



Compliance with Companies Act, 2013 in relation to the Mediation and Conciliation Panel – Part XIV

The Central Government through its notification dated 9th September, 2016, has introduced the Companies (Mediation and Conciliation) Rules, 2016 (“Rules”). The purpose of this notification is to lay down the procedure for the empanelment of mediators and conciliators as envisaged under Section 442¹ of the Companies Act, 2013 (“Act”). Section 442 of the Companies Act states that the central government shall maintain a panel of experts to be called the mediation and conciliation panel (“Panel”). The main object to constitute a Panel is to shift the burden from the Central Government, National Company Law Tribunal (“NCLT”) and its appellate body National Company Law Appellate Tribunal (“NCLAT”) that deal with disputes under the Act. The Rules have prescribed the qualifications and procedure of appointment in the Panel. Further, the Rules have also elaborated on the procedures to be followed by the mediators or conciliators during the proceedings. Additionally, as per Rule 12, the Panel shall not be bound by the Indian Evidence Act, 1872 or the Code of Civil Procedure, 1908 but are expected to abide by the principles of fairness and natural justice, having regard to the rights and obligations of the parties, usages of trade and the circumstances of the dispute.

Mediation or Conciliation procedure:

As per Rule 6 (2), a reference to the Panel, can be made by either of the parties to the dispute by filing Form MDC – 2. Further, if the matter is *sub judice* in the NCLT or NCLAT, as the case may be, or the matter is referred to Central Government, then these institutions can *suo moto* refer the dispute to the Panel.

The parties can mutually decide upon the sole mediator or conciliator for the proceedings to be carried out between the respective parties and if the parties are unable to decide on a single

¹ Section 442 – Companies Act, 2013 - 1) The Central Government shall maintain a panel of experts to be called as the Mediation and Conciliation Panel consisting of such number of experts having such qualifications as may be prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under this Act.

(2) Any of the parties to the proceedings may, at any time during the proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, in such form along-with such fees as may be prescribed, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the panel referred to in sub-section (1).

(3) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, *suo motu*, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel as the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, deems fit.

(4) The fee and other terms and conditions of experts of the Mediation and Conciliation Panel shall be such as may be prescribed.

(5) The Mediation and Conciliation Panel shall follow such procedure as may be prescribed and dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

(6) Any party aggrieved by the recommendation of the Mediation and Conciliation Panel may file objections, to the Central Government or the Tribunal or the Appellate Tribunal, as the case maybe.



mediator or conciliator then the Central Government or NCLT or NCLAT shall nominate a mediator or a conciliator from the council of experts on behalf of the parties or separately ask each party to nominate a mediator or conciliator. The right of nomination of mediators and conciliators is derived from Rule 6 (4) of the Rules. As specified below, any matter being referred to the Panel, the experts appointed by the Panel are required to dispose of the matter within three months and subsequently forward their recommendations to the Central Government or the NCLT or the NCLAT, as the case may be.

Procedure for disposal of matters:

Rule 11 of the Rules specifically deals with the procedure for disposal of matters. The Panel is under an obligation to follow the below mentioned process:

- (i) Consultation with the parties with respect to the suitable dates and the time for each session,
- (ii) The venue of the session shall be conducted at a place decided by the Central Government or the NCLT or NCLAT or such other place mutually agreed between the disputing parties and the Panel,
- (iii) Conducting joint or separate meetings with the disputing parties,
- (iv) 10 (Ten) days before the commencement of the session, disputing parties shall provide to the Panel and the other party a brief memorandum stating the issues which needs to be resolved. The same period may be reduced at the discretion of the Panel,
- (v) Each party shall furnish to the Panel any other information as may be required by the Panel in connection with the resolution of issues.

The mediator shall discuss or seek concurrence on the issues with the disputing party who nominated him prior to interacting with the other mediator appointed by the other party for resolving the dispute.

Role of the mediator / conciliator:

Rule 17 and 18 of the Rules state that the mediator or the conciliator shall not impose any settlement on the parties and shall limit themselves on facilitating a voluntary resolution between the disputing parties by identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options to settle the dispute. The parties alone will be responsible for coming to a mutual consensus and to resolve the dispute amongst themselves.

Time limit on mediation or conciliation:

As per Rule 19, the whole process of mediation or conciliation should be completed within 3 (three) months from the date of appointment of the mediators or the conciliators. In the event, upon the completion of 3 (three) months and the case is still *subjudice* in NCLT or NCLAT, then the time period for the same may be extended by maximum of three months upon the application by any of the parties to the dispute or by the mediator or the conciliator of that particular dispute.



Further, as per Rule 14, even the parties in dispute are under an obligation to co-operate with the Panel for timely completion of the mediation and conciliation procedure. In the event, the parties fail to attend the two consecutive sessions of the mediation and conciliation process and if it is established that the parties willfully or deliberately missed out on two consequent sessions then the mediation or the conciliation process shall be declared to have failed and the matter shall then be reported to the Central Government or the NCLT.

Communication between the mediator / conciliator and the Tribunal:

In order to preserve the confidentiality of the proceedings under Rule 24, the mediator or the conciliator shall not communicate with the central government or the NCLT, except in the following situations: (i) where the parties have failed to attend the mediation and conciliation session; or (ii) there is any settlement pertaining to the dispute between the parties; or (iii) if the Panel is of the opinion that the case cannot be settled by mediation or conciliation. The Panel, in the abovementioned situations, shall address to the central government or the Tribunal the concerns of the Panel, in writing and by providing a copy to both the parties in dispute.

Further, to maintain the confidentiality, the parties and the mediator or the conciliator are not required to submit documents relating to the mediation or conciliation session nor will they be required to depose before the central government or NCLT regarding any statements made during the sessions.

Additionally, the Panel is duty bound to disclose to the central government or to the NCLT, as the case may be, any facts that can reasonably be construed to impede or affect the independence or impartiality of the mediator or conciliator when carrying out the functions and the same needs to be disclosed to the parties as well.

Settlement agreement:

Where a settlement has been reached amongst the parties either on all of the issues or some of the issues as per Rule 24, the settlement shall be recorded in writing and shall be signed by the parties and the counsels representing the parties. This settlement, accompanied by a cover letter shall be submitted to the central government or the NCLT as the case may be. In case the settlement is not reached within the time period or a settlement is not reached on all matters then the same shall be communicated to the central government or the NCLT in writing as the case may be.

Expenses:

Rule 27 clearly specifies that the expenses of the mediation or conciliation shall be borne by both the parties with the fees divided equally between them and shall be paid in a lump sum at the time of referring the matter for mediation and conciliation. The fee of the mediator or the conciliator shall be fixed by the Tribunal.



Ethics to be followed by the Panel:

Rule 28, as detailed under ANNEXURE A of this article, details the ethical grounds laid down to be observed by the Panel.

No parallel proceedings:

Rule 29 bars the parties to initiate judicial or arbitral proceedings regarding the issue which is being referred for mediation and conciliation. However, it may do so in case it feels that it needs to protect his rights.

Non-arbitrable and in-conciliatory disputes:

Rule 30 specifically, provides the list of disputes which cannot be entertained or referred to mediation and conciliation process this Rules. The list is as follows:

- i. Matters in respect of inspection, investigation or inquiry under chapter XIV of the Act;
- ii. Matters relating to defaults or offences for which applications for compounding have been made by one or more parties;
- iii. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.;
- iv. Cases involving prosecution for criminal and non-compoundable offences; and
- v. Cases which involve public interest or interest of numerous persons who are not parties before the government administrator or tribunal as the case may be.

Conclusion

These Rules shall ease the burden of courts by promoting the alternative method of dispute resolution. The process of mediation and conciliation under this Rule is time bound, which implies that there will be a speedy solution to the dispute. Further, due to strict confidentiality provisions, Panel is bound to keep the proceedings private and talks transpired between the Parties shall not be disclosed. This approach will encourage the parties to come to a common solution by mutual consensus and reduce burden on the already overburdened legal institutions. The real question is whether India, where parties are ready to litigate is equipped or ready for such conciliatory process or will such processes just extend the already lengthy process of dispute resolution.



ANNEXURE A

The mediator and conciliator shall:

- a) follow and observe the rules strictly and with due diligence;
- b) not carry on any activity or conduct which shall reasonably be considered as conduct unbecoming of a mediator or conciliator;
- c) uphold the integrity and fairness of the mediation or conciliation process;
- d) ensure that the parties involved in the mediation or conciliation are fairly informed and have an adequate understanding of the procedural aspects of the process;
- e) satisfy himself or herself that he or she is qualified to undertake and complete the assignment in a professional manner;
- f) disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias;
- g) avoid, while communicating with the parties, any impropriety or appearance of impropriety;
- h) be faithful to the relationship of trust and confidentiality imposed in the office of mediator or conciliator;
- i) conduct all proceedings related to the resolutions of a dispute, in accordance with the relevant applicable law;
- j) recognise that the mediation or conciliation is based on principles of self-determination by the parties and that the mediation or conciliation process relies upon the ability of parties to reach a voluntary, undisclosed agreement; and
- k) maintain the reasonable expectations of the parties as to confidentiality and refrain from promises or guarantees of results.

Provided that if any party finds conduct of mediator or conciliator violatively of ethics laid down in this rule, the party may immediately bring it to the notice of the Regional Director.