

REFERRAL MECHANISM AS PROVIDED UNDER SECTION 89 – A OF THE CODE OF CIVIL PROCEDURE, 1908

Guidelines for the Trial Court Judges

Concept of Alternative Dispute Resolution ADR is not new to our legislative documents; however, it has been revisited by the legislators and a few new concepts to do with resolving disputes through ADR have been introduced. Courts have been given powers to take decisions on whether a case is appropriate for referral to Alternative Dispute Resolution or not. Additionally, the parties have been given an opportunity to resolve their disputes with the assistance of a mediator/conciliator/negotiator. These parties may thereafter file a copy of any settlement reached before a Court having jurisdiction with the request that it may be converted into Judgment & Decree. These guidelines below aim to facilitate trial court Judges so that they may be able to make the appropriate decision regarding referring cases for Alternative Dispute Resolution.

1. Reference By Court

Stage 1

As per Section 89-A (2), simply by submitting a case to the jurisdiction of the Court, a presumption arises that both the parties, through mutual consent, agree that their dispute may be referred to for Alternative Dispute Resolution so that an expeditious disposal may be secured¹.

Stage 2

At the first instance, when a plaint is presented to the Court, the Court may assess a possibility of the case being resolved through Alternative Dispute Resolution in a way that is advantageous to all parties².

Stage 3

Once the Court decides to refer the case for Alternative Dispute Resolution, the Court shall issue a notice to the parties to make submissions on the next date of hearing, if they so desire, as to why their case should not be referred to Alternative Dispute Resolution³. If after listening to the submissions, the Court finds that no sufficient cause has been shown⁴, or, if

¹ S89-A (2), the Code of Civil Procedure, 1908

² S89-A(3)(i), the Code of Civil Procedure, 1908

³ S89-A(4)(i), the Code of Civil Procedure, 1908

⁴ S89-A(4)(ii), the Code of Civil Procedure, 1908

any of the parties fail to make submissions at all⁵, the Court shall proceed to refer the matter for Alternative Dispute Resolution in a way which shall be binding upon the parties.

Stage 4

If at first instance, when a plaint is presented to the Court, the Court assesses that the matter is not suitable for Alternative Dispute Resolution, the Court shall carry out standard instructions including issuing summons against the Defendant for filing Written Statements etc. However, the duty to consider whether a matter is suitable for Alternative Dispute Resolution is a continuing one, and as such, the Court must at subsequent stage of the case assess whether the matter could now be resolved through Alternative Dispute Resolution⁶. If, upon such assessment, the Court does find the case now suitable for Alternative Dispute Resolution the Court must again issue a notice to the parties to make submissions on the next date of hearing, if they so desire, as to why their case should not be referred to Alternative Dispute Resolution⁷.

Stage 5

The Law also provides an option for the Court to refer a case for Alternative Dispute Resolution which the Court does not find suitable for Alternative Dispute Resolution, simply owing to the consent of all the parties⁸.

2. Reference by Parties

Stage 1

Parties may decide to resolve a dispute of Civil or Commercial nature through the use of an Alternative Dispute Resolution method before initiating legal proceedings of any kind.⁹

Stage 2

Parties may then file an application along with an amicable settlement reached with the assistance of a neutral person, duly signed by the parties, and accompanied by all relevant documents in a Court having jurisdiction. This will be registered as a “Judicial Miscellaneous” matter.¹⁰

Stage 3

The Court after hearing the parties and viewing the settlement may pass judgment and decree thereby enforcing the settlement.¹¹

⁵ S89-A(4)(iii), the Code of Civil Procedure, 1908

⁶ S89-A(3)(ii), the Code of Civil Procedure, 1908

⁷ The Code of Civil Procedure, S89-A (4)(i)

⁸ S89-A(3)(iii), the Code of Civil Procedure, 1908

⁹ S89-A(4), the Code of Civil Procedure, 1908

¹⁰ Ibid

¹¹ Ibid

Factors to take into account when assessing the possibility of Alternative Dispute Resolution

1. **Jurisdiction:** If both parties are not based in a single jurisdiction consideration will need to be given as to which jurisdiction would be appropriate for litigation and which substantive law will apply to the case. Such issues can be wholly or partly avoided by using Alternative Dispute Resolution.
2. **Appropriate:** It might simply be that a case is not suitable for Alternative Dispute Resolution. For example, where
 - a. A Court Order is needed for precedent
 - b. Matter requires interim orders such as an urgent stay which cannot be obtained through Alternative Dispute Resolution
3. **Time:** The Law itself sets a 60-day time limit from when the Court refers a matter for Alternative Dispute Resolution, to when the return of the reference is expected. As such, the Court may be expected to recognise cases where time is of the essence and where Alternative Dispute Resolution may provide a speedy and satisfactory result.
4. **Cost:** Drawing from the matter regarding time, a case that is being drawn out over years is undoubtedly going to cost more than the time-limited process of Alternative Dispute Resolution.
5. **Complex Law:** The Court should consider whether a clarification of the law is required, in which case Alternative Dispute Resolution would not be appropriate.
6. **Great Animosity Between Parties:** The Court should recognise situations where there is a great deal of animosity between the parties and where it is unlikely that any form of Alternative Dispute Resolution would prove successful.
7. **Privacy:** Most Civil Trials are held in public, whereas Alternative Dispute Resolution processes are agreed and carried out privately. The Court may be able to recognise a situation where parties express a desire to avoid publicity to protect information.
8. **Future Relationships:** Litigation is an adversarial procedure based on a contest between the parties often seeking to allocate blame. Alternative Dispute Resolution can prove a creative forward-looking process focusing on future relationships. As such, the Court may be expected to identify a situation where the preservation of a future relationship is a necessary requirement and as such may be expected to refer such a matter for Alternative Dispute Resolution.
9. **Stage of Proceedings:** Most forms of Alternative Dispute Resolution are likely to achieve best results if commenced at an early stage. As such, Courts must be expected to be mindful of referring matters late into proceedings for Alternative Dispute Resolution.

Factors to take into account when referring a case for Alternative Dispute Resolution:

Appointment of Mediator/ Conciliator

The following organisations and persons may be eligible to be Mediators and Conciliators.

- a) Organisations/ Institutions/ Court-annexed mediation centres established or recognised by the Sindh High Court that specialize in Alternative Dispute Resolutions methods and maintain a list of mediators or conciliators with the required training mentioned below¹².
- b) Persons who have undergone a minimum of 40 hours of skills-based training in mediation/conciliation/negotiation, and who have been accredited as a mediator/conciliator/negotiator by a reputable organisation or institution¹³.
- c) A judge nominated by the Court to conduct Alternative Dispute Resolution who has either been certified as a mediator/conciliator/negotiator by the Sindh Judicial Academy or has satisfied the criteria mentioned above in (b)¹⁴.
- d) A Salis appointed under the Small Claims and Minor Offences Ordinance, 2002¹⁵. A Salis has been defined in the Ordinance as a person acting as conciliator, mediator or arbitrator.¹⁶
- e) Any other person agreed to by the parties and approved by the Court in accordance with the Law¹⁷.

Fixing of Date and Time

- a) Upon referring a case for Alternative Dispute Resolution, the Court will direct the parties to appear before the appointed mediator/conciliator/ negotiator on a specific date and time fixed by the Court.
- b) The Court will also set a timeline of sixty (60) days from when the case is referred for Alternative Dispute Resolution to when the reference must be returned.
- c) The mediator/conciliator/negotiator may submit a written request to the Court for this period to be extended for a maximum of thirty (30) days.
- d) The Court may only grant such extension upon being shown good cause.
- e) Such extension shall be noted in a Court order. ¹⁸

¹² Order X, (1C)(a), the Code of Civil Procedure, 1908

¹³ Order X, (1C)(b), the Code of Civil Procedure, 1908

¹⁴ Order X, (1C)(c), the Code of Civil Procedure, 1908

¹⁵ Order X, (1C)(d), the Code of Civil Procedure, 1908

¹⁶ S2(1)(g) Small Claims and Minor Offences Ordinance, 2002

¹⁷ Order X, (1C)(e), the Code of Civil Procedure, 1908

¹⁸ Order X, (1B)(ii), the Code of Civil Procedure, 1908

Determination of Fee

Upon deciding to refer a case for Alternative Dispute Resolution, the Court may determine the amount of fee, if any, to be paid to the mediator/conciliator/negotiator. The Court may determine that the fee be paid either by one party or both the parties.¹⁹

Appearance of Parties

The Parties to a case shall take part in the Alternative Dispute Resolutions either in person or through an authorized representative empowered to settle the matter²⁰, such as a lawyer, accountant etc.

Procedure

When dealing with the case referred to him, the mediator/conciliator/negotiator may follow the procedure that seems appropriate in the circumstances of that case²¹.

Settlement

- a) If a settlement is reached between the parties, the mediator/conciliator/negotiator shall prepare a deed of settlement.
- b) This deed of settlement shall contain the terms of the settlement and must be signed by all parties.
- c) This deed of settlement must then be submitted to the Court on a day fixed by the Court together with a certificate that this settlement was voluntary²².

Preparation of Decree

After receiving the deed of settlement, and after hearing the parties, the Court may pass Judgment and Decree in terms of the settlement.²³ This would in turn enforce the settlement meaning parties cannot disobey or modify it without the Court's approval.

Failure of Settlement

If the parties are unable to reach a settlement, including if any of the parties simply refused to participate in the process at all, this statement of fact shall be recorded by the mediator/conciliator/ negotiator and submitted to the Court on or before the date fixed by the Court²⁴.

Commencement of Trial

¹⁹ Order X, (1B)(iii), the Code of Civil Procedure, 1908

²⁰ Order X, (1B)(iv), the Code of Civil Procedure, 1908

²¹ Order X, (1B)(v), the Code of Civil Procedure, 1908

²² Order X, (1B)(vi), the Code of Civil Procedure, 1908

²³ Order X, (1B)(vii), the Code of Civil Procedure, 1908

²⁴ Order X, (1B)(viii), the Code of Civil Procedure, 1908

If no settlement is reached within the allocated time period, and no extension has been requested and granted, the case shall proceed in Court as usual²⁵.

Exclusions

The Qanun-e-Shahadat, 1984 and the Code of Civil Procedure, 1908 shall not ordinarily apply to the Alternative Dispute Resolution proceedings.

Prohibitions

- a) The mediator/conciliator/negotiator shall not act in any capacity on behalf of any of the parties in connection with the case in other proceedings whilst the Alternative Dispute Resolution process is ongoing. Similarly, the mediator/conciliator/negotiator shall not be called as a witness once the Alternative Dispute Resolution settlement reaches Court except to attest to the authenticity of the settlement agreement²⁶.
- b) Any information, statement, document, or any other material at all disclosed to the mediator/ conciliator/ negotiator during the Alternative Dispute Resolution proceedings shall be kept confidential. As such, no document including any transcript, formal record or audio-visual recording shall be made of the proceedings except with the written approval of the mediator/conciliator/negotiator and the mutual consent of the parties²⁷.
- c) No communication or any kind of documentation made during the Alternative Dispute Resolution proceedings can be produced in court with regards to the case or any other related proceedings²⁸, what so ever.
- d) No communication made in the Alternative Dispute Resolution proceedings including information disclosed and views expressed shall be used in any other related proceedings whatsoever.²⁹ This is so that both parties can feel comfortable negotiating and bargaining knowing any concessions they make will not be brought up in court. If these concessions were mentioned in Court, it could present the impression that the party making the concession views his case as being weak.

²⁵ Order X, (1B)(ix), the Code of Civil Procedure, 1908

²⁶ Order X, (1D)(i), the Code of Civil Procedure, 1908

²⁷ Order X, (1D)(ii), the Code of Civil Procedure, 1908

²⁸ Order X, (1D)(iii), the Code of Civil Procedure, 1908

²⁹ Order X, (1D)(iv), the Code of Civil Procedure, 1908