



A Comparative Study of India's Mediation Laws and Their Shortcomings

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Abstract

In developing countries like India, where most of the people opt for litigation to resolve disputes, there is excessive over-burdening of courts and a large number of pending cases on the docket, which has ultimately led to dissatisfaction among people regarding the judicial system and its ability to provide justice, often making true the popular belief, "Justice delayed is justice denied". The concept of Mediation as a part of alternative dispute resolution system is an ancient and deeply rooted practice in our country. It has been practised in the form of the panchayat system for centuries, in which certain respected elders of the village acted as mediators between the conflicting parties and helped to resolve their disputes. Beyond certain legislations providing for mediation, at present The Mediation Act, 2023 is a progressive legislation for peaceful dispute resolution in India which streamline, structure and institutionalise the mediation process. Online mediation is covered by the law. Mediation proceedings can be virtual, online or hybrid. This enhances the convenience of participation and allows a wide reach. It applies to commercial disputes with the government. Even though it is fruitful it has its own pitfalls such as registration of mediators, disputes relating to claims of certain persons, lack of mandatory mediation, and international mediation which needs to be addressed.

Keywords: Mediation, Alternative Dispute Resolution, the Mediation Act, 2023.

Introduction

Mediation is a voluntary, binding process in which an impartial and neutral mediator facilitates disputing parties in reaching a settlement. A mediator does not impose a solution but creates a conducive environment in which disputing parties can resolve all their disputes. Mediation is tried and tested alternative method of dispute resolution. It is a structured process where a neutral person uses specialized communication and negotiation techniques. A process of facilitating parties in resolving their disputes. A settlement process whereby disputing parties arrive at a mutually acceptable agreement ^[1].

Categories of Mediation

The ways of initiation of mediation are categorized as follows:

- i). **Contract-Based Mediation:** This is initiated by providing for it in a dispute resolution clause in contracts and resorting to it either through institutional or ad-hoc mediation ^[2].
- ii). **Court-Referred Mediation:** This is initiated by way of reference by the Court under Section 89 of Code of Civil Procedure, 1908 ('CPC') by way of amendment in 1999 which effects from 2002 ^[3]. Hon'ble the Chief Justice of India set up the Mediation and Conciliation Project Committee (MCPC) in 2005 for encouraging amicable resolution of disputes pending in the courts in accordance

with Section 89 of CPC ^[4].

- iii). **Statutory Mediation:** In special legislations such as Section 37 of Consumer Protection Act, 2019 after the case is filed in courts. Section 442 of the Companies Act, 2013 introduced mediation as an alternate dispute resolution mechanism within the framework of the Companies Act, 2013. For implementation of this section, the Companies (Mediation and Conciliation) Rules, 2016 (Rules) have been notified on 9th September 2016 ^[5].
- iv). **Mandatory Mediation:** Mandatory pre-litigation mediation is initiated as provided under an amendment in 2018 to Section 12A of Commercial Courts Act, 2015.
- v). **Voluntary Mediation:** Section 5 of The Mediation Act, 2023 provides for voluntary pre-litigation as whether any mediation agreement exists or not, the parties before filing any suit or proceedings of civil or commercial nature in any court, may voluntarily and with mutual consent take steps to settle the disputes by pre-litigation mediation ^[6].

Benefits of Mediation

Mediation as an Alternative Dispute Resolution system has enormous benefits to both the parties and the judiciary which is lagging of cases to settle over time. This definitely reduces the pressure exerted on judiciary.

- **Reduced Costs:** Settling disputes through court

proceedings is generally very expensive and the overall costs can be highly unpredictable. Resolving disputes through mediation, however, can often be much faster and much cheaper than going to trial ^[7].

- **Flexible and Time Saving:** There exists no set of procedure for mediation thus providing parties access to a wide range of outcomes. The dispute resolution process is quicker due to the least legal formalities and procedural flexibilities. A mediator has the liberty to consider those issues she/he deems significant to bring parties to the agreement, time-consuming evidence is generally avoided, thereby saving time and resources.
- **Confidentiality and Privacy:** All the information and evidence presented during mediation is kept confidential thus outside parties do not have access to the mediation proceedings. Data given to the mediator cannot be used for any other purpose besides helping the mediator to reach an appropriate resolution. In fact, there is such secrecy that there is unique confidentiality between one party and the mediator i.e. if one party provides information to the mediator, it can be kept confidential from the other party subject to specific conditions. Another significant benefit of mediation in India is that it is completely private and helps to protect the public image of the parties. Only the disputing parties and the appointed mediator is present during the process making it personal and private ^[8].
- **Preservation of Relationships:** Settling family or workplace disputes is already a difficult situation to handle, but going through a litigation battle and the stress of the courts can make it even more so, putting added pressure on the relationship between both parties. Mediation on the other hand helps both parties focus on communicating effectively with each other and coming to a negotiated settlement that works for all involved.
- **Satisfactory Outcomes:** Parties control the outcome of the dispute. It provides a win-win situation for both the parties as they play an important role in formulating the terms of the settlement ^[9].

The plaintiff is entitled to refund of full court fees as stated in Section 16 of the Court Fees Act, 1870 if the dispute is settled through the process of mediation ^[10].

Need for Mediation in India

A vibrant judicial system is the basis of a flourishing democratic tradition. With the large backlog of cases in India, mediation has been regarded as a means of reducing arrears by inviting parties to agree to facilitative solutions ^[11].

In *Salem Advocate Bar Association v. Union of India* ^[12], the Supreme Court of India acknowledged that there was insufficient case management in place to give effect to the methods envisaged in Section 89 of the CPC and that “modalities needed to be formulated” for effective implementation of the ADR methods outlined in Section 89. The Supreme Court further went on to list the matters that were appropriate for ADR procedures and were currently ongoing in civil courts or special tribunals. These situations are categorised into five categories:

- i). All cases involving contracts, trade, and commerce;
- ii). Every case involving a tense relationship, such as marriage disputes;
- iii). All instances where maintaining the pre-existing relationship is necessary, such as conflicts between neighbours and society members;
- iv). All tort cases, including those involving motor vehicle

accidents; and

- v). Every customer disagreement ^[13].

However, the landmark judgment that brought mediation to the limelight was *Salem Advocate Bar Association v. Union of India* ^[14], where the Court adopted the principle of purposive construction to uphold the validity of the Amendment Act of 1999 inserting Section 89 to the CPC. Pursuant to this case, the Apex Court constituted a Mediation and Conciliation Project Committee (MCPC) to “oversee the effective implementation of Mediation and Conciliation” in India. The Committee drafted the Model Rules, 2003 which served as the guiding light for various High Courts in framing their own mediation rules.

Afcons Infra Ltd v. M/S Cherian Varkey Constructions ^[15], In this case, the Supreme Court of India further held that all cases relating to trade, commerce and contracts, consumer disputes and even tortious liability could normally be mediated. Notably, in *M.R. Krishna Murthi v. New India Assurance Co. Ltd* ^[16], a more recent case involving a road accident, the Supreme Court of India recognized the increasing significance of the mediation process and observed that “there is a dire need to enact an Indian Mediation Act”.

Birth of the Mediation Act, 2023:

The aforementioned judgments showcase that the higher judiciary generally held a favourable disposition towards the practice of mediation, underlining the need for a dedicated mediation legislation. Additionally, India’s international commitments, including signing the Singapore Convention on Mediation, formally the ‘United Nations Convention on International Settlement Agreements Resulting from Mediation’ or ‘UNISA’ in 2019 also reinforced the need for a comprehensive mediation law. It is in this context that the Mediation Act, 2023 was passed to consolidate and give effect to this general attitude of support for mediation ^[17].

Applause of the Mediation Act, 2023:

- **Enforcement of Settlement Agreement:** Section 27 provides for enforcement of a mediated settlement agreement in a manner as if it were a judgment or decree passed by a court ^[18].
- **Online Mediation:** Section 30 provides for Mediation proceedings can be virtual, online or hybrid. This enhances the convenience of participation and allows a wide reach ^[19].
- **Mediation Council of India:** Section 31 provides for a (MCI) will be set up to monitor, maintain standards and lay down the ethical code of conduct for mediators, service providers and training institutions.
- **Mediation Service Provider:** Section 40 provides that mediation proceedings may be conducted by a Mediation Service Provider which includes a body or an organization, or b) an authority constituted under the Legal Services Act, 1987, c) a court annexed mediation center, or d) any other body as notified, provided any of these are recognized by the MCI for conduct of mediation proceedings under the Mediation Act. The Mediation Service Providers are tasked with the duty to inter alia accredit mediators and maintain a panel of mediators, provide all facilities such as secretarial assistance and infrastructure for the conduct of mediation proceedings, facilitate registration of mediated settlement agreements.
- **Community Mediation:** Section 43 provides for a group of three mediators will oversee community mediation,

aiming to resolve conflicts that could potentially disrupt the peace and harmony within the local community.

Pitfalls of the Mediation Act, 2023:

- **Registration of Settlement Agreement:** Sections 19 and 20 of the Act deals with registration of Agreement and Chapter VI deals with enforcement of Mediation Agreement. Mediated settlement agreement arrived at between the parties, other than those arrived in a court or tribunal referred mediation or award of Lok Adalat or final award of the Permanent Lok Adalat under Section 21 or Section 22E of the Legal Services Authorities Act, 1987, may, at the option of parties, be registered with the Authority constituted under the said Act, or any other body as may be notified by the Central Government, in such manner as may be specified and such Authority or body shall issue a unique registration number to such settlement agreements. This can be done within 180 days (with a possible extension) of receiving the authenticated copy of the agreement. Registration is not mandatory, and the implications is provided under Explanation which says-For the removal of doubts, it is clarified that nothing contained in this sub-section shall affect the rights of parties to enforce the mediated settlement agreement under Section 27 or challenge the same under Section 28 ^[20].
- **Multiple Registration Needed for Mediators:** The necessity for mediators to be registered or authorized at the Legal Services Authority, the Mediation Council of India, a court-annexed mediation center, or an approved mediation service provider raises questions about why fulfilling just one of these criteria is deemed inadequate for this type of mediator ^[21].
- **Delimiting Mediation For certain People:** The First Schedule lists disputes relating to claims of minors, deities, persons with intellectual disabilities, persons of unsound mind and persons with disabilities having high support needs as 'not fit for mediation'. However, all such people are covered by separate legislation which provide for guardianship when they are unable to take legally binding decisions. Excluding such people from mediation would be denying them easy access to justice and is discriminatory. Similarly, disputes involving professionals such as lawyers, doctors, chartered accountants before any statutory authority in relation to registration, discipline or misconduct are excluded. Disputes involving tortious liability such as negligence are recognized in many jurisdictions and are found to be especially suitable for mediation. It is important to clarify that such complaints can be mediated. There is tremendous educative value in such mediation, and it is apprehended that even complaints of negligence may be excluded by a broad stroke.
- **International Mediation:** Although Section 3 (g) defines International Mediation, it is not exhaustive since India is a signatory to the Singapore Convention on Mediation and the legal framework is necessary for ratification.
- **Community Mediation:** Section 43 provides for Community Mediation. It is a progressive step, but the definition is ambiguous. The process mandates 3 mediators on the panel. The provisions are laborious and hinders use.

Epilogue

A change in mindset is required for parties in dispute to adopt mediation. Only a critical mass of users can change mindsets. Restrictions and limitations, other than those that are necessary, are contraindicated and could stifle the growth of mediation at the very inception. This Act seeks to institutionalise and formalise the mediation process, which is likely to improve the efficiency and effectiveness of the process in the future. It is further likely to improve the credibility and acceptance of the process amongst the stakeholders. With commercial disputes and litigations on the rise, India must embrace this new legislation to strengthen its image as an investment destination by redressing all the said pitfalls.

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