

## DRAFT RULES UNDER THE COMPANIES ACT, 2013

### Chapter XXVIII

#### (Rules in respect of Clause 442: MEDIATION AND CONCILIATION PANEL)

##### **28.1. Panel of mediators/conciliators.**

(a) For the purposes of sub-section (1) of section 442 of the Act, any body, institute or association which has been authorized in this behalf by the Central Government shall prepare a panel of experts (to be called as Mediation and Conciliation Panel) willing and eligible to be appointed as mediators/conciliators and such Mediation and Conciliation Panel shall be placed on the website of Ministry of Corporate Affairs or any other website as may be notified by the Central Government.

(b) Any person who intends to get empanelled as mediator/conciliator possessing the requisite qualifications shall make an application addressed to the body, institute or association notified by the Central Government in **Form No. 28.1**. Such body, institute or association shall carry out due diligence before including the name of any person on the Mediation and Conciliation Panel. The body, institute or association may lay down regulations with the approval of the Central Government for considering the name of a person for inclusion in the Mediation and Conciliation Panel and for the purpose charge entrance and annual fee as may be determined by it.

##### **28.2. Qualifications of persons to be empanelled as experts under Rule 28.1.**

The following persons may be enlisted as experts in the panel of mediators/conciliators under Rule 28.1, namely:

- (a) Retired Judges of the Supreme Court of India;
- (b) Retired Judges of the High Courts;
- (c) Retired District & Sessions Judges;
- (d) Retired Members or Registrar of National Tribunal constituted under any law for the time being in force;
- (e) Retired Indian Corporate Law Service Officers or Indian Legal Service Officers with the equivalent pay scale of Joint Secretary to the Government of India or more
- (f) Advocates with at least fifteen years standing at any Bar Council;
- (g) Professionals with at least fifteen years of continuous practice as Chartered Accountant or Cost Accountant or Company Secretary;
- (h) Retired Members and Presidents of State Consumer Forums; and
- (i) Persons who are experts in mediation/conciliation to be decided by the Central Government from time to time.

##### **28.3. Disqualifications of persons.**

(1) The following persons shall be deemed to be disqualified for being empanelled as mediators/conciliators:

- (a) any person who is an undischarged insolvent or has applied to be adjudicated as an insolvent and his application is pending;
- (b) any person:
  - (i) against whom criminal charges involving moral turpitude are framed by a court and are pending; or
  - (ii) who has been convicted by a criminal court or any other court for any offence involving moral turpitude.

(c) any person against whom disciplinary proceedings have been initiated by the appropriate disciplinary authority which have resulted in a punishment.

(2) The following persons shall be deemed to be disqualified for being appointed as mediators/conciliators:

(a) any person who is interested or connected with the subject-matter of dispute(s) or is related to any one of the parties or to those who represent them; and

(b) any authorised representative who has appeared or is appearing for any of the parties in the suit or in other proceedings(s).

#### **28.4. Deletion from panel.**

The body, institute or association may delete any person in the panel of mediators/conciliators by recording reasons in writing and after giving him an opportunity of being heard.

#### **28.5. Preference.**

The Central Government, Tribunal or the Appellate Tribunal shall, while nominating any person from the panel of mediators/conciliators referred to in Rule 28.1, consider his suitability for resolving the dispute(s) involved and shall give preference to those who have proven record of successful mediation/conciliation or who have special qualification or experience in the relevant field.

#### **28.6. Duty of mediator/conciliator to disclose certain facts.**

(a) When a person is approached in connection with his proposed appointment as mediator/conciliator, he shall disclose any circumstance likely to give rise to a reasonable doubt as to his independence or impartiality.

(b) Every mediator/conciliator shall from the time of his appointment and throughout continuance of the mediation/conciliation proceedings, without delay, disclose to the parties, about the existence of any circumstance referred to in sub-rule (a).

#### **28.7. Withdrawal of appointment.**

Upon information furnished by the mediator/conciliator under rule 28.6, or upon any other information received from the parties or other persons, if the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, where the proceeding is pending, or the body, institute or association notified by the Central Government, is satisfied that such information has raised a reasonable doubt as to the mediator/conciliator's independence or impartiality, it may withdraw the nomination and replace him by another mediator/conciliator.

Provided that the mediator/conciliator may, himself, offer to withdraw from the proceedings and request the relevant authority or parties to appoint another mediator/conciliator.

#### **28.8. Procedure of mediation/conciliation.**

For the purposes of sub-section (5) of section 442 of the Act,

(a) The parties may agree on the procedure to be followed by the mediator/conciliator in the conduct of the mediation/conciliation proceedings.

(b) Where the parties do not agree on any particular procedure to be followed by the mediator/conciliator, the mediator/conciliator shall follow the procedure hereinafter mentioned, namely:

(i) he shall fix, in consultation with the parties, a time schedule, the dates and the time of each mediation/conciliation session, where all parties have to be present;

(ii) he shall hold the mediation/conciliation at the place decided by the Central Government, the Tribunal or the Appellate Tribunal or the place where the parties and the mediator/conciliator jointly agree;

(iii) he may conduct joint or separate meetings with the parties;

(iv) each party shall, ten days before a session, provide to the mediator/conciliator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator/conciliator to understand the issue; such memorandum shall also be mutually exchanged between the parties. However, in suitable/appropriate cases, the period of ten days may be curtailed at the discretion of the mediator/conciliator;

(v) each party shall furnish to the mediator/conciliator such other information as may be required by him in connection with the issues to be resolved.

(c) Where there is more than one mediator/conciliator, the mediator/conciliator nominated by each party may first concur with the party that agreed to nominate him and thereafter interact with the other mediator/conciliator, with a view to resolve the dispute(s).

## **28.9. Mediator/conciliator not bound by Indian Evidence Act, 1872 or Code of Civil Procedure, 1908.**

The mediator/conciliator shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, but shall be guided by the principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the circumstances of the dispute(s).

## **28.10. Representation of parties.**

The parties shall ordinarily be present personally or through authorised attorney at the sessions or meetings notified by the mediator/conciliator. However, they may be represented by the counsel with permission of the mediator/conciliator in such sessions or meetings.

The party not residing in India may, with the permission of the mediator/conciliator, be represented by his or her authorised representative at the sessions or meetings.

## **28.11. Consequences of non-attendance of parties at sessions or meetings on due dates.**

If a party fails to attend a session or a meeting notified by the mediator/ conciliator on account of deliberate or willful act, the other party or the mediator/conciliator can apply to the Central Government or the Tribunal or the Appellate Tribunal for issuance of necessary direction in the matter having regard to the facts and circumstances of the case.

## **28.12. Administrative assistance.**

In order to facilitate the conduct of mediation/conciliation proceedings, the parties, or the mediator/conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

## **28.13. Offer of settlement by parties.**

(a) Any party to the application may, 'without prejudice', offer a settlement to the other party at any stage of the proceedings, with a notice to the mediator/conciliator.

(b) Any party to the application may make a, 'with prejudice' offer, to the other party at any stage of the proceedings, with a notice to the mediator/conciliator.

## **28.14. Role of mediator/conciliator.**

The mediator/conciliator shall attempt to facilitate voluntary resolution of the dispute(s) by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute(s), emphasizing that it is the responsibility of the parties to take decision which affect them. He shall not impose any terms of settlement on the parties. However, if both the parties consent, he may impose such terms and conditions on the parties for early settlement of the dispute.

## **28.15. Parties alone responsible for taking decision.**

The parties shall be made to understand that the mediator/conciliator only facilitates in arriving at a decision to resolve dispute(s) and that he will not and cannot impose any settlement nor does the mediator/conciliator give any assurance that the mediation/conciliation will result in a settlement. The mediator/conciliator shall not impose any decision on the parties.

## **28.16. Time limit for completion of mediation/conciliation.**

On the expiry of ninety days from the date fixed for the first appearance of the parties before the mediator/conciliator, the mediation/conciliation shall stand terminated, unless the Central Government or the Tribunal or the Appellate Tribunal, which referred the matter, either suo motu, or upon request by any of the parties, and upon hearing all the parties, is of the view that extension of time is necessary or may be useful; but such extension shall not be beyond a further period of thirty days.

## **28.17. Parties to act in good faith.**

All the parties shall commit to participate in the proceedings in good faith with the intention to settle the dispute (s), if possible.

## **28.18. Confidentiality, disclosure and inadmissibility of information.**

(a) When a mediator/conciliator receives factual information concerning the dispute(s) from any party, he shall disclose the substance of that information to the other party, so that the other party may have an opportunity to present such explanation as it may consider appropriate:

Provided that when a party gives information to the mediator/conciliator subject to a specific condition that it be kept confidential, the mediator/conciliator shall not disclose that information to the other party.

(b) Receipt or perusal, or preparation of records, reports or other documents by the mediator/conciliator, while serving in that capacity shall be confidential and the mediator/conciliator shall not be compelled to divulge information regarding those documents nor as to what transpired during the mediation/conciliation before the Central Government or the Tribunal or the Appellate Tribunal or any other authority or any person or group of persons.

(c) Parties shall maintain confidentiality in respect of events that transpired during the mediation/conciliation and shall not rely on or introduce the said information in other proceedings as to:

- (i) views expressed by a party in the course of the mediation/conciliation proceedings;
- (ii) documents obtained during the mediation/conciliation which were expressly required to be treated as confidential or other notes, drafts or information given by the parties or the mediator/conciliator;
- (iii) proposals made or views expressed by the mediator or conciliator;
- (iv) admission made by a party in the course of mediation/conciliation proceedings;
- (v) the fact that a party had or had not indicated willingness to accept a proposal.

(d) There shall be no audio or video recording of the mediation/conciliation proceedings.

(e) No statement of parties or the witnesses shall be recorded by the mediator/conciliator.

## **28.19. Privacy.**

The Mediation/conciliation sessions or meetings would be conducted in privacy where the persons as mentioned in Rule 28.1 shall be entitled to represent parties. However, other persons may attend only with the permission of the parties and with the consent of the mediator/conciliator.

## **28.20. Immunity.**

No mediator/conciliator shall be held liable for anything bonafide done or omitted to be done by him during the mediation/conciliation proceedings for civil or criminal action nor shall he be summoned by any party to the suit or

proceeding to appear before the Central Government or the Tribunal or the Appellate Tribunal to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation/conciliation proceedings.

## **28.21. Communication between mediator/conciliator and the Central Government or the Tribunal or the Appellate Tribunal.**

(a) In order to preserve the confidence of parties in the Central Government or the Tribunal or the Appellate Tribunal and the neutrality of the mediator/conciliator, there should be no communication between the mediator/conciliator and the Central Government or the Tribunal or the Appellate Tribunal except as stated in sub-rules (b) and (c) of this Rule.

(b) If any communication between the mediator/conciliator and the Central Government or the Tribunal or the Appellate Tribunal is necessary, it shall be in writing and copies of the same shall be given to the parties or the authorised representative.

(c) Communication between the mediator/conciliator and the Central Government or the Tribunal or the Appellate Tribunal shall be limited to communication by the mediator/conciliator:

(i) with the Central Government or the Tribunal or the Appellate Tribunal about the failure of the party to attend;

(ii) with the Central Government or the Tribunal or the Appellate Tribunal about the consent of the parties;

(iii) regarding his assessment that the case is not suited for settlement through the mediation/conciliation;

(iv) that the parties have settled the dispute(s).

## **28.22. Settlement Agreement.**

(a) Where an agreement is reached between the parties in regard to all the issues in the suit or proceeding or some of the issues, the same shall be reduced to writing and signed by the parties. If any counsel has represented the parties, the conciliator/mediator may also obtain his signature on the settlement agreement.

(b) The agreement of the parties so signed shall be submitted to the mediator/conciliator who shall, with a covering letter signed by him, forward the same to the Central Government or the Tribunal or the Appellate Tribunal.

(c) Where no agreement is arrived at between the parties, before the time limit stated in Rule 28.16 or where, the mediator/conciliator is of the view that no settlement is possible, he shall report the same to the Central Government or the Tribunal or the Appellate Tribunal in writing.

## **28.23. The Central Government or the Tribunal or the Appellate Tribunal to fix a date for recording settlement and passing decree.**

(a) The Central Government or the Tribunal or the Appellate Tribunal shall fix a date of hearing normally within fourteen days from the date of receipt of the report of the mediator or conciliator under rule 28.22. On such date of hearing, if the Central Government or the Tribunal or the Appellate Tribunal is satisfied that the parties have settled their dispute(s), it shall pass a decree in accordance with terms thereof.

(b) If the settlement dispose of only certain issues arising in the suit or proceeding, on the basis of which any decree is passed as stated in sub-rule (a), the Central Government or the Tribunal or the Appellate Tribunal shall proceed further to decide remaining issues.

## **28.24. Fee of mediator/conciliator and costs.**

- (a) At the time of referring the dispute(s) to the mediation/conciliation, the Central Government or the Tribunal or the Appellate Tribunal may, fix the fee of the mediator/conciliator.
- (b) As far as possible, a consolidated sum may be fixed rather than for each session or meeting.
- (c) Where the Tribunal has nominated or appointed mediators or conciliators under sub-rule (b) of Rule 28.1, the Tribunal shall fix the fee payable to the mediators/conciliators, which shall be shared equally by the two sets of parties.,
- (d) The expense of the mediation/conciliation including the fee of the mediator/conciliator, costs of administrative assistance, and other ancillary expenses concerned, shall be borne equally by the various contesting parties or as may be otherwise directed by the Tribunal.
- (e) Each party shall bear the costs for production of witnesses on his side including experts, or for production of documents.
- (f) The mediator/conciliator may, before the commencement of the mediation/conciliation, direct the parties to deposit equal sums, 100% of the probable costs of the mediation/conciliation.
- (g) If any party or parties do not pay the amount referred to sub-rule (f), the Central Government, the Tribunal or the Appellate Tribunal, shall, on the application of the mediator/conciliator, or any party, issue appropriate directions to the concerned parties.
- (h) If the expense of the mediation/conciliation including fee, is not paid by the parties, the Central Government, the Tribunal or the Appellate Tribunal, shall, on the application of the mediator/conciliator or the parties, direct the concerned parties to pay, and if they do not pay, the Tribunal shall recover the said amounts as if there was a decree for the said amount.

## **28.25. Ethics to be followed by mediator/conciliator.**

The mediator/conciliator shall:

- (a) follow and observe these Rules strictly and with due diligence;
- (b) not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator/conciliator;
- (c) uphold the integrity and fairness of the mediation/conciliation process;
- (d) ensure that the parties involved in the mediation/conciliation are fairly informed and have an adequate understanding of the procedural aspects of the process;
- (e) satisfy himself/herself that he/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/conciliator;
- (i) conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;
- (j) recognize that the mediation/conciliation is based on principles of self-determination by the parties and that the mediation/conciliation process relies upon the ability of parties to reach a voluntary, undisclosed agreement;
- (k) maintain the reasonable expectations of the parties as to confidentiality and refrain from promises or guarantees of results.

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## **28.26. Transitory provisions.**

Until a panel of Mediators/Conciliators is prepared by the Central Government or body, institute or association as stated in Rule 28.1, the Central Government or the Tribunal or the Appellate Tribunal may nominate a mediator/conciliator of its choice, if the mediator/conciliator belongs to the various classes of persons referred to in Rule 28.2 and is duly qualified and is not disqualified, taking into account the suitability of the mediator/conciliator.