

2

RESEARCH CORNER



- THE MEDIATION ACT, 2023: PIONEERING A NEW PARADIGM IN DISPUTE RESOLUTION
-

The Mediation Act, 2023: Pioneering a New Paradigm in Dispute Resolution

In today's fast-paced business environment, disputes are inevitable but the methods for resolving them are evolving rapidly. Traditionally, litigation has been the go-to mechanism for addressing commercial and corporate conflicts. However, the limitations of court processes, such as time-consuming procedures, escalating costs and an overburdened judiciary have prompted a significant shift toward Alternative Dispute Resolution (ADR) methods, particularly arbitration and mediation. These methods offer more flexibility, confidentiality and efficiency making them highly attractive to businesses seeking swift and less adversarial solutions.



Ravi Prakash

Associate Partner, Securities Law & Corporate Litigation, Corporate Professionals, Delhi
ravi@indiap.com



CS Shivam Singhal, ACS

Senior Associate, Research & Publications, Corporate Professionals, Delhi
shivam.singhal@indiap.com



Siddhant Sekhri

Associate, Securities Law & Corporate Litigation, Corporate Professionals, Delhi
siddhant@indiap.com

INTRODUCTION

USHERING A NEW ERA OF DISPUTE RESOLUTION

Mediation has evolved as a powerful alternative dispute resolution mechanism worldwide, offering a voluntary, confidential process to resolve conflicts amicably.

To address this, the Mediation Bill 2021, which received the Presidential assent on September 15, 2023, became the "Mediation Act, 2023." The enactment of the Mediation Act, 2023, marks a watershed moment in institutionalizing mediation as a viable option for resolving civil and commercial disputes. This article delves into the key provisions of the Mediation Act and its implications for professionals, while also providing some key recommendations to the Mediators for successful conduct of mediation.

HISTORICAL UNDERPINNINGS: FROM LOVEDAYS TO MODERN FRAMEWORKS

The journey of mediation on the global stage reflects its transformation from a culturally ingrained practice to a structured and modern dispute resolution mechanism. This evolution spans centuries and continents, shaped by societal needs, legal developments, and reform movements.

1. English Common Law: The Early Integration of Mediation

Mediation was a fundamental part of medieval English society. Before parliamentary statutes became the cornerstone of law, English common law applied local customs, with mediation often preferred over court litigation. Key features of early mediation included:

- **Lovedays:** Certain days were designated for mediations, allowing parties to resolve disputes without court intervention.
- **Court-Adjourned Mediation:** Courts sometimes adjourned cases to allow disputing parties to mediate.

As legal systems evolved, the preference for mediation declined, giving way to litigation as the dominant mode of dispute resolution. Legal rights, contracts, and adversarial arguments became more prominent, sidelining mediation.

2. The Modern Revival: Civil Rights Movements in the U.S.

The resurgence of mediation in the 20th century is often attributed to the civil rights campaigns of the 1960s in the United States. This era witnessed:

- **Community Mediation Initiatives:** Inspired by participatory democracy, mediation was used

to address community grievances. The Vietnam War activism further fueled the search for constructive alternatives to conflict.

- **Institutionalization of Mediation:** Organizations like the San Francisco Community Mediation Board, established by Ray Shonholtz, laid the foundation for modern community mediation programs.
- **Court-Connected Family Mediation:** Led by figures such as John Haynes and Joan Kelly, family mediation became widespread, creating specialized approaches to conflict resolution.

The U.S. also saw the rise of organizations like the National Association for Community Mediation (NAFCM) and the Society of Professionals in Dispute Resolution (SPIDR), which expanded mediation beyond labor-management contexts to broader conflicts.

3. Mediation in Australia and the Multi-Door Courthouse Concept

Australia was one of the earliest countries to adopt mediation as a formalized alternative dispute resolution mechanism. Simultaneously, Frank Sander's "Multi-Door Courthouse" concept in the U.S. introduced the idea of offering multiple resolution options—including mediation—within the court system, promoting efficiency and accessibility.

4. The Woolf Reforms: Mediation in England and Wales

In the 1990s, England and Wales underwent significant civil justice reform through the Woolf Reforms, led by Lord Woolf, who later became the Lord Chief Justice. These reforms targeted the pressing issues of:

- **Cost:** Reducing expenses associated with protracted litigation.
- **Delay:** Ensuring timely resolution of disputes.
- **Complexity:** Simplifying procedural rules.

Mediation became a central element of the reforms, alongside enhanced case management by judges. These changes culminated in the Civil Procedure Rules of 1998, which formally integrated mediation into the civil justice system.

5. Hong Kong's Civil Procedure Reforms

Inspired by the Woolf Reforms, Hong Kong introduced its own civil procedure reforms in 2009. While sharing similarities, Hong Kong's framework differed by excluding pre-action protocols. Mediation and

case management played vital roles in these reforms, showcasing a tailored approach to addressing local legal challenges.

6. Mediation's Expansion into Schools and the Private Sector

Before the 1970s, mediation was predominantly used in labor-management contexts, such as transportation disputes mediated by the Federal Mediation and Conciliation Services in the U.S. However, the following decades witnessed its expansion into:

- **Education:** Organizations like the National Association for Mediation in Education (NAME) introduced peer mediation programs in schools, later succeeded by the Conflict Resolution Education Network (CRENet).
- **Private Sector:** Mediation gained traction in corporate disputes, marking a departure from its earlier focus on community and labor issues.

By mastering these skills and leveraging the opportunities presented by the Mediation Act, professionals can position themselves as key players in transforming India's dispute resolution landscape.

THE EVOLUTION OF MEDIATION IN INDIA

Mediation in India is intricately woven into the fabric of its cultural heritage, reflecting a long-standing tradition that spans from the traditional Panchayat system to contemporary legal frameworks. This rich history showcases the evolution of dispute resolution in Indian society, where community-based approaches have historically played a crucial role in fostering harmony and understanding among individuals.

Today, modern statutory laws build upon this legacy, incorporating traditional practices into formal structures to enhance conflict resolution and promote social cohesion. The following serves as an indicative timeline of how Mediation has evolved in India:

- **The Panchayat System:** Served as a model for community-driven conflict resolution.
- **Industrial Disputes Act, 1947:** Introduced mediation to address labor conflicts.
- **Legal Services Authorities Act, 1987:** Facilitated compromise through *Lok Adalats*.
- **129th Law Commission Report:** Justice Malimath Committee's report on Urban Litigation and Mediation as Alternative to Adjudication and the Arrears recommended encouragement of parties to refer their disputes to ADR mechanisms.
- **CPC Amendment, 1999:** Integrated mediation into civil justice under Section 89.
- **Tamil Nadu Mediation and Conciliation Centre:** Became the first court-annexed mediation centre in India, having opened on April 09, 2005.

- **Section 442 of the Companies Act, 2013:** Provides that the Central Government is authorised to maintain a panel of experts to be called as ‘Mediation Panel’ for mediation between parties during the pendency of any proceedings before the Central Government or Tribunal or Appellate Tribunal. Companies (Mediation and Conciliation) Rules, 2016 were also notified in this regard.
- **Commercial Courts Act, 2015:** Provides for mandatory pre-institutional mediation in certain classes of Commercial Suits, where no urgent relief is sought.

THE ADVENT OF MEDIATION ACT, 2023

To establish a robust legal framework for mediation and enhance its practice in India, the Mediation Bill, 2021, was introduced in the Rajya Sabha on December 20, 2021. The following day, it was referred to the Standing Committee for a detailed review. After thorough deliberation, the Committee submitted its 117th Report on July 13, 2022, with several recommendations for improvement. Incorporating these recommendations, the Union Cabinet approved revisions to the Bill, leading to its passage in the Rajya Sabha on August 2, 2023, and in the Lok Sabha on August 7, 2023. Upon receiving presidential assent on September 15, 2023, the Mediation Bill became the **Mediation Act, 2023**, marking a significant milestone in India’s dispute resolution landscape.

As per its preamble, the objective of the Mediation Act, 2023 is to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost effective process and for matters connected therewith or incidental thereto.

The Mediation Act defines the word “Mediation” as follows:

“Mediation” includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute;

Mediation, as defined under the Mediation Act, 2023, is a flexible and inclusive process that encompasses pre-litigation mediation, online mediation, community mediation, and conciliation. At its core, mediation is a voluntary mechanism where parties work collaboratively to reach an amicable settlement under the guidance of a neutral third party—the mediator—who facilitates discussions but holds no authority to impose a resolution. This emphasis on mutual consent and dialogue underscores mediation’s distinct and non-adversarial approach to resolving disputes.

Section 6, read with the **First Schedule** of the Act, outlines specific exclusions to ensure that mediation is applied only to disputes that are appropriate for consensual resolution. These exclusions safeguard the process from being misapplied in cases where mediation might be unsuitable or impractical. The following types of disputes are excluded from the ambit of mediation under the Act:

1. **Disputes Involving Vulnerable Parties:** Cases involving minors, persons with intellectual disabilities, or individuals of unsound mind are excluded. This ensures that vulnerable parties are adequately protected through judicial oversight rather than consensual mechanisms.
2. **Criminal Proceedings:** Mediation cannot be used for the prosecution of criminal offences, recognizing that such matters require adjudication through formal legal processes due to their public interest implications.
3. **Professional Complaints or Disciplinary Proceedings:** Complaints or disciplinary proceedings against practitioners, such as CS, CA, lawyers or doctors, are excluded, as these typically involve regulatory bodies and statutory oversight.
4. **Third-Party Rights:** Disputes that affect the rights of third parties not privy to the mediation process are outside its scope. This ensures that the mediation process does not inadvertently affect the rights of uninvolved parties.
5. **Tax Disputes:** Any dispute related to the levy, collection, penalties, or refunds of direct or indirect taxes is excluded, given the statutory nature of tax assessments and enforcement.
6. **Statutory and Regulatory Proceedings:** Proceedings under specialized laws such as the National Green Tribunal Act, Electricity Act, TRAI Act, PNGRB Act, SEBI Act, and Competition Act are excluded. These involve technical adjudication and regulatory frameworks beyond the scope of mediation.
7. **Land Acquisition Proceedings:** Disputes arising from land acquisition proceedings are excluded, as they often involve broader public interest considerations and statutory compliance.

Rationale for Exclusions

The exclusions are carefully designed to ensure that:

- **Judicial Oversight is Retained:** Certain disputes require adjudication by courts or regulatory bodies to ensure compliance with public policy and statutory mandates.
- **Complexity and Public Interest are Addressed:** Issues involving criminal law, taxation, or land acquisition often involve technical, statutory, or public interest considerations that go beyond the collaborative nature of mediation.



- **Parties Are Protected:** Vulnerable individuals, third-party rights, and sensitive regulatory matters are better suited to formal judicial or administrative processes.

PRE-LITIGATION MEDIATION: A GATEWAY TO AMICABLE RESOLUTIONS

One of the cornerstone features of the Mediation Act, 2023, is its focus on **pre-litigation mediation**, as borne in Section 5 of the Act designed to encourage parties to resolve disputes amicably before resorting to formal court proceedings. While earlier drafts of the Mediation Bill, 2021, proposed mandatory pre-litigation mediation, the Standing Committee recommended making it voluntary to preserve the essence of mediation as a consensual process. The Act, therefore, reflects this balanced approach, ensuring pre-litigation mediation remains encouraged but not obligatory.

In jurisdictions like the United Kingdom and Singapore, mandatory pre-litigation mediation has been successfully implemented, demonstrating its potential to streamline dispute resolution. While the Mediation Act, 2023, opts for a voluntary approach, it opens the door for future reforms as mediation gains broader acceptance in India.

Objectives of Pre-Litigation Mediation

1. **Reducing Court Backlogs:** By resolving disputes before they escalate to the courts, pre-litigation mediation helps in alleviate the overwhelming caseload on judicial systems.
2. **Cost and Time Efficiency:** Mediation offers a faster and more affordable alternative to protracted litigation, saving resources for all stakeholders.
3. **Preserving Relationships:** Especially in commercial or family disputes, mediation fosters a cooperative environment, enabling parties to preserve or even improve relationships.
4. **Promoting Settlement-Oriented Culture:** Pre-litigation mediation creates a shift in mindset, encouraging parties to focus on resolution rather than confrontation.

CONFLICT OF INTEREST: UPHOLDING MEDIATOR NEUTRALITY

The Act underscores the importance of impartiality through rigorous conflict-of-interest provisions, as contained in Section 10. Mediators must disclose any potential conflicts—whether personal, professional, or financial before mediation commences. If a conflict arises mid-process, mediators must immediately notify the parties.

Consequences: Parties may waive the conflict through express consent or seek the removal of the mediator by the service provider. This transparent framework ensures trust

in the mediation process and aligns with international best practices for ethical conduct.

TECHNOLOGICAL INTEGRATION: ONLINE MEDIATION

Online mediation is a groundbreaking feature of the Act, signalling India's readiness for digital transformation in dispute resolution. Section 30 recognizes electronic forms of mediation, including video conferencing, secure chat rooms, and email communication. Key advantages include:

- **Accessibility:** Enables parties in different locations to resolve disputes without physical presence.
- **Cost Efficiency:** Reduces logistical expenses associated with traditional mediation.
- **Confidentiality:** Digital platforms are mandated to maintain the integrity and privacy of proceedings.

The incorporation of online mediation aligns with global trends, including the rise of Online Dispute Resolution (ODR) platforms, such as those introduced by SEBI for resolving investor grievances.

MEDIATION COUNCIL OF INDIA: PILLAR OF THE FRAMEWORK

The establishment of the **Mediation Council of India (MCI)** is a pivotal aspect of the Act, aiming to regulate and promote mediation as a professional discipline.

Role and Responsibilities

Outlined in Chapter VIII of the Act, the Council is tasked with:

1. **Standard Setting:** Formulating guidelines for the ethical and professional conduct of mediators.
2. **Accreditation and Registration:** Accrediting mediators and mediation service providers while maintaining an updated panel.
3. **Training and Certification:** Conducting workshops, training programs, and continuous education for mediators.
4. **Promotion of Mediation:** Organizing awareness campaigns to integrate mediation into the mainstream legal framework.
5. **Digital Repository:** Maintaining an electronic repository of mediated settlement agreements to enhance transparency and accessibility.

Ensuring Quality

The Council envisions a stringent accreditation process, ensuring mediators possess the necessary qualifications and undergo periodic assessments to uphold high standards.

International Mediation Hub

MCI is also entrusted with promoting India as a global mediation hub, fostering international collaborations, and aligning domestic practices with global benchmarks.

The Mediation Council's proactive role will be instrumental in shaping India's mediation landscape, ensuring its credibility and acceptance.

COMMUNITY MEDIATION: STRENGTHENING SOCIAL HARMONY

The concept of **community mediation**, introduced under Section 43 of the Mediation Act, 2023, is one of the most innovative and socially significant provisions of the Act. This mechanism aims to address disputes at the grassroots level, particularly those likely to affect peace and harmony within neighborhoods or local communities. By fostering localized solutions, community mediation ensures that disputes are resolved in a way that is inclusive, participatory, and sensitive to cultural and social contexts.

Initiation of Mediation:

- The process requires prior mutual consent of the parties involved.
- An application can be submitted to the Legal Services Authority, District Magistrate (DM), or Sub-Divisional Magistrate (SDM) to initiate the mediation process.

Constitution of the Mediation Panel:

- A three-member panel is constituted to mediate the dispute. The panel includes individuals of standing and integrity who are respected within the community.
- Eligible mediators may include:
 - Local leaders or individuals recognized for their contribution to society.
 - Representatives from area or resident welfare associations.
 - Individuals with prior experience in mediation.
 - Any other person deemed appropriate by the authority.

BINDING NATURE AND ENFORCEMENT OF SETTLEMENTS

Section 27 elevates mediation agreements to the status of court decrees, making them enforceable under the CPC. Challenges to settlements are limited to fraud, corruption, impersonation, or disputes excluded under the First Schedule, ensuring finality and trust in the process.

MEDIATION RULES

The Mediation Council of India shall, with the previous approval of the Central Government, make the following



important rules and regulations under the Mediation Act, 2023:

- 1) Qualification, experience and accreditation for mediators of foreign nationality;
- 2) Manner of conducting mediation proceeding;
- 3) Standards for professional and ethical conduct of mediators;
- 4) Manner of registration of mediated settlement agreement;
- 5) Fees for registration of mediated settlement agreement;
- 6) Cost of mediation;
- 7) Manner of process of conducting online mediation;
- 8) The terms and conditions of experts and committees of experts;
- 9) Conditions for registration of mediators and renewal, withdrawal, suspension or cancellations of such registrations;
- 10) Criteria for recognition of mediation institutes and mediation service;
- 11) Manner of maintenance of electronic repository of mediated settlement agreements;
- 12) Manner for recognition of mediation service provider;
- 13) Such other functions of mediation service provider;
- 14) Duties and functions to be performed by mediation institutes; and
- 15) Any other matter in respect of which provision is necessary for the performance of functions of the Council under this Act.

MEDIATION: OPPORTUNITIES FOR COMPANY SECRETARIES

- 1) **Role as Mediators in Corporate Disputes:** The current Section 442 of the Companies Act, 2013 provides for the maintenance of a panel of mediators

and conciliators to mediate disputes before the Central Government, National Company Law Tribunal (NCLT) or the National Company Law Appellate Tribunal (NCLAT). Practicing Company Secretaries having 15 years of experience, with proper training, can be empaneled as mediators under this provision. This allows them to mediate in cases referred by NCLT/NCLAT involving oppression & mismanagement and shareholder conflicts.

- 2) **Advisory Role in Mediation Procedures:** Company Secretaries can advise companies on the benefits and processes of mediation, helping them navigate pre-litigation mediation under the Mediation Act, 2023. With a focus on compliance and governance, they can assist corporate Boards in understanding how mediation can serve as a cost-effective and timely dispute resolution method.
- 3) **Enhancing Stakeholder Relations:** With their knowledge of stakeholder dynamics, Company Secretaries can mediate between the board, management, and shareholders. The Mediation Act, 2023 and Section 442 of the Companies Act, 2013 allow for mediation in disputes that would otherwise lead to costly litigation, giving CS professionals the opportunity to enhance their value by improving stakeholder relationships and conflict management through mediation.
- 4) **Assisting in Drafting and Implementing Mediation:** Company Secretaries can assist in drafting mediation clauses in contracts, agreements and memorandums of understanding (MoUs), leveraging the provisions of the Mediation Act, 2023.

PRACTICAL TIPS FOR PRACTISING COMPANY SECRETARIES IN MEDIATION

- 1) **Active Listening:** Mediators must listen beyond words, interpreting both verbal and non-verbal cues, including moments of silence, which may signal agreement, confusion, or dissent. For instance, if one party suddenly falls silent, it may reflect internal conflict or hesitation. Picking up on these subtle cues builds trust and encourages parties to share more openly.

- 2) **Empathy and Emotional Intelligence:** Empathy allows mediators to connect at a human level, fostering a cooperative environment. By sharing a personal story or showing understanding, such as recalling the traditional “Panchayat” conflict resolution system, mediators demonstrate that they are approachable and relatable, not just professionals delivering a service.
- 3) **Cultural Sensitivity:** Cultural awareness helps mediators to prevent misunderstandings, especially in family matters or disputes across India’s diverse regions. For example, certain customs may be meaningful for one region but less so for another. In family mediations, awareness of such nuances can be crucial for reaching agreements that respect each party’s values and customs.
- 4) **Problem-Solving Skills:** Effective mediators prioritize finding solutions that satisfy all parties. In a dispute between family shareholders, a mediator discerned that the widow in the case had a strong sentimental attachment to a specific part of the family estate—around the swimming pool. By suggesting this area be allocated to her, the mediator unlocked a resolution that brought the entire dispute to an amicable close.
- 5) **Patience and Perseverance:** Mediation can be time-intensive, requiring mediators to maintain patience to ensure parties stay engaged. For example, in a shareholder dispute within a family, a mediator worked with the family for three months, eventually recognizing that one of the sons was deeply attached to his mother. By patiently proposing a fair share of ownership (20% to each family member), the mediator successfully resolved a lengthy and emotionally charged dispute.
- 6) **Communication Skills:** Clear, respectful and jargon-free communication prevents misunderstandings and ensures parties are aligned. Mediators should use simple language, avoiding complex legal terms, to create a welcoming environment where all parties feel comfortable.
- 7) **Impartiality and Objectivity:** Maintaining an unbiased stance fosters a fair environment, allowing parties to feel equally respected. A mediator’s body language, tone, and words should consistently convey neutrality, avoiding any suggestion of favoritism that might derail negotiations.
- 8) **Strategic Thinking:** Before starting, mediators benefit from understanding the background, interests, and positions of each party, which allows them to navigate challenges more effectively. In commercial mediations, this might mean helping parties recognize tax implications for proposed solutions, guiding them toward options that avoid future legal or financial issues.
- 9) **Legal and Procedural Knowledge:** Knowledge of legal frameworks is critical to ensuring agreements are enforceable. In one case, a mediator drafted a settlement that transferred corporate property without making the company itself a party to the agreement. When contested, this oversight led to the agreement’s invalidation in court. Understanding such nuances helps mediators to avoid costly errors.
- 10) **Building Trust and Rapport:** Trust is essential for productive mediation, built through respectful and honest interactions. Parties feel reassured when they sense that the mediator genuinely seeks to help them resolve the issue, saving them time and expense compared to prolonged litigation.

CONCLUSION

The Mediation Act, 2023 marks a transformative shift in India’s approach to dispute resolution, emphasizing collaboration, efficiency and the preservation of relationships over adversarial litigation. By institutionalizing mediation and providing a robust framework for its practice, the Act not only reduces the burden on the judiciary but also empowers individuals and businesses with a flexible and cost-effective mechanism to resolve disputes.

For professionals such as Practicing Company Secretaries, the Act opens new avenues to enhance their roles in corporate governance, compliance and conflict resolution. From advising on pre-litigation mediation to acting as mediators or facilitating structured negotiations, these professionals can significantly contribute to fostering a culture of amicable dispute resolution in India.

Mediation is more than a legal process; it is a collaborative art that requires empathy, cultural sensitivity, patience, and strategic thinking. By mastering these skills and leveraging the opportunities presented by the Mediation Act, professionals can position themselves as key players in transforming India’s dispute resolution landscape.

In an era where businesses value efficiency and harmony, mediation is no longer an alternative but a preferred solution. The Mediation Act, 2023 not only formalizes this process but also paves the way for a future where disputes are resolved with dignity, preserving both relationships and resources. The time is ripe for stakeholders across industries to embrace this shift and make mediation a cornerstone of their conflict resolution strategies.

REFERENCES:

- i. *Mediation Act, 2023;*
- ii. *Parliamentary Standing Committee Report on the Mediation Bill, 2021 (July, 2022);*
- iii. *Webinar on “Opportunities for Professionals in Mediation” conducted by Corporate Professionals on 08th November, 2024: <https://www.youtube.com/watch?v=PPV94-ISJ5M>* □