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Mediators for Company Disputes in India – How effective will this be?

Anil Xavier (Indian Institute of Arbitration & Mediation (IIAM)) · Friday, September 30th, 2016

The Ministry of Corporate Affairs (MCA), Government of India, notified the "Companies (Mediation and Conciliation) Rules, 2016" on September 9, 2016. With the publication of these Rules, Central Government introduces a structure of setting up of a panel of mediators or conciliators who will have the role to communicate the view of each party in a dispute, identify issues, reduce misunderstanding, clarify priorities and facilitate voluntary resolution of the dispute based on the consent of parties.

These Rules were made to implement the provisions in Section 442 of the (Indian) Companies Act, 2013. As per the said section, the Central Government has to maintain a panel of experts to be called as the Mediation and Conciliation Panel for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or the Appellate Tribunal under the Companies Act. It provides that 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, for the matter pertaining to such proceedings to be referred to the Mediation and Conciliation Panel. It also makes provision for the Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending to *suo-motu* refer any matter pertaining to such proceedings to the Mediation and Conciliation Panel.

It makes sense to provide a structure to resolve disputes under the Companies Act by way of mediation where the parties could take the responsibility of finding a resolution themselves.

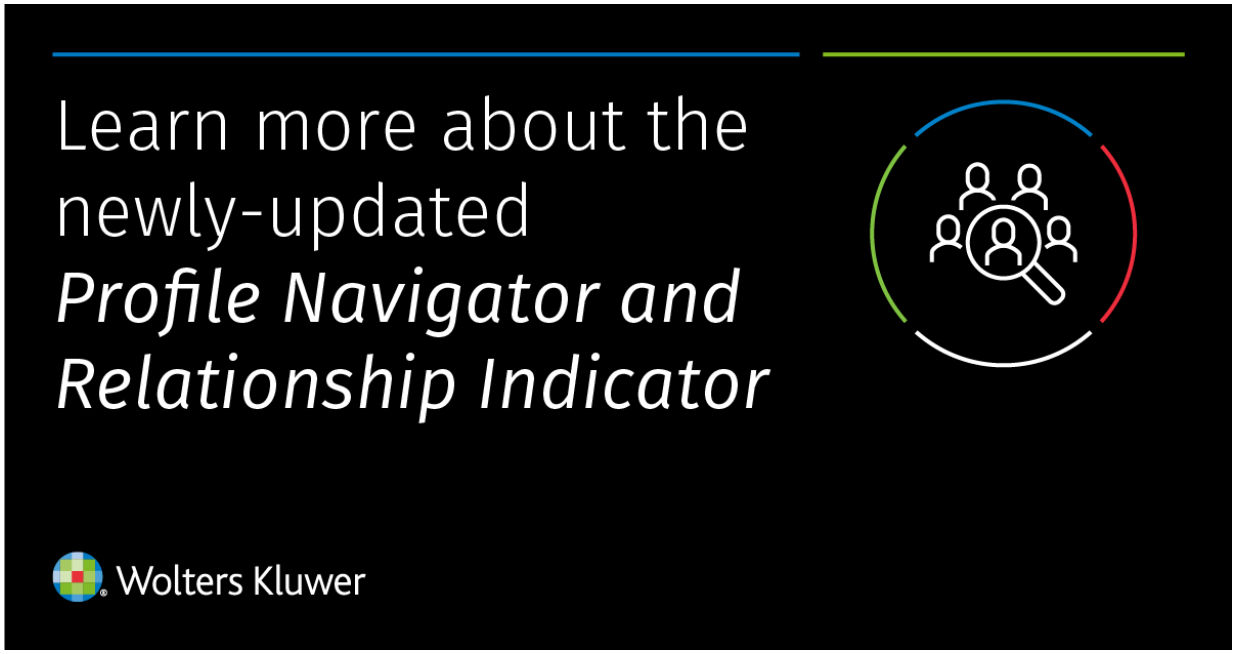
The Rules stipulate that the mediation shall be facilitative. Rule 17 says that the Mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, emphasizing that it is the responsibility of the parties to take decisions which affect them and the mediator shall not impose any terms of settlement on the parties. Rule 18 also reiterates this mode of mediation, stating that the parties shall be made to understand that the mediator will facilitate the parties in arriving at a resolution and the mediator shall not and cannot impose a settlement or decision on them. This is in tune with the international style and mode of mediation – viz., facilitative mediation.

But when we look at the qualifications prescribed for admission as a mediator to the Mediation & Conciliation Panel, which is provided under Rule 4, one may probably question whether the Rule-makers really understood the meaning, mode and style of facilitative mediation and whether they confused the process of mediation with arbitration. As per Rule 4, a person shall not be eligible to

be on the panel as a mediator unless he:

(a) has been a Judge of the Supreme Court of India; or
(b) has been a Judge of the High Court; or
(c) has been a District & Sessions Judge; or
(d) has been a Member or Registrar of a Tribunal constituted at the National level under any law for the time being in force; or
(e) has been an officer in the Indian Corporate Law Service or Indian Legal Service with fifteen years experience; or
(f) is a qualified legal practitioner for not less than ten years; or
(g) is or has been a professional for at least fifteen years of continuous practice as Chartered Accountant or Cost Accountant or Company Secretary; or
(h) has been a member or President of any State Consumer Forum; or
(i) is an expert in mediation or conciliation who has successfully undergone training in mediation or conciliation.

Out of the nine eligibility criteria, the first eight require no formal training in facilitative mediation and those who would be eligible under these criteria would in all probability fail to follow facilitative mediation as prescribed under the Rules. Facilitative mediation is a science and an art and trained mediators would know that it is a highly skilled profession. It would have been better if the Rule-makers had understood the science of mediation and determined eligibility based on the mediators' quality, skill and efficiency, rather than establishing a panel of retired Judicial and Quasi-Judicial officers who have been trained on adversarial adjudication and not on facilitative amicable resolution. Let us see how effective mediation will be under these Rules.



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