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Mediation Rules – Efficient dispute resolution mechanism or increasing uncertainty?

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The government has recently notified the Companies Mediation and Conciliation Rules, 2016 ('Rules'), pursuant to its powers to implement provisions of the Companies Act, 2013 ('Act'), under s. 469 of the Act. These rules give teeth to s. 442 of the Act, which, is a new and welcome provision that enables settlement of disputes through 'alternate dispute resolution'. It gives parties the option to refer proceedings pending before the Central Government, Tribunal or Appellate Tribunal, at any stage, to mediation conducted by the Mediation and Conciliation Panel ('Panel'). As per the Rules, this Panel will consist of judicial experts (like ex-judges, experienced legal practitioners, ex-member of tribunal/ national or state commissions), or experts particularly within the field of corporate law (like experienced Chartered Accountants, Cost Accountants or Company Secretaries). In addition, the Central Government, the Tribunal or the Appellate Tribunal also have the power to *suo-moto* refer a dispute to the Panel. However, disputes pertaining to investigations initiated under Chapter XIV of the Act i.e. misfeasance and malfeasance of the officers of the company, or those involving serious and specific allegations of fraud, or cases involving prosecution for criminal and non-compoundable offences cannot be referred to mediation or conciliation.

Briefly, the procedure specified in the Rules entails that any party can apply to the Central Government, Tribunal or Appellate Tribunal ('Relevant Authority') at any stage of the on-going proceedings, to refer the same to mediation. Consequently, such Relevant Authority shall appoint one or more experts from the Panel, to mediate the dispute. The Relevant Authority may also *suo-moto* refer a dispute to mediation. The Parties may agree on the name of the sole mediator or conciliator for meditation between them. However, where there are two or more number of Parties who are unable to agree on a sole mediator, Relevant Authority may ask each party to nominate the mediator or move to appoint one on its own. The Rules ensure that the mediators/ conciliators always remain independent and impartial in carrying out their functions.

The goal of all mediations is to facilitate the parties to reach an amicable settlement. If the mediation is successful, it may result in a settlement agreement with consent of all parties. However, all dispute referred to mediation are subsequently recorded in the order of the Relevant Authority after the recommendation of the Panel is submitted to it. It is also likely that the parties may reach settlement only on some issues, in which case the Relevant Authority shall dispose such issues and move to decide the remaining issues on its own.

The Rules also ensure that the Panel acts in good faith, by specifying certain ethics that should be followed by a member of the Panel. These include, upholding ideals of fairness towards the Parties, especially by being mindful of the relationship of trust that should be maintained throughout the proceedings.

These provisions have been enacted primarily to reduce the judicial burden on the relevant authorities mentioned, i.e., the Central Government, Tribunal and the Appellate Tribunal. Principally, mediation as a method of dispute resolution is viable for disputes under the Act, since it can lead to efficient and commercially viable means to resolve disputes between parties. At the same time providing parties with the protection of confidentiality of information and prohibition of use of such of the information in any other proceedings. This is especially relevant, since, mediation is not as time consuming a process, as adjudication before Courts, Tribunals or even arbitral tribunals. Accordingly, if a relevant expert is appointed as the Mediator, which the

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Rules seem to take into account, the Rules have the potential to become a very popular method of amicably resolving disputes.

However, the structure and the manner in which the Rules state the procedure of mediation, leave sufficient cause for concern. For instance, the Rules provide little guidance on how a *suo-moto* referred mediation, should operate in co-existence with Rules 29, which restricts parties to a mediation from approaching arbitral or judicial fora, during the pendency of a mediation under the Rules, unless the initiation of such proceedings would be in its own interests. Therefore, if a party is not participating in the mediation with the good intention of reaching an amicable settlement, its subjective determination of its own interests, can lead it to indulge in dilatory tactics, by abusing the second half of Rule 29. Further, if parties to a dispute have a procedure for settling disputes within their internal agreements, it is difficult to understand how a *suo-moto* referral to Mediation might conflict with the intention of the parties to resolve their dispute in a certain manner. This provision can also be subject to misuse, since, Rule 29 may not be invoked if the party considers adjudication by the judicial or arbitral process to be in his own interest. A subjective view of "his interest" has been taken in the Rules, leaving little clarity on what ought to be considered in determining the "interests" of a Party. This has considerable potential for parties unwilling to participate in mediation, to engage in dilatory tactics. In addition, the Rules impose a time limit of three months to complete the entire procedure for mediation, but are silent as to whether or not such a settlement agreement should be reached within this time period. Finally, Rule 25 specifies that, if a Panel is not satisfied that the dispute has come to a conclusion, it is required to "report" the same, to the Central Government, Tribunal or Appellate Tribunal which initiated the mediation process. This provision does not give much needed clarity on the contents of this "report", or on the consequences of submitting this report to the relevant authority.

It is also interesting to understand how these Rules depart from s. 89 of the Code of Civil Procedure, 1908 ('CPC'). This provision gives a judicial authority the power to remand a dispute before it to mediation, if it deems such mediation to be an efficient mode of resolving that particular dispute. The Rules seem to build on this ideal, by providing specific procedures and an ethical code that ought to be followed by the Panel. However, the Rules' major shortcoming lies in the lack of guiding principles to address those situations when a non-cooperating party is stalling the delivery of justice. Nonetheless, with the Rules now in place, the intention of the government is clear, i.e. parties should receive any and all opportunities to amicably resolving between themselves. However, the intention of the parties to use these mechanisms in a *bona-fide* manner is of utmost importance. Till the Rules are applied in a manner so as to incentivize parties for the same, it is unclear as to whether the Rules actually help resolve disputes or add another rung in the ladder.