

Chapter Three: Mediation

Mediation /Conciliation

In the preceding sub-sections you have dealt with about negotiation and its features. In this part you will get answers for the questions:

- ✚ What is mediation /Conciliation? And their difference from negotiation?
- ✚ Are mediation and conciliation the same?
- ✚ What merits and demerits does mediation have?
- ✚ What are the roles of mediator?
- ✚ What would be the legal effect of mediated agreement? And so forth.

2.4.1 Meaning of mediation /Conciliation

The history of mediation only begins to define what it is. Many questions about mediation are answered by understanding what mediation is and what it is not. The practice falls along a spectrum that defies a strict definition. The specifics of mediation depend on what is being mediated, the parties in a dispute, who is doing the mediating and the setting in which mediation is offered.

Mediation / conciliation is an alternative to violence, self –help or litigation that differs from the process of counselling, negotiation, and arbitration. It can be defined as the processes by which the participants, together with the assistance of neutral person or persons, systematically isolate disputed issues in order to develop optional alternatives and reach a consensual settlement that will accommodate their needs. Mediation/conciliation is a process that emphasizes the participants‘ own responsibility for making decisions that affects their lives. It is therefore a self-empowering process. Thus , it is purely different from negotiation so long as there exist a third party involvement.

The more useful way of looking at mediation / conciliation is to see it as a goal –directed, problem –solving intervention. It is intended to resolve disputes and reduce conflict as well as provide a forum for decision making. Even if all elements of the dispute may not be resolved, the underlying conflict can be understood by the participants and reduced to manageable level.

Though some people mention the difference in meaning between mediation and conciliation, others unlike argue that both words are to mean the same thing. And the argument which supports the interchangeability of the two words prevails. In both procedures a successful completion of the proceedings results in a mutually agreed settlement of disputes between the parties though, in some jurisdiction, mediation is treated as distinct from conciliation in as much as in mediation the emphasis is the more positive role of the neutral third party than conciliation. Still others say that conciliation is —non-binding arbitration‖ whereas

mediation is merely —assisted negotiation. As already said, these factors where the role that the neutral third party can play depend on the nature of the disputes, the degree of the willingness of the parties and the skill of the individual neutral. In this teaching material mediation and conciliation are as synonymous. In Ethiopia the word conciliation is used.

2.4.2 Features of Mediation /Conciliation

Mediation, differ from arbitration where the outsider decides for the parties (their behalf) how the matter is to be resolved. Although a mediator may recommend or try to influence a party, he or she has no comparable decision making powers and practical or legal ability to compel any party to do or refrain from doing any thing. This is to mean that mediation is not binding.

Practical purpose of mediation is settlement. To facilitate the settlement, parties normally insert —with out prejudice clause in their discussion. A —with out prejudicel process does not alter a party_s legal right. No admission or inferences are drawn from the fact of participation. All with out prejudice —communication is a protected one that shelters under the confide settlement attempts and can not latter be used to harm the communicator. Admissions against interests made during the course of with out prejudice discussion are not be used against the admitting party to its detriment, such as to prove facts or issues in a law suit.

Mediation could be annexed to the court system, so as to become a judgment of the court if the agreement is reached. The parties may define the issues to be settled by themselves or the mediator may assist them in this regard. The extent to which the mediator interferes in the negotiation process can vary widely , on a continuum ranging from mere as chairperson , to very structured process in which the mediator go so far as to suggest settlements to the parties.

2.4.3 Perceived advantages of mediation

When used in the contested of on going relation ships, mediation allows underlying issues and emotion to be addressed and resolved , and so allows the relation ship to be continued in the future . Thus, mediation is commonly used in the area of family law. As the decision is reached by the parties to the dispute instead of being imposed on them, there is a great satisfaction with the dispute resolution process and out come, and consequently, greater compliance with the result. The process is less confrontational than adjudication and so reduces the likely hood of win or loss mentality and provides a frame work for the future dispute between the parties. As opposed to adjudication, mediation process is faster, cheaper and less formalized, both in terms of process and in tailoring results. This increased flexibility allows the needs of particular parties to be addressed.

2.4.4 Perceived disadvantages of mediation

As of the perceived advantages, there are also shortcomings of mediation: it is inappropriate where parties to a dispute are at an imbalance of power, or where there is a history of physical violence, as one intimidates the other; it also increases cost if mediation fails and arbitration follows; an unrepresented party by a lawyer may be disadvantaged than the represented one. It is also questionable whether the perceived advantages of mediation are possible if the process is involuntary. There are concerns regarding the ability and qualification of mediators, and whether they should be subject to professional standards. Finally, the use of mediator as alternative to court adjudication may result in second class justice for low-income and disadvantaged peoples.

2.4.5 Mediation proceedings and the roles of mediator(s)

Mediation involves an impartial, independent third party, mediator, helping disputing parties to reach a voluntary, mutually agreed solution. The disputants, not the mediator decide the terms of the agreement. The only function of mediator is to assist the disputants to overcome any obstacles during their negotiation, to determine the dispute in the hope that disputants and mediator will develop creative solutions that satisfy their interest.

To achieve this purpose there are various stages in mediation with their own characteristics which demand different skills of arbitrator. Writers divided these steps into different stages: some of them make the steps ten and others make it seven.

Here under you will see various stages of mediation (mediation proceeding) and the function of mediator in each stage.

A) Introduction and setting frame work

The mediator is responsible for the condition which prevails at the mediation. After the mediator welcomes the disputing parties, he will explain the process and his/her approach to the disputants and try to make them at ease with the process. The mediator at this stage should inform the disputants that he is impartial and neutral. Furthermore, apart from his impartiality and neutrality, he should tell the parties that he does not have the role of judge or arbitrator since he is there just to facilitate the negotiation process between the parties. At the same time mediator sets ground rules /rules of courtesy and introduces the same to the disputants so as to attain full cooperation of parties to listening each other, to be open for the persuasion and to have a forward looking to avoid their difference through smooth dialogue.

The rules of courtesy may include the following contents and others depending on the nature of dispute or issues involved thereof.

- 1) Disputants should respect the view of the other party.
- 2) Disputants can leave the mediation at any time and they will not be coerced in the solution.

- 3) Mediation could be taken place with the presence of mediator and parties in the same ceiling or private meeting with the mediator.
- 4) Information discussed in mediation is confidential: issues revealed during mediation process remain secret.
- 5) A mediator can not be called as a witness at the future proceedings and that the mediator notes can not be cited.

B) Statement taking

After the ground rules have been set and accepted by the parties, each party in a dispute explains the dispute from his perspectives. Depending on the case or the emotion of the parties involved, the process may or may not take longer period. At this juncture, the mediator makes sure that there is no interruption while one of the parties expresses his feeling. In addition he would take note concerning the interest of disputing parties and the preliminary ideas for settlement. In this regard, for instance, Art. 3320 Civil Code of Ethiopia imposes duty upon conciliator (mediator) to ensure that parties in mediation process express their view. Other important functions of mediator at this stage of proceeding is summarizing and checking the accuracy of the arguments of parties.

C) List /agenda construction

This stage is for the mediator to conduct open sessions to ask the disputants questions, to clarify perceptions and underlying interests. Parties suggest topics, agree on the list of the issues, and agree on the priority of agenda to be discussed. While the parties forward their opinion on the matter, there might be words which offend the other party and the mediator need to substitute these words with positive language. Generally the mediator here attempts to identify agreed upon facts and issues.

D) Exploration

Following determination of the agendum, parties will discuss the lists. The mediator here encourages parties to talk each other directly as far as the dispute or the issue is their. The mediator directs parties move from blame to understand each other's position. At the point where parties face difficult items, mediator assists them on resolving the issue.

E) Separate meeting(caucuses)

A separate meeting (caucuses) is one of the techniques used by the mediator in conducting the meditation process. At the open session of mediator and disputants, real intention and interest of the latter may not be revealed and to get the real intention of parties mediator can arrange separate meeting with each of the disputants. Such meetings are an opportunity for the

mediator and each party to explore frankly and in confidence the issue in the case and option for settlement. The benefits of having caucuses by neutral party include;

- i. It enables mediator to build closer relation ship with parties
- ii. It avoids firm position of disputing parties that they hold as the time of joint session.
- iii. Allow for deeper and sustainable discussion on the issue with out argument or interruption

F) Option generation, negotiation

There are several ways of generating options. These ways include: writing, interview, survey, bench marking and brain storming session. One of the main ways to generate option is brain storming. It is conducted by out lining the aims of the session by mediator. It is conducted to identify problems to generate feasible ideas as a solution to the problem identified by drawing on people's own experience and to the problems, and to help the participants to develop a new skill that they could use themselves in the future.

After generating all possible ideas or options, it is useful for an efficient brainstorming that the facilitator looks for common theme or categories and grouping the problems and ideas.

F. Selecting an option.

At this stage of mediation process, the mediator will allow the disputants to assess the options generated and comment on options that may be feasible or that may be impractical. The mediator may afford objective criteria or bench marks to help disputants in choosing a best option and the ones which is conceived as fair by both parties. Mediation would be much more effective if the participants do have standards by which they rely on their proposed solution for amicable solution. The criteria may include market value, depreciation cost, etc.

G. Closure

As discussed in the previous sub-sections parties in a dispute often put the BATNA while they negotiate to end their dispute amicably. Based on the BATNA they evaluate the proposed solution suggested by the other party and accept the proposal if it is better than their BATNA. If the disputants reach an agreement, they can put their agreement in writing. The parties can then determine with the assistance of the mediator, what steps they need to take to implement the agreement. Such as when, where and how the agreement has to implement will be determined.

If there is no agreement, the mediator can assist the disputants to determine whether there are any issues that they can agree on.

2.4.6 The roles of lawyers in mediation

Lawyers may assume different participatory roles in mediation. A lawyer may represent his client and negotiate on his behalf. In case of court annexed mediation particularly, clients would favour if their lawyers involved in that process.

Lawyers would enable their clients to assess litigation consequences if the latter take their dispute to courts, and also disputants would get sufficient information about the working atmosphere in court.

Lawyers should be able to inform disputants of the relevant law and suggest possible court outcome. However, the extent of his help should be limited to general information, to the extent of defining the legal issues. Lawyers should not serve as legal advisors or should not direct the decision of the clients in line with their interpretation of the law as applied to the fact of the situation. Even after agreement of disputing parties is reached, lawyers can play great role to draft the agreement of their clients through mediation process.

Indeed, there are various arguments about the appropriate roles of lawyers who serve as mediators. The first line of argument is the one which equates mediation with presentation and raises ethical values that prohibits the practice of attorney mediation. Second argument on the opposite supports the role of lawyer as mediator in carefully prescribed conditions.

2.4.7 Legal effects of mediated agreement.

The purpose of mediation is to enable the parties to arrive at a mutually acceptable resolution of the dispute in a cooperative and informal manner. If the matter is settled at mediation, the mediation agreement, as observed from practice and contents of laws on this regard, is considered to be a contract and is enforced under the general principle of contract law. The Ethiopian law, for instance, has the similar position. Art. 3320 of the civil code requires conciliator to draw up the terms of compromise when the parties settled their dispute amicably, i.e. through mediation. Art. 3307 C.C also defined compromise as one forms of contract. The provision reads as —A compromise is a contract whereby the parties, through mutual concession, terminate an existing dispute or prevent a dispute arising in the future.¶ If one of parties in their compromise renounced all of his rights ,actions and claims , he will loose such rights , actions and claims for good. We can also understand from art.1731 of the C.C that contractual agreement is a law between contracting parties and parties are duty bound to respect their promise.