and they will tune you out. Use jargon sparingly if you must or you’ll come across as insincere.

8. **Practice active listening.**

Active listening ensures people feel heard which is an essential component of good communication. To listen actively,

- Spend more time listening than you do talking.
- Don’t answer questions with questions.
- Don’t finish other people’s sentences.
- Focus more on others than yourself.
- Focus on what people are saying, not on what their interests may be.
- Reframe or repeat what’s been said to make sure you understand him or her correctly.
- Think about what you’ll say after someone has finished speaking, not while he or she is speaking.
- Ask questions.
- Don’t interrupt.
• Don’t take notes.

Effective communication takes time and practice. Work on one or a few of these suggestions at a time. You won’t be able to improve with all of them simultaneously. Improving your communication skills is a work in progress and it will improve as you put time and energy into it.

Roles of the Mediator

The mediator’s ultimate role is to do anything and everything necessary to assist parties to reach agreement. In serving this ultimate end, the mediator may take on any or all of the following roles:

Convener

The mediator may assist in contacting the other party(ies) to arrange for an introductory meeting.

Educator

The mediator educates the parties about the mediation process, other conflict resolution alternatives, issues that are typically addressed, options and principles that may be considered, research, court standards, etc.

Communication Facilitator

The mediator seeks to ensure that each party is fully heard in the mediation process.

Translator

When necessary, the mediator can help by rephrasing or reframing communications so that they are better understood and received.

Questioner and Clarifier

The mediator probes issues and confirms understandings to ensure that the participants and the mediator have a full understanding.

Process Advisor

The mediator comes to be trusted to suggest procedures for making progress in mediation discussions, which may include caucus meetings, consultation with outside legal counsel and consultation with substantive experts.

Angel of Realities

The mediator may exercise his or her discretion to play devil’s advocate with
one or both parties as to the practicality of solutions they are considering or the extent to which certain options are consistent with participants' stated goals, interests and positive intentions.

**Catalyst**

By offering options for considerations, stimulating new perspectives and offering reference points for consideration, mediator serves as a stimulant for the parties reaching agreement.

**Responsible Detail Person**

The mediator manages and keeps track of all necessary information, writes up the parties' agreement, and may assist the parties to implement their agreement.

**HOW TO OVERCOME IMPASSE**

As negotiations proceed, Parties sometimes reach an impasse -- often not due to overt conflict, but rather due to resistance to workable solutions or simply exhaustion of creativity. While the impasse might signal that the dispute is unresolvable in mediation, the mediator may believe that a workable agreement is still possible. Below are some techniques to get negotiations moving.

Always remember: The goal isn't to overcome impasse per se, but to help the Parties analyze and negotiate constructively. The Parties are free to stick with a position -- there may be a legitimate reason for impasse, and it's not your job to pressure the Parties into a settlement!

1. Take a break. Often, things have a way of looking different when you return.
2. Ask the Parties if they agree to set the issue aside temporarily and go on to something else - preferably an easier issue.
3. Ask the Parties to explain their perspectives on why they appear to be at an impasse. Sometimes, the Parties need to feel and focus consciously on their deadlock.
4. Ask the Parties, "what would you like to do next?" and pause expectantly. Or, say "frankly, it looks like we're really stuck on this issue. What do you think we should do?" These questions help the Parties actively share the burden of the impasse.
5. Ask each Party to describe his/her fears (but don't appear condescending and don't make them defensive).
6. Try a global summary of both Parties' sides and what they've said so far,
"telescoping" the case so that the Parties can see the part they're stuck on in overall context. Sometimes, the impasse issue will then seem less important.

7. Restate all the areas they have agreed to so far, praise them for their work and accomplishments, and validate that they've come a long way. Then, ask something like: "do you want to let all that get away from you?"

8. Ask the Parties to focus on the ideal future; for example, ask each: "where would you like to be [concerning the matter in impasse] a year from now?"

Follow the answers with questions about how they might get there.

9. Suggest a trial period or plan; e.g., "sometimes, folks will agree to try an approach for six months and then meet again to discuss how it's working."

10. Help the Parties define what they need by developing criteria for an acceptable outcome. Say: "before we focus on the outcome itself, would you like to try to define the qualities that any good outcome should have?"

11. Be a catalyst. Offer a "what if" that is only marginally realistic or even a little wild, just to see if the Parties' reactions get them unstuck.

12. Offer a model. Say: "sometimes, we see Parties to this kind of dispute agree to something like the following . . . ."

13. Try role-reversal. Say: "if you were [the other Party], why do you think your proposal wouldn't be workable?" or "if you were [the other Party], why would you accept your proposal?"

14. Another role-reversal technique is to ask each Party to briefly assume the other's role and then react to the impasse issue. You also can ask each Party to be a "devil’s advocate" and argue against their own position.

15. Ask the Parties if they would like to try an exercise to ensure they understand each other's position before mediation ends. Ask Party A to state his/her position and why, ask Party B to repeat what B heard, and then ask A if B's repetition is accurate. Repeat for B. Listen and look for opportunities to clarify.

16. Ask: "what would you be willing to offer if [the other Party] agreed to accept your proposal?"

17. Use reality-checking. For example, "what do you think will happen if this goes to court?" Draw out the emotional, financial, and other costs of litigation and delay.

18. If all else fails, suggest (or threaten) ending the mediation. Parties who have invested in the mediation often won't want it to fail, and may suddenly come unstuck. This approach is useful where one Party may be hanging on because he/she enjoys the attention the process provides, or enjoys the other Party's discomfort.