

Mediation:- Crafting Peaceful Solution for Conflicts



Wednesday Wisdom
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WHAT IS MEDIATION?

The term mediation is defined as follows:-

- Blacks Law dictionary defines mediation as “Intervention; interposition ; the act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute. In international law and diplomacy, the word denotes the friendly interference of a state in the controversies of others, for the purpose, by its influence and by adjusting their difficulties, of keeping the peace in the family of nations[2].”
- Section 2(25) Consumer Protection Act 2019[3] "mediation" means the process by which a mediator mediates the consumer disputes.
- Section 4 Mediation Act, 2023 ("Act")[4] :- Mediation shall be a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby party or parties, request a third person referred to as mediator or mediation service provider to assist them in their attempt to reach an amicable settlement of a dispute.
- Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018[5], Rule 2(e) “mediation” means a process undertaken by a Mediator to resolve, reconcile and settle a commercial dispute between the parties thereto.

HISTORY OF MEDIATION/CURRENT SCENARIO

Mediation is not an innovative concept in India. Mediation has been a dispute resolution mechanism since ancient times. But in view of the legislation not being structured and mediation not being given the importance of an affordable and accessible dispute resolution mechanism, the people were not very inclined towards mediation, despite having some infrastructure like mediation centres. Currently, the people can initiate the mediation proceedings in 3 broad ways:

- **Voluntary Mediation-** The Parties may decide to adopt mediation as dispute resolution mechanism, and add the appropriate clause in the agreement.
- **Reference of Courts-** The Court can refer the case to mediation under section 89 of Code of Civil Procedure, 1908 ('CPC') or under special legislations such as Section 37 of Consumer Protection Act, 2019, after case is filed with Court, or under the CPC Order 32A Rule 3 in matters related to family disputes.
- **Mandatory Pre-litigation Mediation-** Under the Commercial Courts Act Section 12A.

[1]The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

[2]<https://thelawdictionary.org/mediation/>

[3] <https://www.indiacode.nic.in/bitstream/123456789/15256/1/a2019-35.pdf>

[4] https://prsindia.org/files/bills_acts/bills_parliament/2021/Mediation%20Bill,%202021.pdf

[5] <https://nalsa.gov.in/the-commercial-courts-acts-rules/the-commercial-courts-rules-2018>

ADVANTAGES OF MEDIATION

Participative, Voluntary- Parties directly participate and present their own case and Parties may opt out of mediation in case they feel so..

Speedy, Efficient, Economical- Time and Money saving for both Parties involved.

Fair Process- A neutral third party will access the case and bring parties to common platform.

Simple, Informal- This type of environment in mediation helps to schedule it flexibly, thereby helping the parties, and effective communication is sought between the Parties.

Settlement of entire conflict of parties vs a specific dispute between the parties.

Mutually Beneficial settlement- Mediation aims for win-win situation for both the Parties, so neither party is aggrieved by the order.



MEDIATION ACT:- TIMELINE[6]

INTRODUCED IN RAJYA SABHA	20TH DECEMBER 2021
REFERRED TO STANDING COMMITTEE	20TH DECEMBER 2021
REPORT SUBMITTED BY STANDING COMMITTEE	13TH JULY 2022
PASSED BY RAJYA SABHA	01ST AUGUST 2023
PASSED BY LOK SABHA	07TH AUGUST 2023
PASSED BY LOK SABHA [7]	15TH SEPTEMBER 2023

MEDIATION ACT 2023-SALIENT FEATURES

1. Is pre-litigation mediation mandatory in the Act? [8]

No. It is not mandatory. Earlier it was proposed to make the pre litigation mediation mandatory, but as per the suggestions of the standing committee, the pre litigation mediation was made optional for the parties involved. However pre-litigation mediation is mandatory under the Commercial Courts act, 2015 for certain commercial disputes[9] . The pre-litigation mediation shall be in accordance with the provisions of section 12A of the Commercial Courts Act, 2015. In addition, regardless of whether the parties have agreed to mediation or not a Court or tribunal has the right to suggest mediation to the parties concerned at any time at any stage of a legal proceeding.

[6]<https://prsindia.org/billtrack/the-mediation-bill-2021>;

[7]<https://www.scconline.com/blog/post/2023/09/16/ministry-of-law-and-justice-notifies-mediation-act-2023/>

[8]Section 6 of The Mediation Act, 2023.

[9] Section 2(c) of the Commercial Courts Act, 2015



2. How are the mediators appointed? [10]

The Act states the procedure for appointment of mediators by the Parties. The mediator appointed can be of any nationality, but the Act states that in case a mediator of a foreign nationality is sought to be appointed by the Parties, he has to have the qualifications as may be prescribed by the Mediation Council of India from time to time.

The mediator so appointed, is required to provide a declaration disclosing any existing or potential personal, professional, financial, or other scenario that could create a conflict of interest or that could lead to legitimate concerns about his objectivity or independence as a mediator in the particular mediation matter. In the absence of a mutually agreed-upon mediator, the parties have the option to submit a request to the institutions that provide the mediation services (“Mediation Service Provider”) [11] for the appointment of a mediator from their established panel of mediators. This selection process will factor in the parties' preferences and the mediator's appropriateness for effectively resolving the dispute.

The Mediator can be terminated by either Party, or if there is conflict of interest, or his voluntary withdrawal from mediation due to any reason. In case of termination of mediator, (in case other than institutional mediation), then another mediator may be appointed within 7 (seven) days from such termination of mediator. In case of Mediation Service Provider, the Mediation Service Provider shall appoint the new mediator within 7 (seven) days from such termination.

3. How should the parties agree to submit the dispute to mediation?

According to section 5(1) of the Act, it is stated that a mediation agreement should be entered into by the parties. The agreement may be in form of a separate agreement altogether, or a mediation clause in the agreement as long as it is stated explicitly in writing. A mediation agreement shall be construed to be valid even such agreement is contained in the communications exchanged amongst the parties.. Parties are at liberty to enter into an agreement to submit the dispute to mediation, even after the commencement of dispute. The mediation clause in the agreement should be detailed to include the number of mediators and method of appointment of the mediators, language of the mediation, jurisdiction of mediation, venue of the mediation, adherence to the laws etc.

4. Which matters cannot be subjected to Mediation?

Section 7 read along with the first schedule of Act states the exclusions related to the matters which are not fit to be mediated. Those include :

- disputes against minors or persons with disabilities,
- criminal offenses which require prosecution,
- taxation matters and collection of taxation or refunds,
- any telecom related disputes, or
- disputes where the rights of multiple parties are affected, public matters.

The Act is also sought to apply for compoundable offences including but not limited to matrimonial disputes.

[10]Section 10 of the Mediation Act, 2023.

[11]Chapter IX of Mediation Act, 2023.



5. How to conduct the mediation proceedings?[12]

The Act provides detailed procedures of mediation under section 17. The mediator shall at all times be guided by the principles of objectivity and fairness and protect the voluntariness, confidentiality, and self-determination of the parties, and the standards for professional and ethical conduct as may be specified. The mediator may take such measures as may be considered appropriate, taking into account the circumstances of the case, including meeting with parties or participants, jointly or separately, as frequently as deemed fit by the mediator, both in order to convene the mediation, and during the mediation for the orderly and timely conduct of the process and to maintain its integrity.. The mediation proceedings shall not be strictly bound by the CPC or Evidence Act, 1872. The Act has sought for speedy resolution of disputes, as the mediation under the act shall be completed within one hundred and eighty (180) days from the date of first appearance before the mediator. This time limit may be extended by the parties after mutual agreement, but it should not exceed further by one hundred and eighty (180) days.

6. What is a mediation settlement agreement?[13]

Mediation settlement agreement shall mean a document which will be in a nature of agreement of some or all of the parties of mediation have agreed upon regarding the points in the disputes raised in mediation. Such mediation settlement agreement should be authenticated by the mediator of the dispute. In such an agreement, parties may insert terms which are extending beyond the scope of the mediation.

The mediation settlement agreement should be in writing and signed by both the parties. In case of any institutional mediator, the mediation settlement agreement should be submitted to the institution and mediator, who will then attach a covering letter to the same, and submit the report to both the parties. In other cases, the mediator shall authenticate such mediation settlement agreement and submit copies of the agreement to both the parties.

In case, where the mediation is not successful, then the mediator shall prepare a failure report and submit a signed copy to the disputing parties. It's crucial to remember that the non - settlement report will be handled with confidentiality in order to protect the interest of the parties. This means that the mediator is not allowed to disclose the causes of lack of settlement or any details regarding the conduct of the parties throughout the mediation process.

[12]Chapter V of The Mediation Act, 2023.

[13]Section 22 of The Mediation Act, 2023.



7. Can a mediation settlement agreement be challenged?[14]

Yes. While a mediation settlement agreement is binding on the parties, it can be challenged on limited grounds. In case a mediation settlement agreement is sought to be challenged by either party, the parties may file an application in the Court or tribunal of competent jurisdiction within 90 days of the date of receipt of the copy of the mediation settlement agreement. A mediation settlement agreement may be challenged only on the four grounds namely

- a) Fraud
- b) Corruption
- c) Impersonation
- d) Where the mediation was conducted in disputes or matters which are not fit for mediation.

8. Does the Act provide for Online Mediation?[15]

Yes. In this era of digital world, the Act also provides for online mediation for the parties involved. The online mode for the mediation may include audio or video conferencing, encrypted communication, email as may be preferred by the parties. The procedure of online mediation shall be as per the specification by the Act. The other requirements of mediation such as integrity, confidentiality shall remain the same.

9. Is there a body to govern the mediation in India?[16]

Yes. The Act provides for formation of an independent body known as Mediation Council of India ("Council") to discharge the functions stated under this Act. The Act also specifies the location of head offices and other offices. It also specifies the composition of the council, salaries of the council members, appointment of committees, duties and functions of the council.

10. What is community mediation?[17]

Under the Act, section 44, recognises the concept of community mediation. Community mediation is not a new concept in India. Since long times, panchayats have been mediating the disputes between households in villages or in communities. The crux of community mediation is the same. The disputing parties have to make an application before the concerned Authority constituted under the Legal Services Authorities Act, 1987

or District Magistrate or Sub-Divisional Magistrate in areas where no such Authority has been constituted, for referring the dispute to mediation. There shall be a panel of three mediators to facilitate the settlement of disputes. The procedure of community mediation is also stated in detail in the Act.

11. Is there a provision for mediation institutes?[18]

The Act also provides for concepts of institutional mediation. Such mediation service providers shall also be graded in the manner specified. The mediation service providers shall perform functions such as maintaining panel of mediators, providing services of mediator, provide all the infrastructure facility, secretarial assistance, promote ethical and professional conduct between mediators etc.

[14] Section 29 of the Mediation Act, 2023

[15] Section 32 of The Mediation Act, 2023

[16] Chapter VIII of The Mediation Act, 2023

[17] Chapter X of The Mediation Act, 2023.

[18] Chapter IX of The Mediation Act, 2023.

CONCLUSION:

The mediation scenario in India as an alternative form of dispute resolution is still in its nascent stage. The passing of the Act is a significant step towards alternative dispute resolution and it shall facilitate a range of cases domestic as well as international. This Act will bring common man closer to availing justice at a reasonable cost and limited timeframe. It shall remain to be seen whether the Mediation Act, shall be implemented in letter and spirit and it shall fulfil the intentions of the legal connoisseurs. The enactment of the Mediation Act is constructive and motivating step towards reforming the field of conflict resolution. Without the necessity for formal adjudication, it offers parties a valuable opportunity to resolve all conflicts willingly and effectively.

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