



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2024 – ISSN 2582-7820
 Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

Mediation Act 2023 – A Progressive Plunge in the world of Alternate Dispute Resolution

Anushka Ajmera^a Simran Rauf^b

^aManipal University, Jaipur, India ^bJai Narayan Vyas University, Jodhpur, India

Received 30 August 2024; Accepted 03 October 2024; Published 07 October 2024

This is another gauge, yet another attempt to reduce the country's case backlog. Mediation Act 2023¹ has been recently passed by the Parliament in lieu of prolonged litigation and costs attached to it. Due to the lack of structured codification of the mediation process in the private setup, people were hesitant to choose this as an alternative dispute mechanism. Grappling with the situation, an extensive, structured framework is designed to promote institutional mediation. The Act significantly includes pre-mediation, appointment of mediators, enforcement of settlement agreements, and online mediation for not only commercial disputes but also civil disputes. It's making an attempt to streamline the process of mediation. A Mediation council has also been set up under the Act to regulate and check the proper application of the provisions. Every law has its own shortcomings, including this Act, as it fails to embrace other institutional frameworks that support mediation as a mechanism of alternate dispute resolution and undecided mediation. It delves into the formalisation of the process and makes it one of the most efficient and cost-effective methods of dispute resolution.

Keywords: *mediation, dispute resolution, online mediation, commercial disputes.*

¹ The Mediation Act 2023

INTRODUCTION

Mediation is a specially institutionalised voluntary binding structured process for the resolution of disputes, commercial or otherwise. It provides for mediated settlement agreements by an impartial and neutral mediator who uses specialised communication and techniques for reaching the settlement. The mediator does not impose a solution but creates a conducive environment in which disputing parties can resolve all their disputes.

The Supreme Court of India directed the government regarding the feasibility of the Mediation Act, especially in the context of consumer disputes like insurance claims. They pointed out the lack of a structured mediation framework at that time and expressed the need for a more robust system to facilitate mediation in insurance and similar disputes. This observation laid the groundwork for the subsequent legislative developments that culminated in the Act.²

Given its track record of effectiveness in numerous large cities, mediation is a tried-and-true alternative form of conflict resolution. There are several dispute resolution techniques outside mediation, including arbitration, negotiation, and conciliation.

The goals of the act encompass pre-litigation mediation, online mediation, community mediation, conciliation, or a statement of a similar nature, in which parties work with a third party to try and settle their disagreement amicably. This clearly states that the process of mediation is voluntary. This means that no party can be threatened into participating in the process. Nevertheless, in certain types of cases, the Court can make it mandatory for the parties to be given an option of mediation. The judge, thus, has a great responsibility of referring only the substantial and easy to come to settlement cases to mediation.

For this, mediation provides for an agreement to be in writing; it can be either contained in a clause under the contract or a separate agreement itself. Sometimes, it may be contained in any document signed by the parties or by the exchange of communication, which also includes electronic communication. The dispute can be referred for mediation prior to or after a dispute arises. Then, in the pleading, the existence of a fact with reference to any agreement containing

² *M R Krishna Murthi v New India Assurance Co Ltd* (2020) 15 SCC 493

a mediation clause is alleged by one party and the same fact is denied by the other party. If and when the judge is able to determine the terms of the settlement in the dispute, the case may be sent for the mediation procedure. Furthermore, the parties should be aware of the rights available to them and must be consented to and informed before entering into negotiation to reach an amicable settlement or agreement that will content and satisfy the needs of both parties.

BRIEF ABOUT THE ACT

The Mediation Bill of 2023, after being passed by both houses and receiving the assent of the President, has been introduced and enacted by the Central Government as “The Mediation Act of 2023”³, extending to the whole of India.⁴

OBJECTIVE OF THE ACT

The purpose and the objective of the Act is to promote mediation and facilitate mediation by making mediation as one credible and authorised alternate dispute resolution system. The act provides for the execution of the mediation settlement arrangement and the establishment of a Mediation council in India to regulate and administer the process of Mediation. The Act also provides for the registration of the mediators and mediation service providers so to train, educate, and certify them as expert mediators across the country. The Act also authorises online mediation, making it hassle-free and cost-effective.

WHAT IS MEDIATION?

The act defines the “Mediation” under section 3(h). Mediation is the structured interactive process of settling and resolving disputes with the intervention of a specialised trained third personnel known as the mediator who strives for parties to reach at an amicable settlement. The settlement, then, if voluntarily agreed by both parties, takes up the form of a contract. The Mediation process also includes consulting with legal counsels and professionals who are experts and guide parties to ultimately resolve their issues.⁵

³ The Mediation Act 2023

⁴ The Mediation Bill 2021

⁵ The Mediation Act 2023, s 3(h)

WHO IS A MEDIATOR?

This mediator is a specialised person registered with the Mediation Council who advocates as a neutral facilitator and provides for the discussion between both parties so as to arrive at an amicable settlement and is registered with the council.⁶ The mediator plays the role of one who bridges the indifferences of issues between two opposing parties and focuses on eliminating obstacles to communication. The main goal of this Mediator is always reaching a consensus by keeping in mind the interests and regards of both the parties.

ONLINE MEDIATION

Section 30 of the Act defines “online mediation”. One of the most significant aspects of the Mediation Act is that it provides for the recognition and validation of online mediation and agreements formed therefrom. As per the section, online mediation is a process whereby a neutral third-party mediator assists and guides two opposing disputing parties to arrive at a concord through an internet-based portal or platform. This type of mediation bridges the geographical gap of gathering physically and provides numerous other benefits such as accessibility, convenience and, time and cost-effective medium.⁷

MEDIATION AGREEMENT

Mediation Agreements are basically a brief summary of important issues agreed upon by the parties themselves, where they refer the matter for mediation to resolve those issues that might arise between the parties in present or future. The mediation agreement is a written agreement signed by both parties and is strictly confidential. A mediation clause in a written agreement or an agreement itself will be considered a mediation agreement when the same is made with reference to making mediation a part of the agreement. There could be instances when parties have an agreement of mediation independent of the principal contract then, in that case, the validity of the contract would not question the validity of the mediation agreement.⁸

⁶ The Mediation Act 2023, s 3(i)

⁷ Mediation Act 2023, s 30

⁸ Mediation Act 2023, s 4

PRE-LITIGATION MEDIATION

The mediation act voluntarily recognises and advocates for mutually consented pre-litigation mediation between the parties for the settlement of disputes. In this, the parties, prior to filing any suit or proceeding of a civil or commercial nature before the court, opt for pre-litigation mediation. Earlier, there was a concept of compulsory pre-litigation, which was later on amended as voluntary and consented to the recommendation of the standing committee. However, pre-litigation mediation concerning commercial disputes is to be governed and regulated as per the rules given under section 12A of the Commercial Courts Act 2015".⁹ Other than this, there is no requirement for a prior mediation agreement for pre-litigation mediation. The only prerequisite is the mutual consent of the parties. Also, the Act envisages a comprehensive list of disputes or issues not fit for mediation.¹⁰

MEDIATED SETTLEMENT AGREEMENT

The agreement formed on the consensus of both parties after following the established procedure of the mediation is called a mediated settlement agreement. As per section 20 of the Act, such an agreement does not necessarily involve compulsory registration by the statute as it is at the option of the parties to get the agreement registered or not.¹¹ It is always prescribed to get the agreement registered to avoid challenging the legality of the agreement. The agreement must be duly and consented to and signed by both parties and must be reduced in writing. And the same must be made authenticated by the mediator. Such a mediated settlement agreement will be final and binding because an agreement, once verified, gets the power to bind the parties under the said statute. So, they shall be made enforceable in the same manner as if it were a decree or judgement passed by a court having jurisdiction. The parties to the agreement are free to form other agreements pertaining to the settlement during the procedure of the mediation, but only valid if followed with proper guidelines.

⁹ Laila Ollapally, 'Mediation finds its place in India: Benefits and pitfalls of the Mediation Bill, 2023' *Bar and Bench* (12 August 2023) <<https://www.barandbench.com/columns/mediation-finds-its-place>> accessed 15 August 2024

¹⁰ Mediation Act 2023, s 5

¹¹ The Mediation Act 2023, s 20

Also, the registration of the Mediated settlement agreement shall be done by parties or mediation service providers and must be done within one eighty days from the date of receipt of the authenticated copy of the mediated settlement agreement.¹²

It is important to mention here that in the case of institutional mediation, the agreement must be in line with the Indian Contract Act 1872.¹³ Fraud, corruption, impersonation, and disagreements unsuited for mediation are among the reasons to contest the agreement.

JURISDICTION

Owing to the need and want of mediation, it improved its applicability and included mediations taken within the territorial jurisdiction of the court or tribunal competent to adjudicate upon the dispute in India. The Mediation can be conducted where the parties reside or carry on business. However, with the consent of the parties, Mediation can also be conducted at any other place or by using the online facilities of mediation. The act also includes jurisdiction over commercial disputes where one party is either the state or the Centre.¹⁴

The Act is also applicable on international mediation conducted in India. The place of mediation falling in the territorial jurisdiction will have jurisdiction over the enforcement of mediated settled agreements or disputes thereunder.

MATTERS NOT FIT FOR MEDIATION

According to the act, it lays down an indicative list of certain disputes which are not entertained by the mediation act or which do not fall under the mediation form of dispute resolution. These disputes are as follows:

1. Dispute related to prosecution of criminal proceedings initiated with relation to misconduct by any registered professional.
2. Disputes relating to the collection and levy of any direct or indirect taxes or refunds.

¹² The Mediation Act 2023, s 20(2)

¹³ Indian Contract Act 1872

¹⁴ The Mediation Act 2023, s 13

3. Disputes that impact the rights of any third party who is not a party to the mediation proceeding or who does not have any interest in the ongoing disputes.
4. Disputes involving minors, persons of unsound mind and persons with mental illness.
5. Disputes relating to the matter in which the subject matter of the proceeding or investigation or inquiry falls within the jurisdiction of the National Green Tribunal Act of 2010, Competition Act of 2002, Electricity Act of 2003 and the Securities and the Exchange Board of India Act of 1992.¹⁵

Furthermore, the Act additionally states that the cases of criminal proceedings involving matrimonial disputes or disputes which are compoundable in nature then, if the Courts deem fit or if it is of the opinion that justice will be served if the matter to be dealt with by the mediation, then the Court can order the parties to get their matter referred for the Mediation. Such mediation shall be valid, but the only condition is that the procedure must be systematically followed.

TIME LIMIT

As per Section 18 of the Act, the mediation procedure shall be completed within One Hundred and twenty Days from the date of the first meeting with the Mediator. A maximum sixty days extension can be given if parties justify the need for such an extension.¹⁶ Earlier, the limitation period for mediation was set at one eighty days and extendable for a further one eighty days.¹⁷ It is pertinent to note that the time period for settlement of an agreement, termination of mediation or a non-settlement shall be excluded while calculating the period for limitation in the same dispute.

¹⁵ The Mediation Act 2023, s 6

¹⁶ The Mediation Act 2023, s 18

¹⁷ The Mediation Bill 2021, s 2

MEDIATION COUNCIL OF INDIA

A step towards bringing the process to parity mediation council is set up under the Act. The central government shall establish the council for regularisation. It includes a chairman, two full-time members who have an experience in alternate dispute resolution, three ex-officio members, including a law secretary, expenditure secretary, etc. and part-time members from the industry.¹⁸ Majorly, the council regularise mediators' registration, recognises mediation institutes, endeavours to promote domestic and international mediation in India through appropriate guidelines, and lays down the professional conduct of the mediators.¹⁹

COMMUNITY MEDIATION

A progressive step towards maintaining harmony in the community. The idea behind community mediation is to resolve community fights through a peaceful manner. Under this Act, Mediation shall be conducted by a panel of three mediators. The agreement which parties reach must be signed and authenticated by the community mediators. Such mediators must be respectable community members, members of the resident welfare association or any member as deemed fit.²⁰

CONFIDENTIALITY

One of the fundamental tenets of the Alternate dispute resolution is confidentiality. The Act has mandated the maintain confidentiality of the settlement. Section 23 specifically affords protection against admissibility and privilege disclosure.²¹ But every section has its own caveat, and it doesn't provide confidentiality to agreements which are against the law or for domestic violence or child abuse and pose an imminent threat to public health and safety.²²

¹⁸ The Mediation Act 2023, s 31

¹⁹ The Mediation Act 2023, s 38

²⁰ The Mediation Act 2023, s 43, 44

²¹ The Mediation Act 2023, s 23

²² The Mediation Act 2023, s 23(2)

LACUNAS OF THE ACT

The idea behind the Mediation Act is to strengthen the terrain of Alternate dispute resolution. But, some strong amendments are required to make this Act unassailable.

- The mediation act allows mediators to be registered and unregistered under Section 2(h).²³ This gives rise to suspicious agreements converted into mediated settlement agreements. According to the Act, all the mediated settlement agreements are enforced by the mediators by themselves, and unregistered mediators are at the advantage of enforcing agreements which are suspicious in nature as these agreements are not treated as decrees or judgments.
- Section 8 of the Act²⁴ gives autonomy to the parties to select the mediators. However, foreign nationals require a certain level of qualification and accreditation as specified by the Act. The Act is ambiguous on the qualification of foreign nationals. Also, this takes away the autonomy of the parties to decide the mediators of their choice owing to the qualifications which are not specified in the Act.
- The scope for non-enforcement of mediated settlement agreements is quite narrow. Agreement shall not be enforced if it is reached through fraud, corruption or impersonation. It fails to include an agreement reached through coercion or duress. The Act is ambiguous on the point as to what will happen if, after the limitation period, fraud or corruption is discovered.²⁵
- Considering the fact India is a signatory at the Singapore Convention on Mediation, the Act lacks clarity on foreign mediation and mediators. It is pertinent to mention here that the Act must be in consonance with the Singapore Convention. However, it has failed to give a clear picture of the same.
- Only commercial cases of the Government are given place under the Act. The basic idea behind alternate dispute resolution is to reduce the pendency in the court of law, however,

²³ Mediation Act 2023, s 2(h)

²⁴ Mediation Act 2023, s 8

²⁵ 'What, How, Where, When and Why of The Mediation Act, 2023' (Mondaq, 25 September 2023)

<<https://www.mondaq.com/india/arbitration--dispute-resolution/1369216/what-how-where-when-and-why-of-the-mediation-act-2023>> accessed 15 August 2024

giving place to commercial transactions of the government won't reduce the burden of courts in terms of governmental litigations.

WAY FORWARD

- Alternate dispute resolution is always seen as a resolution mechanism for civil disputes. However, we look at the compoundable offences under Section 320 of the IPC,²⁶ and these cases can be settled by the parties themselves. So, the Act can imbibe criminal offences which are compoundable in nature so that it becomes easier for the parties to come to a settlement of their desire with the help of mediators who facilitate settlement. It also reduces the pendency of trials at the court of law.
- Alternate dispute resolution had never been given the importance it required. Through different Acts, it has been recognised and has become popular. The Act needs to enforce the mediated settlement agreements as a decree or judgement so that unregularised or suspicious agreements are in accordance with the law and chances of fraud, corruption and more are reduced.
- As the signatory of the Singapore Convention, the legislature has a duty towards its implementation through the Act. The qualifications of the foreign mediators are to be mentioned clearly so that it gives parties a fair chance to decide their mediators by choice.
- Fraud or corruption, coercion, and duress should also be included under this Act. The mediated settlement agreement is most likely to be influenced by coercion or duress as the non-registered mediators are given the power to enforce the agreement. Also, the limitation period should be calculated from the date these factors are identified so that the rights of the parties are not violated.
- Alternate dispute resolution was designed to reduce the burden of the court, but just including commercial cases of the Government is defying the same. It is suggested to include all other possible civil cases of the government under the ambit of the Act for easy, flexible and less time-consuming disposal of the cases. The major pendency in the country is against the government.

²⁶ Indian Penal Code 1860, s 320

- The list of groups of people “not fit for mediation” should be revised. It includes minors, deities, persons with unsound minds, and the intellectually disabled. However, their rights are secured in separate legislations where they have been given guardianship.²⁷ It is unfair to exclude them when they can be represented by their guardians. They are denied easy accessibility to justice and speedy trial.
- Urge to disseminate information regarding the Act. The National and State Legal Services Authorities should disseminate more information regarding mediation and ADRs so that they become the first option explored by potential litigants.²⁸ Law schools and colleges should propagate practical knowledge relating to alternate dispute resolution to bring awareness about easy accessibility of justice.

CONCLUSION

The Mediation Act 2023 is indeed a progressive plunge into the world of alternate dispute resolution. It has proved to be one of the most substantial and revolutionary developments in the field of alternate dispute resolution, irrespective of various challenges and lacunas in it. The Act has systematised the procedure of the mediation as it has established parameters for the practice and has ensured authenticity and efficiency by giving equal importance to a mediated settled agreement. Mediation has become one of the most formally effective and harmonious modes of resolving disputes out of doors. The legislature has recognised the need for the Act due to its rising popularity and speedy disposal of cases. It applies to a broad range of litigations, not just domestic cases. The Act provides for community mediation, institutional mediation and online mediation specifically for those who are unable to attend physically. To iron out unregularised processes and malpractices regarding mediated settlement agreements, a Mediation Council of India is set up. Bearing in mind the signatory of the Singapore Convention, the Act has rightly included foreign mediators to facilitate the parties, and foreign mediation is encouraged. It, thus, dynamically changed the standpoint regarding alternate dispute resolution. Owing to some inexorable gaps in the Act, it is close to becoming an air-tight Act.

²⁷ Ollapally (n 9)

²⁸ ‘Mediation Act 2023-Explained’ (*Forum IAS*, 23 September, 2023) <<https://forumias.com/blog/upsc-current-affairs-news/mediation-act-2023-explained-pointwise/#gsc.tab=0>> accessed 15 August 2024