

## ANALYSING THE IMPORTANCE OF ADR AND MEDIATION ACT 2023

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### ABSTRACT

*The principal objective of this paper is to analyse the Mediation Bill, of 2023. This paper gives an idea about the ADR and its mechanisms, especially Mediation. It Discusses what is the status of ADR in India and how India is working towards becoming an ADR hub in the future. This paper includes different laws that have been passed and different institutions that have been established to promote ADR. Finally, this paper discusses the Mediation Act, 2023 its features and the benefits of the act.*

**Keywords:** ADR, Mediation, Mediator, Indian Judiciary, Conciliation.

ADR stands for Alternative Dispute Resolution which is a multifaceted approach to solve disputes outside the court. In today's world, it stands as a crucial organ of the modern legal system. It acts as an alternative to traditional legal methods of litigation. ADR is an umbrella term that encompasses a variety of ADR methods. The main aim of ADR is to solve disputes in a more cost-effective and dispute-effective way.

### FEATURES OF ADR

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**Voluntariness:** ADR is generally voluntary in nature which means that parties willingly participate in the dispute resolution process. The benefit of this nature is that it empowers individuals to come together and solve disputes without coercion which are associated with court orders and decisions.

**Confidentiality:** In ADR confidentiality is one of the crucial features because of which big corporate firms or individuals prefer ADR instead of courts as they have public proceedings. ADR methods comprising Mediation and Arbitration provide a private and confidential setting because of which parties can have open conversations which allows the involved parties to come up with creative solutions without the fear of getting publicly exposed.

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**Flexibility:** ADR is very flexible as it lacks the complexity involved in traditional court proceedings which allows parties to get customized solutions to the dispute or which they are seeking resolution. Customization of solutions to ensure that parties get apt solutions that fulfil their needs in terms of complexity, nature and specific circumstances of the dispute.

### **TYPES OF ADR METHODS**

**Arbitration:** It is one of the methods of ADR in which the disputes are submitted to a neutral third party, which makes a decision an award that is mostly binding on the parties. It is less formal than a trial. The arbitrator reviews the evidence and arguments of both sides. Parties prefer these methods because of the efficiency, expertise to make decisions and confidentiality.

**Mediation:** Mediation is conducted by a mediator, who is a third party of neutral behaviour their work is to help the parties to communicate with each other and find a solution. In mediation, the mediator doesn't decide the matter they just help parties to come together and communicate with each other to solve their dispute.

#### **To become a mediator there is a process that one has to complete:**

- A person is required to go under the training of 40 hours stipulated by the mediation and conciliation project committee of the SC after which they become a mediator.
- The person is also required to have 10 mediation matters resulting in a settlement.
- Along with this, a total of 20 mediations in all to be eligible to become a qualified mediator.

**Conciliation:** It is a non-binding process where the neutral third party is involved and they take an active part in solving the dispute. They also suggest solutions but parties have the choice to accept or reject it. This kind of dispute resolution is common in matters related to labour and international conflicts related to business.

**Negotiation:** It is the most common and simple form of ADR, it is a non-binding process where no third party is often required. Negotiation is simple as it allows parties to come together and communicate, it allows parties to have greater control and helps them to find more tailored and creative solutions it often serves as the initial step in dispute resolution.

## ADVANTAGES OF ADR

**Time – Efficient:** ADR is a time-efficient system as disputes are resolved quicker in comparison with traditional litigation. This is beneficial in matters where quick resolutions are required such as matters related to family or business transactions.

**Cost – Effective:** ADR is cost-effective in comparison to traditional methods as it is less formal than traditional litigation, and less lengthy battles which reduces the court fees and saves money.

**Less Adversarial Atmosphere:** ADR methods are more cooperative where parties come together to solve disputes, unlike formal court proceedings.

**Preservation of Relationships:** ADR methods are known to preserve relationships as ADR methods involve open conversation without any outside intervention. They help to maintain a positive relationship between the parties.

**Customized Solution:** ADR helps one to get a tailored solution which helps parties to get specific solutions for the dispute this feature leads to more satisfactory and sustainable solutions for the parties involved.

## STEPS TAKEN TO MAKE INDIA AN ADR HUB

ADR has become a crucial organ of the Indian Legal System and has gained its significance within the legal framework of India. It is being actively supported and promoted by the Indian Judiciary as it alleviates the burden on traditional courts.

In the year of 1987, The Legal Services Authorities Act was passed to encourage out-of-court settlement. The Arbitration and Conciliation Act 1996<sup>1</sup> was passed and it became a pillarstone for ADR in India. This Act not only governs ADR by giving the autonomy to choose the ADR method to parties but it also makes a border for the mechanisms of arbitral awards. In addition to the Arbitration and Conciliation Act several other statutes and laws were enacted to promote ADR one such act is the Commercial Court Act, of 2015<sup>2</sup> whose aim was to promote the use of ADR mechanisms in commercial disputes.

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<sup>1</sup> Arbitration and Conciliation Act 1996

<sup>2</sup> Commercial Court Act 2015

Several Institutions have been established dedicated to ADR such as the International Centre for Alternative Dispute Resolution (ICADR) which is an autonomous body that promotes ADR. Several institutions played a crucial role in promoting ADR at the grassroots level in family and commercial matters. Indian Judiciary has always expressed its stand on pro ADR as Indian Judiciary recognizes ADR's role is reducing backlog. The landmark case of Bhatia International V. Bulk Trading<sup>3</sup> also contributed to the development of ADR.

Mediation is one of the popular methods of ADR and therefore The Mediation and Conciliation Project Committee (MCPC) was established to promote mediation and conciliation. Its main aim is to train mediators and establish cells for mediation and it also aims to create awareness about the benefits of mediation. Even the SC has formulated the 'Samadhan Scheme' which encourages the settlement of pending cases.

### THE MEDIATION BILL

Mediation<sup>4</sup> is not a new concept in India we used to follow the Panchayat System in fact during the British Rule the Panchayat system lost its ground. The Mediation Bill was introduced to provide structure and framework for Mediation and ADR. Section 89(1) of CPC, 1908<sup>5</sup> permits the use of Judicial Settlement, Arbitration and conciliation for solving disputes.

India became a signatory to the Singapore Convention on 7<sup>th</sup> August 2019 but it is yet to be ratified and this is the reason why the Mediation Act doesn't adopt it akin to the adoption of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards. (New York Convention, under the Arbitration and Conciliation Act 1996. Singapore Convention aims to make a framework for cross-border enforcement which acts as a border for International Mediation. The Mediation Bill was proposed to the Rajya Sabha on 20<sup>th</sup> December 2021. The standing committee issued the 117<sup>th</sup> report on the Mediation Bill on 13<sup>th</sup> July 2022. The Union Cabinet approved the recommendation after which the Mediation Bill was passed by the Rajya Sabha on 2<sup>nd</sup> Aug 2023 and by the Lok Sabha on 7<sup>th</sup> August 2023.

<sup>3</sup> Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105 : 2002 SCC OnLine SC 336 : (200)

<sup>4</sup> Nishtha Desai, 'Decoding The Mediation Act, 2023(Nishtha Desai, sept 4,2023)

[https://www.nishithdesai.com/NewsDetails/10748#:~:text=The%20Mediation%20Act%202023%20aims.the%20definition%20of%20'mediation'](https://www.nishithdesai.com/NewsDetails/10748#:~:text=The%20Mediation%20Act%202023%20aims.the%20definition%20of%20'mediation) accessed 24Dec 2023.

<sup>5</sup> Code of Civil Procedure 1908,s 89(1)

The Bill got the President's assent on 15<sup>th</sup> September 2023 which is now known as the Mediation Act 2023.<sup>6</sup>

### **KEY FEATURES OF THE BILL**

**Definition:** This act aims to expand the scope of Mediation it also recognizes different kinds of mediation such as Pre-litigation Mediation -which is done with the consent of both parties before filing a suit, and online mediation – Which allows parties to do mediation in an online mode community mediation- used to solve disputes between individuals or groups. This will dispense the concept of one of the ADR mechanisms that are of conciliation in agreement with the international practice of using mediation synonymous with mediation as done by SC before this and this was also documented in the Singapore Convention.

**Mediation Council:** The act says that regulators (Mediation Council) will recognize, register and regulate mediation institutions as well as mediators in India. It will also help to promote international as well as domestic mediation across the country through several training programs, certificate courses and other things. It will also act as a depository of the mediation settlement agreement made in India.

### **ESTABLISHING AN INSTITUTE OR AUTHORITY FOR CONDUCTING MEDIATION**

There are several conditions mentioned in the act regarding the conduct of mediation:

- An organization recognized by the Mediation Council in India and which conducts mediation according to rules formed by the Mediation Act.
- An authority established under the Legal Service Authorities Act of 1987<sup>7</sup>.
- A mediation centre annexed by the court.
- Any other institution or body which is recognized or notified by the central government.

The Mediation Council recognizes authorities constituted under the Legal Services Act and is deemed to be the mediation service provider.

**Agreement:** The act providing the agreement to be in writing form including electronic forms of pleadings should be accepted by both parties. The Agreement for mediation which allows

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<sup>6</sup> Mediation Act 2023

<sup>7</sup> Legal Services Authorities Act 1987

parties to choose mediation or arbitration methods as a form to solve disputes should either be a part of the agreement in the form of a clause or it can be in the form of a separate agreement.

**Mediator:** A Mediator can be chosen regardless of its nationality but for foreign mediators, there are specific qualifications experience and accreditations that are required. The parties are free to choose a mediator of their choice. If there is no agreement then the service provider known as the mediation service providers will appoint a mediator from the panel maintained by them. The mediator needs to disclose any circumstances that may result in impartiality or doubt between the parties. Additionally, mediators appointed in this manner serve as the arbitrator or act to represent any of the parties in the court.

**Role of Mediators:** The Mediator's role is to help parties to come together and have communication which will help them to solve the dispute and find a more tailored solution to the problem. The Mediators are free to assist the parties in any manner as they are not bound by the rules of the Code of Civil Procedure, 1908 or The Evidence Act of 1872<sup>8</sup>. This allows a more tailored approach and helps to settle.

**Place:** It is up to the parties to decide mutually the place for mediation. They can also agree to do it in online mode or mediations is generally conducted within the jurisdiction of the court which has the power to resolve the dispute.

**Process of Commencement:** It officially begins after a party sends a notice to initiate mediation, and if there is no prior agreement then the date from which the mediator is appointed or the consent to be appointed whichever comes first.

**Period:** The process of mediation should be continued within 120 days from the 1<sup>st</sup> day of the mediator's appearance. In addition, it can be extended up to 60 days only if all parties agree.

**Confidentiality:** Section 22<sup>9</sup> of the Act states that mediation is a confidential process and therefore parties and the mediators are responsible for keeping everything confidential. Recording in the form of Audio and Videography is also strictly prohibited it is done to protect the confidentiality of the mediation. Even the information discussed by the parties in front of the mediator can't be presented in Court proceedings as evident against any of the parties.

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<sup>8</sup> Evidence Act 1872

<sup>9</sup> Mediation Act 2023,s 22

The protection is extended without legal proceedings to parties that support and encourage parties to discuss matters.

### **MEDIATION SETTLEMENT AGREEMENT**

The solution of the dispute when accepted by both parties is known as Mediated Settlement.

The features of the agreement are as follows:

- It should be in written format signed by the parties and it should also be authenticated by the mediator.
- The agreement is binding on the parties.
- The registration of the agreement is not mandatory. The parties involved in the disputed matter also have the choice of whether they want the mediated settlement agreement to be registered or not. The agreement should be other than the agreement which was brought in court Or any tribunal referred mediation or it should not also be brought under the Legal Services Authorities Act of 1987) but it should be with the authority under the Mediation Act within 180 days after the authenticated copy of the agreement has been received.

**Enforcement and challenges to the mediation settlement agreement:** The agreement can be challenged within 90 days before a competent authority on four grounds which consist of fraud corruption, impersonation, or if the matter was not eligible under the act. The parties can challenge the mediation agreement within 90 days of receiving the copy with a further chance of extension to 90 days if the court thinks so. The bill aims to limit the challenges that may lead to misuse of power.

**Non Settlement Report:** If the mediation doesn't result in settlement within a specific time then the mediator needs to submit a non-settlement report without mentioning the reason for non-settlement and share prints with the parties. In case it is institutional mediation then the submission should be given to the Mediation Service Provider.

**Interim Orders by Court:** The court may even pass interim orders to protect any party's interest if necessary. But it doesn't specify the extent of the power as mentioned in Section 9 of the Arbitration and Conciliation Act 1996.<sup>10</sup>

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<sup>10</sup> Arbitration and conciliation Act 1996, s 9

Exclusion of Period In respect of which the mediation has been taken under the mediation act. To calculate the period of limitation which is fixed to resolve any dispute related to mediation taken under the mediation act. The period is calculated from the beginning of mediation under the Mediation Act and to the date of Submitting the non-settlement report by the mediator or after the termination of the whole mediation process under the Mediation Act shall be excluded.

**Fees/Expenses:** Fees that are to be paid to the mediators should be that which is already specified in the rules and regulations of the act agreed by the parties. The charges are equally paid by the parties.

## CONCLUSION

In a country India where approx. 5 crore cases are pending, and ADR is like the supporting hand, till now there has been a lack of specific laws that express the aim of Dispute Resolution. The Mediation Act will help in clearing backlogs and the step to codify is a big step towards making India the ADR hub which will help in clearing backlogs and will make people come forward without the fear of the long and complex process of traditional litigation.

