

Mediation Handbook

for

Consumer Disputes



Office of Consumer Protection

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ACKNOWLEDGEMENT

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INTRODUCTION

The Mediation Handbook for Consumer Disputes is a guide intended for Consumer Advocates and *Gups* to help them mediate disputes as per the Consumer Protection Act of Bhutan, 2012 (hereafter referred to as “the Act”), and Consumer Protection Rules and Regulations, 2015 (hereafter referred to as “the Regulations”). The Consumer Advocates and *Gups* are individuals identified by the Act to conduct mediation for consumer disputes according to sections 91 (c) and 95 of the Act.

The handbook enumerates the roles of a mediator in general and also the ethical considerations required of a mediator. It explains the prerequisites of mediation where the consent to mediate and mediation settings are elaborated. It sets out the mediation process starting from convening a mediation to finding settlement and closing the mediation.

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MEDIATION OF CONSUMER DISPUTES

Mediation is a process where parties resolve misunderstandings, determine underlying concerns, find agreements and, ultimately, incorporate these agreements into solutions¹ with the facilitation by Consumer Advocate(s) or *Gups*. Whether Consumer Advocates or *Gups* can mediate consumer disputes depend on the nature of the complaint. They can only mediate cases where the complaint is made by an aggrieved consumer against a business entity.

ROLE OF CONSUMER ADVOCATES & GUPS AS A MEDIATOR

The principal role of the mediator is to facilitate a voluntary resolution of the dispute between two parties, and communicate the view of each party to the other, assist them in identifying the issues, reducing clashes, highlighting priorities, enunciating on areas of compromise and finally, generating options in an attempt to resolve the dispute(s), and constantly pressing on the point that is the duty and responsibility of both parties to make a decision and that s/he shall not impose any terms of settlement on the parties.

¹ *Consumer Protection Rules and Regulations, 2015 § 168 (d).*

The mediator is in charge of the proceedings and manages the discussion for which s/he should:

1. Explain the process of mediation in facilitating the discussion between the parties to negotiate a resolution.
2. Help set and inform the ground-rules. This may be done by encouraging the parties to proceed with civility and helping them diffuse strong emotions.
3. Listen and encourage the parties to communicate with respect. This will not only help the mediator fully understand the case but also make parties feel heard.
4. Help the parties analyze their underlying interests and figure out possible solutions.
5. When required, ask questions to the parties to help them better articulate their underlying interests that are driving their claims. This will provide the parties a deeper understanding of their needs and allows them to be creative with their solutions.
6. Refrain from imposing his/her views and opinions to encourage parties to find settlements.
7. Maintain confidentiality of the process and the outcome of mediation unless the law so requires.
8. Be impartial, independent and follow the code of conduct provided in the handbook.

MEDIATORS' CODE OF CONDUCT

A mediator should conduct a mediation based on the following ethical standards:

1. Party self-determination:
A mediator should conduct mediations in accordance with the principle of party self-determination. Self-determination should entail that parties make free and informed decisions voluntarily without coercion from the mediator. Parties should be allowed to exercise self-determination at any stage of a mediation process.
2. Impartiality
A mediator should conduct the mediation in an impartial manner. Mediators should be free from favoritism, biases and prejudices. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason. A mediator should decline or withdraw from a mediation process if at any time prior to or during the mediation process, s/he is unable to conduct in an impartial manner.
3. Independence
A mediator should facilitate the mediation in an independent manner free from external interference.

4. Fairness of process

A mediator must ensure that all parties have adequate and equal opportunities in the mediation process.

5. Competence

A mediator should mediate only when the mediator has the necessary competence to conduct the mediation of the parties concerned. The mediator should have the competence to satisfy the reasonable expectations of the parties. Training, experience in mediation, skills, cultural understanding and subject matter knowledge are qualities necessary for mediators' competence.

If a mediator, during the course of a mediation, determines that the mediator cannot conduct the mediation competently, the mediator should discuss with the parties as soon as possible and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

6. Conflict of Interest

A mediator should have no conflict of interest or the appearance of conflict of interest while agreeing to mediate, during or after the mediation. Conflict of interest should be declared if the mediator is involved with the subject matter of the dispute or has any relationship with the parties, whether past or present, personal or professional, that raises the question of a mediator's impartiality.

If a mediator learns any fact after accepting a mediation of any possible or actual conflict of interest, the mediator shall disclose it as quickly as possible. After disclosure, if all parties agree, the mediator may proceed with the mediation.

7. Confidentiality

A mediator should maintain the confidentiality of all communications made to him/her by the parties involved, unless otherwise agreed by the parties or as required by the law.

PRE-REQUISITES OF MEDIATION

Consent to Mediate - Consent Form for Mediation

The parties agreeing to mediate are required to sign a Consent Form for Mediation provided in Annexure I.

Mediation Setting - Where and How Should Mediation Take Place?

The mediator should make sure that the mediation room is as lively and as welcoming as possible. All parties should be treated with respect and fairness.

Following are a few seating arrangements the mediator can take into consideration:

1. Face to Face



2. Side by Side



3. *Shared Corner*



MEDIATION PROCESS

Convening the Mediation

Mediations should always start with a good opening to ensure that the entire mediation process that follows runs smoothly. The mediator should consider the following while starting a mediation. This non-exhaustive list is to set an effective, informal and friendly mediation process:

1. The mediator should start mediation by introducing himself or herself, and let the parties introduce themselves too.
2. The mediator should try to create an informal atmosphere, and build trust and confidence among the parties.
3. The mediator should ensure that parties feel comfortable during the mediation.
4. The mediator should explain the voluntary nature of mediation in the introduction.
5. The mediator should, at the commencement of any mediation, explain the roles of mediator provided in this Handbook.
6. The mediator should also explain his/her mandate under the Act to mediate the dispute.

Setting the Ground Rules

The mediator should set ground rules for mediation prior to the start of the mediation. Ground rules should be agreed upon by all the parties. Agreement to ground rules builds trust, confidence and indicates a willingness to cooperate and address their differences. It also ensures effective communication. The following rules should be informed by the mediator to the parties to ensure that the parties adhere to these rules. Parties can discuss and add additional rules for the purpose of the mediation.

1. Parties should respect each other throughout the mediation process.
2. Parties should refrain from personal attack and characterization.
3. Parties should be given equal opportunity to present their views.
4. Parties should take turns to speak and not interrupt each other.
5. Parties should not bring past grudges and complaints irrelevant to the issue(s) at hand.
6. Parties may consult a third party to seek approval or get more information at any time.
7. Parties should refrain from using abusive language throughout the process.
8. Parties can request a caucus² at any time, and the mediator can also call a caucus if required.
9. Each party has authority to withdraw from mediation at any time.
10. Parties may come to resolution on one or more issues, while refusing to agree on other issues.
11. Parties should refrain from possessing any weapons or items that can be used to cause bodily harm during the mediation.

During Mediation

The mediator should consider the following during the mediation procedure:

1. The mediator allows the parties to share their grievances, each taking turn, in order to make the parties feel heard.
2. The mediator facilitates the negotiation between the parties in order to help them come to a conclusion that is acceptable to both of them.
3. The mediator identifies the underlying interests of the two parties and facilitates the parties to convey the interests to each other.
4. The mediator helps the parties redefine their perspectives on the disputes. When parties come to mediate, each has their own view of the issues in disagreement; reasons for the rise in disputes and the possible solutions to it. The mediator helps parties understand each other's perspectives.
5. Misunderstandings and distrusts are frequent between parties, it is the mediator who promotes and ensures transparency and honesty in the procedure.

² *Caucus is a separate meeting held by mediators with each party to keep mediation going forward. They can be summoned by either the mediator or one of the parties to help resolve issues that arise throughout the procedure.*

6. The mediator limits the scope of the mediation to the business transactions owing to which the conflict arose between a consumer and a business entity.
7. When the parties are hostile against each other, in order to prevent the situation from escalating, the mediator halts the mediation, and allows the parties to settle down.
8. The mediator helps the parties understand the differences and also identify the mutual interests in order to work toward solutions that benefit both parties.
9. The mediator may caucus when required or when requested by the parties.
10. When the parties disrupt the decorum of the mediation process, the mediator respectfully reminds the parties of the ground rules.

*Communication*³

During a mediation, effective communication is very important to accomplish mediation goals. In essence, effective communication is about sending and receiving messages accurately for the parties to increase their understanding of the real issues and the options for resolving it. Mediators should be aware that powerful emotions such as anger, fear, anxiety, and sadness, influence parties and undermine effective communication. Therefore, s/he has an important role in ensuring good communication and managing emotions during mediation.

In order to enhance effective communication for a successful mediation, following are some of the techniques that mediators can use to improve their own communication skills and those of the parties:

1. Effective Listening

Effective mediation requires effective listening. Effective listening involves accurate reception of both the verbal and nonverbal messages of the speaker. Mediators should be alert, focused, patient, open, and impartial to enhance active listening. Mediators should also be vigilant to avoid talking too much and using unfamiliar language, vocabulary or jargon. They should avoid prejudice and bias.

2. Skillful Questioning

Another technique that can enhance the mediator's communication is through skillful questioning. Mediators should skillfully see the context and ask good questions to gain crucial information to enhance understanding of the case. Mediators should ask simple and clear questions to engage the parties equally. Skillful questioning includes asking open and closed ended questions depending upon the situation.

3. Paraphrasing

³ Mark D. Bennett & Scott H. Hughes, *The Art of Mediation* (2005).

Paraphrasing is a major tool for mediators that allows them to ensure that they understood the parties. It also ensures that parties have been heard and gives the other party a second opportunity to hear and understand the speaker's message.

4. Reframing

Reframing is often useful when one party makes a statement that is likely to be received by another party as judgmental, contemptuous, or demanding. So the mediator interprets such statements in a positive manner and reframes the message to give it a constructive meaning.

Closing the Mediation

Closure is the final phase of a mediation process. Parties need not necessarily reach a settlement for the mediation to be closed. Closure can occur whether or not the parties have reached a settlement.

Closure on Reaching a Settlement

When parties reach a settlement, the mediation is closed with the terms of settlement being reduced into a written Agreement signed by parties, and the mediator thanking the parties (and their representatives if any) for their participation and efforts toward a successful mediation. In reducing the terms of settlement into an Agreement, the mediator should take appropriate measures to ensure that attention is paid to the details of what the parties want. In doing so:

1. The mediator should orally confirm the terms of settlement and reduce such terms into a Mediation Settlement Agreement. A sample format is provided in Annexure III.
2. The Agreement should clearly specify all material terms agreed to. It should also clearly state who will do what, when, where and how.
3. The Agreement should be drafted in plain, precise and unambiguous language.
4. The Agreement should be concise and, as far as possible, use active voice.
5. The Agreement has to be signed by the parties, or their representatives if any, and their respective witnesses.
6. A copy of the signed agreement has to be furnished to the parties.

Closure on Not Reaching a Settlement

Where parties do not reach a settlement, or parties agree that no settlement is likely to be reached, or the mediator concludes that further mediation would not be likely to result in settlement, the mediation is closed with the mediator thanking the parties and their representative for their participation and efforts for settlement. No record of discussions or offers made during the mediation is to be kept. The statements made during the mediation will remain confidential. However, the mediator should facilitate the parties' signing of the No Settlement Declaration form in Annexure IV so that the case can be forwarded to the Dispute Settlement Committee as required by the Act and the Regulations.

CONCLUSION

Mediation is a non-binding and confidential process involving minimal risks for the parties. Settling a dispute through mediation can spare the parties their time, money and most importantly gives them an opportunity to maintain their relationship through a personalized solution to the problem. Even if a settlement is not achieved, mediation defines the facts and issues of the dispute to the parties preparing them for subsequent mediation or court proceedings. It is therefore very important for mediators to do their due diligence in mediating a dispute. This handbook explains the purpose of mediation, role of the mediator, gives an overview of the entire process, and it is intended to guide the mediators of consumer disputes for a successful mediation

ANNEXURE I

Date: _____ (DD/MM/YYYY)

CONSENT FORM FOR MEDIATION

I, Mr/Ms/Mrs _____, bearing CID number/ Business License Number/ Passport number/Special Residence Permit number _____ consent to mediate the consumer dispute case numbered _____.

I understand and hereby agree as follows:

1. To attempt to resolve the dispute in good faith.
2. To be governed by the Consumer Protection Act, Alternative Dispute Resolution Act, the Contracts Act and other relevant Acts of Bhutan.
3. I understand and agree that all information arising out of and in connection to the mediation should remain confidential and will not be disclosed to any third party except in accordance with law.
4. By signing this agreement, I agree and acknowledge the commencement of mediation and also understand that they will be bound by the terms of this agreement.



(Signature)

Name: _____

Mobile Number: _____

ANNEXURE II

FORM CONSENTING REPRESENTATION

I authorize Mr./Ms./Mrs. bearing CID number/passport number/special residence permit number to represent on my behalf in the mediation held by the Consumer Advocate/Gup on/...../..... Any consensus agreed to by Mr./Ms./Mrs. shall be considered no different from the agreement I have come to and shall be treated the same by the mediator and the other party.

I consent to this representation with full knowledge of the risks and competence of my representation. I shall not object to any agreement made by my representation. I acknowledge that I understand the content of this form.



(Signature)

Date:

Name:

CID/ Business License Number:

Mobile Number:

ANNEXURE III

SAMPLE FOR MEDIATION SETTLEMENT AGREEMENT

This Mediation Settlement Agreement (“the Agreement”) is entered into and executed on (DD/MM/YYYY),

BETWEEN

....., bearing CID number/Passport number/Special Residence Permit number/Business License number, residing/located at (hereinafter referred to as “Party A”)

AND

....., bearing valid Business License number, located at (hereinafter referred to as “Party B”).

RECITAL

Party A filed a complaint with the Consumer Advocate/Gup at against Party B on (DD/MM/YYYY) concerning the supplied/ provided by Party B to Party A on(DD/MM/YYYY)

The Parties hereby agree as follows:

1.
2.
3.
4. The Agreement shall be effective from the date of execution, and enforceable before the relevant Court of law.



(Signature of Party A)



(Signature of Party B)

Name:

Mobile Number:

Name:

Mobile Number:



(Signature of Party A's Witness)

Name:

CID No.

Mobile Number:



(Signature of Party B's Witness)

Name:

CID No.

Mobile Number:

ANNEXURE IV

NO SETTLEMENT DECLARATION FORM⁴

Ms./Mr./Mrs., bearing CID number/Passport number/Special Residence Permit number (“Party A”)

AND

....., bearing valid Business License number located at (“Party B”),

HEREBY declare that settlement for the consumer dispute case number could not be reached during the mediation facilitated by Consumer Advocate/Gup at on(DD/MM/YYYY).

(Signature of Party A)
Date :
Name:
Mobile Number:

(Signature of Party B)
Date :
Name:
Mobile Number:

⁴ To be printed with the letterhead of the respective Regional Office/Gewog Administration.

ANNEXURE V

DECLARATION OF CONFLICT OF INTEREST

I,bearing CID No/employee ID..... from the Office of
Gewog.....Dzongkhag....., declare that in serving as a mediator for(Party A) and(Party B) :

- do not have or anticipate any Conflict of Interest. I shall notify the Agency concerned immediately in the event such interests arise in the course of or before discharging my duty;
OR

- do have Conflict of Interest in view of the following reason(s):

- Family Member:
- Close Relative:
- Close Friend:
- In-Laws:
- Enemy:
- Others:

I hereby confirm that the above information is true to the best of my knowledge. In the event the above declaration is found to be incorrect, I shall be liable for administrative/legal action.

Date:

Place: