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ADR under the Companies Act, 2013 - Is India Inc. Ready?

■ **K.P.S Kohli**

BACKGROUND

Post independence the Parliament has made laws regarding Alternate Disputes Resolution (“ADR”) under the Legal Services Authorities Act, 1987 and the Arbitration and Conciliation Act, 1996 (“A&C Act”). The incorporation of ADR mechanisms under Section 89 and Order X Rules 1A, 1B and 1C of the Civil Procedure Code, 1908 (“CPC”) was a radical step towards the promotion of ADR mechanisms in India.

Under Section 89 of the CPC, where it appears to the Court that there exist elements of settlement which may be acceptable to the parties, it shall formulate the terms of settlement and give them to the parties for

their observation. The Court may reformulate the terms of possible settlement after receipt of observation and refer the same for arbitration or conciliation or judicial settlement including settlements through Lok Adalat or Mediation.

For conciliation the provisions of A&C Act under Part III, which is modeled on UNCITRAL Conciliation Rules, 1980 shall apply, whereas, mediation follows such procedure as may be prescribed under Part II of the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 (“Civil Procedure ADR & Mediation Rules”). The Rules under Part II of the Civil Procedure ADR & Mediation Rules are called Civil Procedure Mediation Rules (“Mediation Rules”).



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Mediation & Conciliation – The Differentiators

Under the Civil Procedure ADR & Mediation Rules, “Mediation” has been defined, inter-alia, as the process by which a Mediator appointed by parties or by the Court, facilitates discussion between parties, assists parties in identifying issues in dispute, reduce misunderstandings, clarifying priorities, generating options in an attempt to solve the dispute and emphasizing that it is the parties’ own responsibility for making decisions which affect them.

“Conciliation” under the Mediation Rules has been defined, inter-alia, as the process by which a Conciliator who is appointed by parties or by Court, applies the provisions of the A&C Act insofar as they relate to conciliation, and in particular, make proposals for settlement of the dispute and formulate or re-formulate the terms of a possible settlement.

The scope of conciliation and mediation may vary, but both depend on the will of the parties. In Conciliation, the Conciliator brings the parties to an agreement through negotiation after the dispute has arisen and agreement is an

“award” on agreed terms under the A&C Act and is executable like a decree.

On the other hand, a Mediator assists the disputants to reach a negotiable settlement, which results in a signed agreement which is called “settlement”. The Court has to pass a decree on the basis of settlement for the same to be executed as a decree.

CHANGE IN GEARS

The past few years have seen a flurry of reforms in various laws to enhance ease of doing business in India. Numerous old and feeble laws have been repealed or replaced with robust enactments and new laws have been introduced to draw a parallel to the altered national and international economic environment. There is a common overriding objective that the plethora of recent legislations and amendments are trying to achieve i.e. early resolution of disputes especially in commercial matters.

Section 442 of the Companies Act, 2013

One of the many recent enactments that perhaps covers a large number of commercial disputes is the Companies

Act, 2013 (“Companies Act”). Section 442 of the Companies Act interestingly provides the ADR mechanism vis-a-vis Mediation and Conciliation as possible options for parties involved at any stage of the proceedings.

The Companies (Mediation and Conciliation Rules, 2016 (“M&C Rules”) have been notified by the Government under the powers conferred by Section 442 read with Section 469 of the Companies Act. The M&C Rules lay down the procedure for disposal of matters by adopting ADR mechanisms by parties at any stage of the proceeding before the Central Government, “Tribunal” or “Appellate Tribunal”. The National Company Law Tribunal (“NCLT”) is a “Tribunal” constituted under Section 408 of the Companies Act and similarly, the “Appellate Tribunal” is the National Company Law Appellate Tribunal (“NCLAT”) constituted under Section 410 of the Companies Act.

MEDIATION & CONCILIATION UNDER THE M&C RULES

The M&C Rules are unique in many ways from the existing provisions for mediation and conciliation in India. The provisions of M&C Rules are broadly based on the Mediation Rules and provisions of conciliation under the A&C Act. However, certain new provisions have been introduced in the M&C Rules, which are summarized below:

1. Rule 6 provides for application for appointment of Mediator or Conciliator and makes it mandatory for the Central Government or the NCLT or the NCLAT, to refer the matter pending before it for mediation and conciliation upon an application made in Form MDC-2 along with the requisite fee. The ADR mechanisms of mediation or conciliation can be initiated either upon consent of the parties or where the Court feels that there is a scope for settlement under ADR mechanisms.

2. Rule 11 regarding the procedure for disposal of matters, mandates each party to provide to the mediator or conciliator as well as exchange amongst them a brief memorandum setting forth the issues which need to be resolved, within ten days before a session or shorter period at the discretion of the mediator and conciliator. The Rule 11 is similar to Section 65 of the A&C Act, but under Section 65 of the A&C Act conciliator has to ask for information.

3. Rule 14 provides that if a party fails to attend a session or a meeting fixed by the mediator or conciliator deliberately or willfully for two consecutive times, the mediation or conciliation shall be deemed to have failed. There is no automatic failure of mediation and conciliation under the A&C Act.

4. Time limit of three months has been provided for completion of mediation or conciliation under Rule 19 and on expiry of three months, the mediation or conciliation process shall stand terminated. However, upon application by the mediator or conciliator or any party to the proceedings, the period of mediation or conciliation may be extended by such period not exceeding three months. There is no time limit for conciliation under the A&C Act, although under Rule 18 of the Mediation Rules, mediation expires after sixty days from the date fixed for first appearance. The mediation may further extend by not more than thirty days either suo moto, or upon request by the Mediator or any or the parties.


5. Rules 25 and 26 seems to be at variance with the provisions of Sections 73 and 74 of the A&C Act. Under Section 73 parties upon settlement of dispute may draw up and sign a written settlement agreement and such settlement agreement in terms of Section 74 shall have the same status and effect as if it is an arbitral award on agreed terms rendered by an arbitral tribunal under the A&C Act. However, under Rule 25, the settlement agreement signed even in conciliation shall be forwarded to the Central Government or

the NCLT or the NCLAT and under Rule 26, upon satisfaction of the Central Government or the NCLT or the NCLAT regarding settlement of dispute, it shall pass an order in accordance with terms thereof;

6. Rule 29 states that the parties shall not initiate any arbitral or judicial proceedings in respect of a matter that is the subject matter of the mediation or conciliation, except where, such proceedings are necessary for protecting the rights of the parties. The said Rule is similar to Section 77 of the A&C Act, but the Rule 29 also provides for similar bar even in case of mediation.

THE CLOSING NOTE

We should attune our mediation practices with global best practices. Ad-hoc application of ADR mechanisms for resolution of disputes under the Companies Act have often been misused to cause delay by unscrupulous litigants. Thus, introduction of M&C Rules is a welcome measure. The M&C Rules establish a framework for application of ADR mechanisms to disputes arising under the Companies Act. The M&C Rules provides for constitution of a panel of expert mediators and conciliators for disputes arising under the Companies Act. Further, the M&C Rules give power to the Central Government, NCLTs and NCLAT to refer parties to mediation or conciliation if it feels there is a scope of settlement. The disputing parties, who are either, referred by the Central Government or NCLTs or NCLAT or with mutual agreement adopt the M&C Rules have the benefit of the well-defined procedure. The M&C Rules provides for automatic closure of the ADR process, if any party does not attend two consecutive sessions and an automatic closer of proceedings upon completion of three months, if no one time extension of another three months is granted.

The M&C Rules have great potential for effective resolution of disputes arising under the Companies Act, but it remains to be seen if in practice the M&C Rules achieve the objective of early resolution of disputes under the Companies Act. 



With nearly ten years' experience, KPS Kohli is the Associate Partner of the firm and specializes in Telecommunications, IT, Arbitration, Corporate and Commercial. He has worked with various notable conglomerates and regularly advises clients on complex legal matters. An alumni of National Institute of Law, Mr. Kohli offers hands-on legal advice and overall strategic inputs in a wide range of matters that addresses the client's interests and make them trust his legal acumen. He represents the firm in reputed forums as a speaker and also regularly publishes articles/research papers in various publications.