

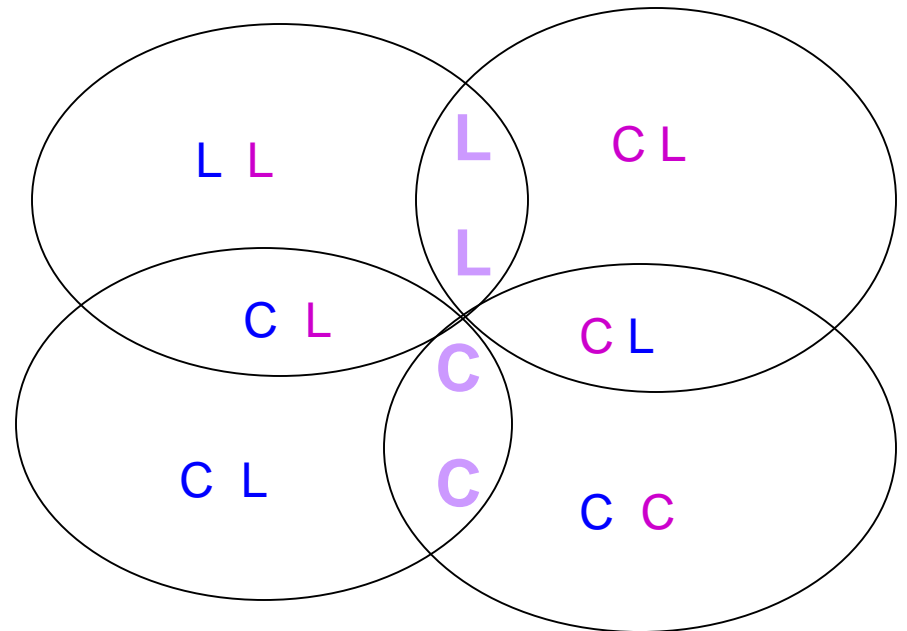
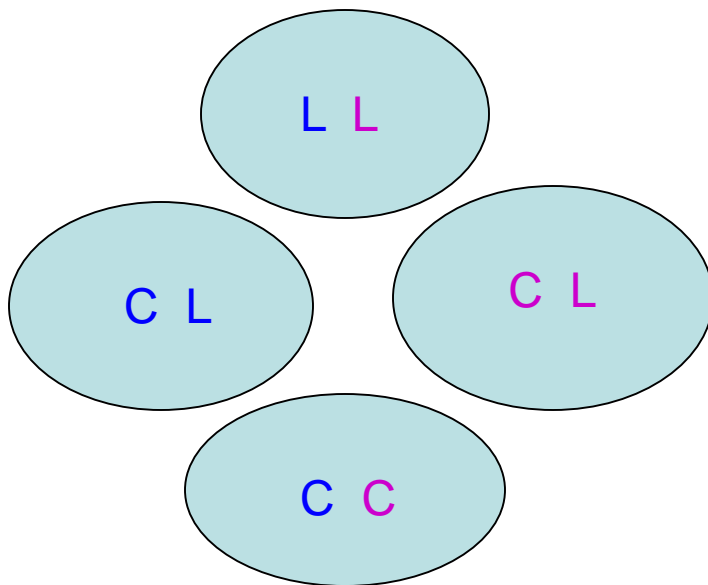
# CHALLENGES TO ADR



- Roshan Dalvi

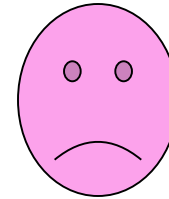
# SUBSTANCE OF MEDIATION

Connecting People



# MEDIATION STRATEGY

P – Identifying **P**roblems



O – Generating ptions

S – Reaching **S**olution



Genius is the ability to reduce  
the complicated into the simple !

# MEDIATION STRATEGIES

- **Case of contracts**

- Create options for novation by Negotiation – Ownership of Idea

- **Case where the bottom line is money**

- Arrive at the right figure

(from: “*How to win any argument*” by Robert Mayer)

# TIME FOR REFERENCE



## ⌚ Pending Matters

- ✧ Any time is good time
- ✧ At the time of hearing of interim application
- ✧ After Issues are framed and before evidence is recorded
- ✧ Even after part trial

## ⌚ New Matters

- ✧ At the time of the filing itself (in case of all referable matters)
- ✧ After the first hearing (as deemed fit by the Judge)

*Mediation in one word is **ENDISPUTE***

*-Sriram Panchu*

# CAUTION

✕ Matters which cannot be referred to Mediation:

- ✕ Involving point of law
- ✕ Involving interpretation of documents
- ✕ Involving alleged fraud, forgery
- ✕ Involving relief in rem, representative suit
- ✕ Acts against society / human rights

***“All my life through, the very insistence on truth has taught me to appreciate the beauty of compromise.”***

***- Mahatma Gandhi***

# TYPES OF STRATEGIES

## 1. To arrive at a figure :

2 persons/arbitrators naming a figure,

It is not acceptable,

Ask a 3<sup>rd</sup> independent person to state,

His decision is final.

*There should be less talk;*

*A preaching point is not a meeting point.*

*- Mother Teresa*

# TYPES OF STRATEGIES (contd....)

## **2. To choose between properties:**

The 2 parties would number the properties

e.g., 1 to 4,

The 1<sup>st</sup> would get his 1<sup>st</sup> & 4<sup>th</sup> choice

The 2<sup>nd</sup> would get his 2<sup>nd</sup> & 3<sup>rd</sup> choice

If not, a flip of a coin would decide.

*No greater justification than justice is required;  
No less justification is acceptable.*



# TYPES OF STRATEGIES (contd....)

## 3. Buy or sell :

Both parties write down their figure.

(This is the value of the property - to pay or to accept)

If the 2 are within 15% of each other, they would be averaged.

Else, a neutral party would select the more realistic figure.

(This ensures reasonableness.)

**A friend in court makes the matter short.**

# TYPES OF STRATEGIES (contd....)

## 4. Buy or sell :

A figure for the property is fixed by the parties

(This is the value of the property - to pay or to accept)

If they are more than 15% apart, a neutral party would write down a figure which is most reasonable,

The parties would write their figures,

The figure close to the neutral party's figure would be accepted.

Don't keep your meat so high the dogs won't jump for it !

# TYPES OF STRATEGIES (contd....)

## **5. Buy or sell :**

One party puts the value upon the property:

The other gets the choice: to buy it or sell it.

Mediation means not thinking less about ourselves,  
But thinking about ourselves less.

# TYPES OF STRATEGIES (contd....)

## **6. To choose from many properties :**

1 party would choose 2 properties,

The other would get any 1 of those 2.

Again the 1<sup>st</sup> party would choose 2 other properties,

The 2<sup>nd</sup> party would get any 1 of those properties.....

Experience has shown that Mediation is not always by the book !

# MED-ARB / MID-ARB

- Med-Arb in the UK, USA, Canada
  - In case of an impasse, the Mediator becomes the Arbitrator.
- Mid-Arb in India
  - In case of an impasse, the parties may leave the final solution to the Mediator. But, they must sign the settlement agreement / consent terms as per the last suggestion of the Mediator. The Mediator does not give an award.

*Change your Attitude and gain some Altitude*  
*Donald Trump*

# Med - Con

The difference –

- Allowing the parties to create options for settlement
- Nudging the parties - Lending a helping hand; e.g. LIC, rent the flat
- Med - as the Judge rules;

Con - by consent ( Afcons' case 2010 8 SCC 24 )

When it is obvious that goals cannot be reached,  
Don't adjust the goals; Adjust the action steps

# Challenges for Mediation

- The Legislative approach
  - Wider Court Rules
  - New Legislation
- Human resources
  - Training of Mediators
  - Selection of Co-ordinators
- Infra-structure
  - Providing properly equipped Mediation Centres
- Limits of Mediation
  - Family matters
  - Criminal Matters
  - Property Disputes

# KEY FACTORS

- Public awareness – e.g. notice, summons, court premises
- Stakeholders involvement
- Consistent players e.g. banks, insurance
- TOT
- Impact Assessment

The courts in this country should not be the places where resolution of disputes begins;  
They should be places where the alternative methods of resolving disputes have been considered and tried.



# WHY IT FAILS – WHAT IT REQUIRES

- **Lack of Institutionalisation** – K. Srinivas Rao v. D.A. Deepa  
2013 5 SCC 226
- **Lack of Case Management** – Afcon Infrastructure v.  
Cherian. 2010 8 SCC 24
- **Excessive Interlocutory Appeals**
- **Mandatory Reference to ADR** – also pre-litigation
- **Case Management by Judges**
- **Committed Teams of Lawyers & Judges**

*The test is, at the end of the negotiation, both must smile*

# RESULT OF REFERENCE

## ✓ “Successful” Mediation

- Consent Terms to be drawn up by the parties
- Matter disposed of

## ✗ “Failed” Mediation

- Matter to be taken up by the Judge expeditiously as “Failed Mediation” matters
  - Take Affidavit of Evidence
  - Consider admissibility of documents
  - Refer matters to Commissioners for cross-examination
  - Fix date for arguments
  - Deliver Judgment

*What counts is not the size of the dog in the fight,  
But the size of the fight in the dog –Dwight Eisenhower*

# THE TOTALITY OF ADMINISTRATION

## Case Management

- Pending Matters
  - ➡ Expeditious Hearing
- New Matters
  - ➡ Separate Assignment

*Failing to Plan is Planning to Fail*