



A Critical Analysis Of The Mediation Act,2023

Dr. Samina Nahid Baig*

* Dr. Samina Nahid Baig, Assistant Professor, Karnataka Law Society's Raja Lakhamgouda Law College, Belagavi Karnataka -590006

Abstract

The Mediation Act, of 2023, marks a significant shift in India's dispute resolution framework by institutionalizing mediation as a preferred alternative to litigation. The Act aims to streamline and promote mediation as a formal process, ensuring the enforceability of mediated settlements and encouraging pre-litigation mediation in civil and commercial disputes. However, while the legislation introduces a structured mechanism, it has shortcomings.

One of the Act's key strengths is its emphasis on mandatory pre-litigation mediation for civil and commercial disputes, which could reduce the judicial backlog and promote faster resolution. The Act also provides online mediation, making dispute resolution more accessible and cost-effective. Additionally, it ensures confidentiality and voluntariness in the mediation process, which is crucial for fostering trust between parties. The recognition of mediated settlements as legally binding agreements, enforceable like court decrees, further strengthens their efficacy.

Despite these advancements, the Act has several limitations. The mandatory nature of pre-litigation mediation may be counterproductive, especially in cases where parties are unwilling to mediate or where power imbalances exist. The Act also excludes certain disputes, such as those involving criminal offences, rights of third parties, and matters concerning public policy, which may limit its broader applicability. Additionally, concerns remain regarding the qualification and regulation of mediators, as the Act does not establish a robust accreditation system. The lack of provisions addressing power asymmetry in mediation, especially in disputes involving marginalized groups, could lead to unfair outcomes.

Furthermore, the Act's enforcement mechanisms and procedural clarity need further refinement, particularly in ensuring that mediated settlements do not contradict existing legal rights and precedents. The success of the Act will largely depend on its implementation, mediator training, and judicial support.

In conclusion, while the Mediation Act, of 2023, is a progressive step toward institutionalizing mediation in India, its effectiveness will depend on addressing practical challenges, ensuring inclusivity, and refining regulatory frameworks. A more nuanced approach, particularly in balancing mandatory mediation with party autonomy and ensuring mediator competence, will be necessary for its long-term success.

The researcher will explore the new Mediation Act, of 2023 and present a critical analysis of the same.

Key Words: ADRS, Mediation, Out of Court Settlements, Section 89 CPC, Dispute Resolution

I. Introduction

Mediation is a kind of alternative dispute resolution settlement method, and it means a compromise entered by the parties with the assistance of the court adjudicating the matter or another judge to whom the court had referred the dispute. The word "mediation" derives from the Latin word "mediated," which means "to be in the centre."

As can be seen, the process of mediation requires someone to mediate as a neutral party standing in the middle of the two parties in conflict. This is because the Latin word "mediated" means "to be in the centre." It is a well-known form of alternative dispute resolution (ADR) that takes an approach that is not confrontational when resolving conflicts. In *Salem Advocate Bar Association, Tamil Nadu v. Union of India*¹, the Supreme Court ruled that conciliations and arbitrations should be pursued wherever applicable before pursuing a court trial and, mediation as a mechanism of ADR has gained legal and social legitimacy because of this decision.

Settlement by 'Mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the newly enacted Mediation Act, 2023, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions which affect them.²

A mediation process is one where a neutral third party (the mediator) acts as a non-judgmental facilitator to help the disputants reach an agreement which is satisfactory to all involved. Mediation requires cooperation among the parties to "re-orient" them toward each other for the sake of maintaining their ongoing relationships.³

II. History and Background

The concept of amicable settlement of disputes is not new to India. In the olden days, disputes used to be resolved by panchayat where elder people used to resolve disputes. In "Tales of Maryada Ramanna" people used to go to a gentleman, who heard their disputes and settled amicably by applying common sense.⁴

If we look at the history of mediation at the international level, we can observe that mediation is a form of dispute resolution that has ancient roots, dating back thousands of years. It's hard to pinpoint an exact introduction date because different cultures developed similar practices independently. In Ancient China, Mediation was integral to Confucian philosophy, emphasizing harmony and community. It was a preferred method over litigation, focusing on restoring relationships rather than assigning blame. Ancient Greece and Rome: Both societies used early forms of mediation. The activity of mediation appeared in very ancient times. The practice developed in Ancient Greece (which knew the non-marital mediator as a proxenetas), then in Roman civilization. (Roman law, starting from Justinian's Digest of 530–533 CE) recognized mediation. In Greece, respected elders or neutral third parties often facilitated disputes, while Romans had intercessors who helped resolve conflicts without going to formal courts. Mediation was seen in many Indigenous Practices. Many Indigenous cultures worldwide, such as Native American tribes, used mediation-like processes rooted in community discussions and consensus-building to resolve conflicts.

¹ AIR 2005 SUPREME COURT 3353, (2005) 4 BOM CR 839

² *Ibid*

³ As referred to in *Brown Divorce and Family Mediation: History, Review, Future Directions*, CoNC. Source: *Smriti Madan Kansagra vs Perry Kansagra* Delhi High Court, decided on 11 December 2017

⁴ "Introduction - Understanding Conflict - Concept of Mediation" Mediation & Conciliation Work shop-IV to be held on 25-8-2018 Article by Smt. P.V.Jyothirmmai, Chairman VAT Appellate Tribunal, Visakhapatnam.

Smt.P.Sri Satya Devi, Pr.Senior Civil Judge Gajuwaka. Smt. K.Latha III Addl. Junior Civil Judge, Visakhapatnam. Source: Website: <https://districts.ecourts.gov.in/sites/default/files/workshop-IV%20material1.pdf>. Visited on 3/1/2025

Under the Islamic Legal Tradition, for Islamic societies, sulh (amicable settlement) has long been a recognized method of resolving disputes, emphasizing reconciliation and mutual agreement.

Modern mediation, as a formalized legal process, began gaining traction in the 20th century, especially in the United States during the 1960s and 70s, with the rise of Alternative Dispute Resolution (ADR) to reduce court caseloads. It quickly spread worldwide as a preferred method for resolving civil, commercial, and family disputes.

Looking behind, some years back, it may be noticed that section 73 of the Arbitration and Conciliation Act, 1996 contemplates the conciliator suggesting the terms of the settlement. According to Shri Justice R. V. Raveendran, former Judge of, the Supreme Court of India and author of the judgment in the Afcons Infrastructure case,⁵ where the conciliator is a professional trained in the art of mediation (as contrasted by a layman, friend, relative, well-wisher, or social worker acting as a conciliator), the process of conciliation is referred to as mediation. In cases where the third party assisting the parties to arrive at a settlement is not a trained professional mediator, the process is referred to as conciliation. It is however necessary to point out that in many States, there are trained mediators including legal professionals and there are mediation centres managed by the Judiciary in a few States. Mediation has emerged as a science now. In the Afcons Infrastructure case⁶, the Supreme Court referred to the definition of mediation as given in the Model Mediation Rules, according to which "settlement by 'mediation' means the process by which a mediator appointed by parties or by the court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between the parties directly or by communicating with each other through the mediator, by assisting the parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' responsibility for making decisions which affect them." In short, mediation is the process of dispute resolution by which the mediator assists and persuades the disputing parties to arrive at an amicable settlement.⁷

Mediation in India has seen significant growth over the past few decades, evolving from informal community-based practices to a more structured, legally recognized dispute resolution mechanism. Mediation has deep roots in India's rural and community traditions, with village councils (panchayats) and elders often mediating disputes to maintain harmony within communities. This informal system emphasized reconciliation and consensus. The formal journey began with the Arbitration and Conciliation Act, of 1996, which marked a significant step towards institutionalizing Alternative Dispute Resolution (ADR) in India, including mediation, influenced by the UNCITRAL Model Law on International Commercial Arbitration. The Civil Procedure Code Amendment, of 2002, introduced Section 89, empowering courts to refer cases for ADR, including mediation, conciliation, arbitration, or judicial settlement, aiming to decongest overburdened courts. Starting in the early 2000s, mediation centres were established across various High Courts and District Courts, with the Delhi High Court Mediation and Conciliation Centre (Samadhan), established in 2006, showcasing the efficiency of mediation in resolving disputes. Mediation became especially popular in family disputes, matrimonial cases, and later in commercial disputes, offering a less adversarial and more cost-effective resolution method.

The Supreme Court of India, in landmark cases like Salem Advocate Bar Association v. Union of India (2003), upheld the constitutional validity of Section 89 CPC and emphasized the importance of ADR mechanisms, including mediation. The government introduced the Mediation Bill, 2021, to institutionalize mediation further, aiming to make pre-litigation mediation mandatory in civil and commercial disputes, set up the Mediation Council of India to oversee training and accreditation, and provide legal recognition to online mediation. This bill was part of a broader effort to encourage faster, amicable dispute resolution outside traditional courts. The Commercial Courts Act, 2015, amended in 2018, made pre-institution mediation mandatory for commercial disputes under a certain monetary threshold, significantly boosting

⁵ M/S.Afcons Infrastructure Limited vs M/S.Cherien Varkey Construction ... on 11 October 2006

⁶ M/S.Afcons Infrastructure Limited vs M/S.Cherien Varkey Construction, CRP No. 1219 of 2005

⁷ Justice R. V. Raveendran, " Section 89 CPC: Need for an Urgent Relook", (2007) 4 SCC J23

mediation in the corporate sector. Apart from court-annexed mediation, private mediation services and institutions, like the Indian Institute of Arbitration and Mediation (IIAM), also grew. The COVID-19 pandemic accelerated the adoption of online mediation platforms, making mediation more accessible and efficient. The Mediation Bill, 2023, was passed in August 2023 and is now recognized as the Mediation Act, 2023, further solidifying mediation's role in India's legal framework.

III. The Mediation Act, 2023 - A New Roadmap for ADR

The Mediation Act, of 2023 represents a pivotal development in India's legal landscape, addressing the long-standing need for a structured, efficient alternative dispute resolution (ADR) mechanism. For decades, India's judiciary has grappled with an overwhelming backlog of civil and commercial cases, resulting in delays, high costs, and adversarial proceedings. This inefficiency underscored the urgent need for mediation as a faster, amicable, and cost-effective method of resolving disputes. While earlier frameworks like the Arbitration and Conciliation Act, of 1996 and the Civil Procedure Code Amendment of 2002 (Section 89) introduced ADR concepts, they lacked comprehensive guidelines for mediation, leading to inconsistent application across jurisdictions.

The Supreme Court of India, through landmark judgments such as Salem Advocate Bar Association v. Union of India (2003), emphasized the importance of ADR and highlighted the absence of a unified mediation framework. The early 2000s saw the establishment of court-annexed mediation centres, notably the Delhi High Court Mediation and Conciliation Centre (Samadhan) in 2006, which showcased mediation's potential to reduce court backlogs. The Commercial Courts Act, 2015 (amended in 2018) further bolstered mediation by mandating pre-institution mediation for certain commercial disputes, especially in the corporate sector. On the global front, India's participation in international commerce necessitated aligning its ADR practices with global standards, particularly following the signing of the Singapore Convention on Mediation in 2019. This international commitment catalyzed the development of a robust domestic framework, culminating in the introduction of the Mediation Bill, in 2021. After extensive feedback from legal experts, mediators, and public stakeholders, the bill was refined and passed as the Mediation Act, 2023 in August. The Act mandates pre-litigation mediation in civil and commercial disputes, establishes a legal framework for online mediation, and creates the Mediation Council of India to oversee mediator accreditation and ethical standards. It also ensures the enforceability of mediated settlements, granting them the same legal status as court decrees. The Act is expected to significantly alleviate the burden on courts, promote amicable dispute resolution in business environments, and enhance India's standing in the global ADR landscape.

However, its success will hinge on effective implementation, widespread public awareness, and maintaining mediator neutrality and competence. In essence, the Mediation Act, of 2023 is a culmination of judicial advocacy, legislative reform, and a growing recognition of mediation's role in fostering a more efficient and harmonious dispute-resolution culture in India.

IV. Key Highlights of the Mediation Act, 2023

The "Survey of Dispute Resolution in India, 2023," conducted by the Federation of Indian Corporate Lawyers (FICL) and the Centre for Trade and Investment Law (CTIL), identified mediation as the second most preferred method for resolving disputes in India. While mediation centres are established across the country, private mediation has faced challenges due to the lack of a clear legal framework and enforceability, leading to hesitancy among participants. A key drawback is the risk of an unwilling party refusing to cooperate or honour settlements, resulting in wasted time and resources compared to arbitration or litigation, which offer enforceable outcomes. However, virtual mediation has gained popularity for its flexibility, with advancements in technology ensuring confidentiality through secure platforms. To address these challenges and enhance the mediation process, the Mediation Act was

introduced, aiming to provide a solid legal framework, institutionalize mediation, and improve its overall efficiency and effectiveness.⁸

The Mediation Act, of 2023 broadens the scope of mediation to encompass civil and commercial disputes while delineating specific categories of disputes—such as those involving minors, individuals with intellectual disabilities, criminal offences, tax-related matters, land acquisition issues, and certain regulatory concerns—that are deemed unsuitable for mediation.

The Act applies to mediations conducted within India, and it covers cases where all parties are domiciled in India, where a mediation agreement stipulates its applicability, and in international commercial mediations involving at least one foreign party. However, when the Central or State Government is a party, the Act applies exclusively to commercial disputes or other disputes as may be notified.

Mediations conducted outside India fall beyond the Act's purview. The Act offers a comprehensive definition of mediation, encompassing pre-litigation mediation, online mediation, community mediation, and conciliation, effectively rendering the conciliation process under the Arbitration and Conciliation Act, 1996, redundant.

Pre-litigation mediation allows parties to seek settlement before initiating court proceedings, while international mediation pertains to cross-border commercial disputes. Community mediation aims to preserve harmony within localities, conducted by a panel of three mediators, and online mediation facilitates digital resolution processes, maintaining jurisdictional clarity for enforcement and legal proceedings.

The establishment of the Mediation Council of India, as mandated by the Act, will oversee the registration, recognition, and regulation of mediation institutions and practitioners, promote mediation domestically and internationally, and maintain a repository of mediated settlement agreements. Mediation may be conducted by recognized Mediation Service Providers, including bodies accredited by the Mediation Council, authorities under the Legal Services Act, 1987, court-annexed mediation centres, or other entities notified by the Central Government.

Under the Act, a mediation agreement must be in writing and may be documented through signed agreements, electronic communications, or pleadings where the existence of such an agreement is acknowledged. Mediators can be of any nationality, subject to qualifications prescribed for foreign mediators, and must disclose any potential conflicts of interest. They are precluded from acting as arbitrators, legal representatives, or witnesses in related proceedings. Mediators operate independently, and impartially, and are not bound by the procedural constraints of the Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872.

Mediation proceedings typically occur within the jurisdiction of the competent court, though parties may mutually agree on alternate venues or online mediation. Proceedings commence upon receipt of a mediation notice or mediator appointment and must conclude within 120 days, extendable by 60 days upon mutual consent. Confidentiality is paramount; all mediation communications are privileged and inadmissible in legal proceedings.

A Mediated Settlement Agreement, authenticated by the mediator and signed by the parties, is final, binding, and enforceable as a court decree under the Code of Civil Procedure, 1908. While registration is optional, agreements not arising from court-referred or Legal Services Authority mediations may be registered within 180 days. Challenges to such agreements are limited to grounds of fraud, corruption, impersonation, or ineligibility of the dispute for mediation, and must be filed within 90 days, extendable by another 90 days under valid circumstances.

In the event of non-settlement, mediators must submit a non-disclosure report to the parties and, where applicable, to the Mediation Service Provider. Courts may issue interim orders during mediation to safeguard parties' interests, though the Act does not specify the scope of such powers. The mediation period is excluded from the statutory limitation period for related legal proceedings. Unless otherwise

⁸ Source: <https://www.mondaq.com/india/civil-law/1401910/the-mediation-act-2023-understanding-the-key-features>. Visited 20.1.2025

agreed, mediation costs, including mediator fees and service provider charges, are shared equally by the parties, with specific fee structures to be outlined in the Act's accompanying rules and regulations.

The Mediation Act, of 2023 introduces a comprehensive framework to institutionalize mediation as a voluntary mechanism for resolving civil and commercial disputes, allowing parties to opt for mediation even in the absence of a pre-existing mediation agreement. It mandates that any mediation agreement must be in writing and can pertain to past, present, or future disputes between the parties or their successors. While the Act upholds party autonomy by granting them the right to appoint mediators and determine procedural aspects—including qualifications, experience, and accreditation—it also allows parties to approach recognized mediation service providers for mediator appointments within a strict seven-day timeframe, potentially placing pressure on parties unfamiliar with the process. The Act establishes stringent disclosure obligations to mitigate conflicts of interest, requiring mediators to maintain independence, neutrality, and impartiality. Mediation proceedings are generally confined to the territorial jurisdiction of competent courts, unless mutually agreed otherwise or conducted online, offering flexibility but also raising jurisdictional complexities in enforcement.

A notable provision allows parties to seek interim relief from courts or tribunals before or during mediation in exceptional circumstances; however, the Act remains vague on defining the scope of such exceptions, potentially leading to inconsistent judicial interpretations. The establishment of the Mediation Council of India, tasked with registering mediators, setting professional standards, and certifying practitioners, is a critical step toward standardizing mediation practices, though concerns may arise regarding bureaucratic delays and overregulation. The Act explicitly excludes specific disputes from mediation—such as those involving criminal prosecution, serious fraud, third-party rights, land acquisition, and cases before regulatory bodies like SEBI and the Securities Appellate Tribunal—reflecting a cautious approach but potentially limiting the utility of mediation in complex, multi-faceted disputes.

The Act imposes a 180-day upper limit for concluding mediation, balancing efficiency with the risk of rushed settlements. Mediated settlement agreements are treated as final, binding, and enforceable akin to court decrees, but the narrow grounds for challenging these agreements—limited to fraud, corruption, impersonation, and ineligibility for mediation—may expose parties to risks of coercion or unfairness settlements, particularly in cases where power imbalances exist. Community mediation provisions aim to resolve disputes affecting local peace and harmony, yet the practical implementation of such panels could be fraught with challenges regarding neutrality and effectiveness. The strict confidentiality obligations are commendable in fostering candid dialogue, but they may hinder transparency, particularly in disputes involving public interest. Lastly, by extending its application to international mediations conducted in India where one party is foreign, the Act seeks to position India as a global mediation hub, though its practical impact will depend on harmonization with international legal standards and the effectiveness of the Mediation Council in facilitating cross-border dispute resolution.

V. Critical Analysis of the Mediation Act, 2023

The Mediation Act, of 2023 marks a significant step toward formalizing mediation as a dispute resolution mechanism in India, aligning the country's legal framework with global best practices. While the Act introduces commendable features to encourage mediation in civil and commercial disputes, it also exhibits certain shortcomings that could hinder its effectiveness. This critical analysis examines the key provisions from a legal perspective, highlighting both strengths and areas requiring improvement.

- 1. Lack of Mandatory Pre-Litigation Mediation-** Section 3(u) of the Mediation Act defines "pre-litigation mediation" means a process of undertaking mediation, as provided under section 5, for

settlement of disputes prior to the filing of a suit or proceeding of civil or commercial nature in respect thereof, before a court or notified tribunal mentioned under section 5.⁹

The Act emphasizes the voluntary nature of mediation,¹⁰ allowing parties to mediate disputes before initiating legal proceedings, irrespective of the existence of a mediation agreement. This promotes access to alternative dispute resolution (ADR) mechanisms, potentially reducing the burden on the judiciary. However, the lack of a mandatory pre-litigation mediation requirement for certain categories of disputes, such as commercial matters, limits the Act's potential to streamline dispute resolution. Mediation is considered mandatory in countries like Italy, Spain, France, Germany, most of the European Union, Singapore, and India (particularly for commercial disputes under the Commercial Courts Act of only a particular value), where parties are often required to attempt mediation before filing a lawsuit in court; this is often implemented as an "opt-out" model where parties can choose to not mediate after attending an initial session with a mediator. Drawing from models like these countries, where pre-litigation mediation is mandatory for disputes, India could adopt a similar approach to encourage early settlement and judicial efficiency.

2. **Lack of International Scope-** The Act applies to mediations conducted in India and international mediations involving at least one foreign party.¹¹ However, its exclusion of mediations conducted outside India may create enforcement challenges, especially in cross-border commercial disputes. To address this, India could consider incorporating provisions that recognize and enforce internationally mediated agreements, particularly in line with the UNCITRAL Model Law on International Commercial Mediation and the Singapore Convention on Mediation, to which India is a signatory. Additionally, the exclusion of certain disputes—such as criminal matters, land acquisition, and regulatory issues—while prudent in some cases, might be overly restrictive. For instance, certain regulatory and tax disputes could benefit from a mediated resolution framework, particularly where complex negotiations or settlements are required.
3. **Flexibility in Mediation Agreement** - The Act mandates that mediation agreements be in writing, including through electronic communications.¹² While this ensures clarity and enforceability, the **rigid requirement** may inadvertently exclude disputes where informal agreements exist but are not formally documented. A more flexible approach, recognizing **oral agreements** in limited circumstances where the intention to mediate is clear, could enhance accessibility, especially in community and small-scale commercial disputes.

⁹ Section 5. (1) Subject to other provisions of this Act, 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 by the provisions of this Act: Provided that pre-litigation mediation in matters of commercial disputes of Specified Value shall be undertaken by the provisions of section 12A of the Commercial Courts Act, 2015, and the rules made thereunder

¹⁰ See Section 5 (1) Mediation Act, 2023

¹¹ See Section 3(g) "International mediation" means mediation undertaken under this Act and relates to a commercial dispute arising out of a legal relationship, contractual or otherwise, under any law for the time being in force in India, and where at least one of the parties, is—

(i) an individual who is a national of, or habitually resides in, any country other than India; or

(ii) a body corporate including a Limited Liability Partnership of any nature, with its place of business outside India; or

(iii) an association or body of individuals whose place of business is outside India; or

(iv) the Government of a foreign country.

¹² See Section 4 (1) A mediation agreement shall be in writing, by or between parties and anyone claiming through them, to submit to mediation all or certain disputes which have arisen, or which may arise between the parties. (2) A mediation agreement may be in the form of a mediation clause in a contract or the form of a separate agreement. (3) A mediation agreement is in writing if it is contained in or recorded as (a) any document signed by the parties; (b) an exchange of communications or letters including through electronic form as provided under the Information Technology Act, 2000; (c) any pleadings in a suit or any other proceedings in which existence of mediation agreement is alleged by one party and not denied by the other. (4) A reference in any agreement containing a mediation clause shall constitute a mediation agreement if the agreement is in writing and the reference is such as to make the mediation clause part of the agreement. (5) The parties may agree to submit to mediation any dispute arising between them under an agreement, whether entered before arising of the dispute or subsequent thereto. (6) A mediation agreement in case of international mediation shall refer to an agreement for resolution in matters of commercial disputes referred to in clause (a) of section 3.

- 4. Seven-day timeframe for the appointment and acceptance of Mediation process - difficult for complex legal issues** - The Act upholds party autonomy by allowing disputing parties to appoint mediators and determine the appointment procedures. However, the requirement to approach mediation service providers within a seven-day timeframe for mediator appointments could be impractical, especially in complex disputes where parties need more time to vet potential mediators. A longer, more flexible timeframe would better balance efficiency with procedural fairness.¹³ Furthermore, while the establishment of the Mediation Council of India to regulate mediators is a positive step toward professionalizing mediation, overregulation may deter experienced mediators from participating, particularly those from legal or corporate backgrounds. The Council should focus on facilitating rather than controlling the mediation process, ensuring a balance between quality control and flexibility.
- 5. Conflict of Interest and Mediator Independence-** India is facing the problem of qualified mediators. A significant challenge in India's legal system is a "lack of professional mediators," meaning there is a shortage of well-trained and qualified individuals to facilitate mediation processes, which can hinder the effectiveness of Alternative Dispute Resolution (ADR) mechanisms in the country; this is often attributed to inadequate training programs, limited government support for mediator accreditation, and a general lack of awareness about professional mediation practices. The Act includes strong disclosure obligations to prevent conflicts of interest, requiring mediators to remain neutral and impartial. However, the lack of specific guidelines for identifying potential conflicts could lead to inconsistent interpretations. The Mediation Council should develop detailed ethical standards and provide clear examples of conflicts, like the International Mediation Institute's Code of Professional Conduct, to ensure uniform application across cases.¹⁴
- 6. Unclear Jurisdictional Provisions for Online Mediation-** Mediations are to be conducted within the territorial jurisdiction of the competent court unless parties mutually agree otherwise.¹⁵ While this provision supports local dispute resolution, it may limit flexibility in cases involving parties from different jurisdictions. The growing relevance of online mediation is acknowledged, and parties are allowed to opt for online mediation. The Act clarifies where the parties agree to conduct the mediation at any place outside the territorial jurisdiction or online, for enforcement, challenge and registration of the mediated settlement agreement, the same shall be deemed to have been undertaken within the territorial jurisdiction of the court or tribunal of competent jurisdiction. This

¹³ See Section 8. (1) Unless otherwise agreed upon by the parties, a person of any nationality may be appointed as a mediator: Provided that the mediator of any foreign nationality shall possess such qualification, experience and accreditation as may be specified. (2) The parties shall be free to agree upon the name of the mediator and the procedure for their appointment. (3) If the parties do not reach an agreement on a matter referred to in subsection (2), then the party seeking initiation of mediation shall make an application to a mediation service provider for the appointment of a mediator. (4) Upon receiving an application under sub-section (3), the mediation service provider shall, within seven days, appoint,— (i) the mediator as agreed by the parties; or (ii) in case the parties are unable to reach agreement as to the appointment of mediator or mediator agreed by them refuses to act as mediator, a mediator from the panel maintained by it, with his consent. (5) The person appointed under clause (i) of sub-section (4) shall communicate his willingness or otherwise within seven days from the date of receipt of communication of such appointment.

¹⁴ See Section 10. (1) The person appointed as a mediator shall, before the conduct of mediation, disclose in writing to the parties regarding any circumstance or potential circumstance, personal, professional, financial, or otherwise, that may constitute any conflict of interest or that is likely to give rise to justifiable doubts as to his independence or impartiality as a mediator. (2) During the mediation, the mediator shall, without delay, disclose to the parties in writing any conflict of interest, referred to in subsection (1), that has newly arisen or has come to his knowledge. (3) Upon disclosure under sub-section (1) or sub-section (2), the parties shall have the option to waive any objection if all of them express in writing, which shall be construed as the consent of the parties. (4) Upon disclosure under sub-section (1) or sub-section (2), if either party desires to replace the mediator, then, in case of— (i) institutional mediation, such party shall apply to the mediation service provider for termination of the mandate of mediator; (ii) mediation other than institutional mediation, such party shall terminate the mandate of a mediator.

¹⁵ 13. Every mediation under this Act shall be undertaken within the territorial jurisdiction of the court or tribunal of competent jurisdiction to decide the subject matter of dispute: Provided that on the mutual consent of the parties, mediation may be conducted at any place outside the territorial jurisdiction of the court or tribunal, or by way of online mediation.

deeming provision is unclear relating to the jurisdictional implications of online settlements, especially concerning cross-border enforcement.

7. **Time Limits and Efficiency-** The Act imposes a 120-day limit for mediation proceedings, extendable by 60 days upon mutual consent. While intended to promote efficiency, this rigid timeline may pressure parties into rushed settlements in complex cases. A more flexible, case-by-case approach, allowing for judicial discretion to extend timelines, would better accommodate the diversity of disputes.¹⁶ If the parties are rushed through the settlement there are chances that they may not agree to the settlement and opt out of mediation. Some disputes may require more time to get resolved, and such compulsion would harm complex disputes.
8. **Enforcement and Limited Grounds for Challenge-** Mediated settlement agreements are treated as final, binding, and enforceable like court decrees. This enhances the credibility of mediation outcomes.¹⁷ However, the Act restricts challenges to grounds such as fraud, corruption, impersonation, and ineligibility of the dispute for mediation.¹⁸ While this limits frivolous litigation, it may not sufficiently protect against coercion or undue influence, especially in cases where there is a power imbalance between the parties. The inclusion of duress and unconscionability as grounds for challenge could strengthen the fairness of mediated agreements.
9. **Confidentiality Provisions-** The Act's strict confidentiality obligations¹⁹ Are a cornerstone of effective mediation, encouraging candid discussions. However, the absolute prohibition on using mediation-related information in subsequent legal proceedings could hamper accountability, particularly where public interest or illegal conduct is involved. The Act should consider exceptions where disclosure is necessary to prevent harm, enforce legal obligations, or protect public interest, akin to confidentiality carve-outs in the UK's Civil Mediation Council standards which state that in rare cases, confidentiality may be breached if there is a legal obligation to disclose information, such as in cases of fraud or serious harm.

¹⁶ See Section 18. (1) Notwithstanding anything contained in any other law for the time being in force, mediation under this Act shall be completed within a period of one hundred and twenty days from the date fixed for the first appearance before the mediator. (2) The period for mediation mentioned under sub-section (1) may be extended for a further period as agreed by the parties, but not exceeding sixty days.

¹⁷ See Section 27. (1) A mediated settlement agreement resulting from a mediation signed by the parties and authenticated by the mediator shall be final and binding on the parties and persons claiming under them respectively and enforceable as per the provisions of sub-section (2). (2) Subject to the provisions of section 28, the mediated settlement agreement shall be enforced by the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a judgment or decree passed by a court, and may, accordingly, be relied on by any of the parties or persons claiming through them, by way of defence, set off or otherwise in any legal proceeding.

¹⁸ See Section 28. (1) Notwithstanding anything contained in any other law for the time being in force, in any case in which the mediated settlement agreement is arrived at between the parties and is sought to be challenged by either of the parties, such party may apply to the court or tribunal of competent jurisdiction. (2) A mediated settlement agreement may be challenged only on all or any of the following grounds, namely:— (i) fraud; (ii) corruption; (iii) impersonation; (iv) where the mediation was conducted in disputes or matters not fit for mediation under section 6. (3) An application for challenging the mediated settlement agreement shall not be made after ninety days have elapsed from the date on which the party making that application has received the copy of mediated settlement agreement under sub-section (3) of section 19: Provided that if the court or tribunal, as the case may be, is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of ninety days, it may entertain the application within a further period of ninety days.

¹⁹ See Section 22. (1) Subject to the other provisions of this Act, the mediator, mediation service provider, the parties and participants in the mediation shall keep confidential all the following matters relating to the mediation proceedings, namely:— (i) acknowledgements, opinions, suggestions, promises, proposals, apologies and admissions made during the mediation; (ii) acceptance of, or willingness to, accept proposals made or exchanged in the mediation; (iii) documents prepared solely for the conduct of mediation or in relation thereto; (iv) any other mediation communication. (2) No audio or video recording of the mediation proceedings shall be made or maintained by the parties or the participants including the mediator and mediation service provider, whether conducted in person or online to ensure confidentiality of the conduct of mediation proceedings. (3) No party to the mediation shall in any proceeding before a court or tribunal including arbitral tribunal, rely on or introduce as evidence any information or communication outlined in clauses (i) to (iv) of sub-section (1), including any information in electronic form, or verbal communication and the court or tribunal including arbitral tribunal shall not take cognizance of such information or evidence. (4) The provisions of this section shall not prevent the mediator from compiling or disclosing general information concerning matters that have been subject of mediation, for research, reporting or training purposes, if the information does not expressly or indirectly identify a party or participants or the specific disputes in the mediation. *Explanation.*—For the removal of doubts, it is hereby clarified that nothing contained in this section shall apply to the mediated settlement agreement where its disclosure is necessary for registration, enforcement and challenge.

10. Community Mediation and Public Interest- The Act provides for community mediation²⁰ To resolve disputes affecting local peace and harmony, conducted by a panel of three mediators. While this approach fosters grassroots dispute resolution, the selection process for community mediators needs greater clarity to prevent bias and ensure representative diversity. Furthermore, the Act could incorporate mechanisms for oversight and accountability in community mediation outcomes, especially in cases involving marginalized groups. The criteria for inclusion in the mediation panel, as outlined in sub-section (4), lack clarity and specificity, potentially leading to inconsistencies in the selection process. Broad categories such as "persons of standing and integrity" or "local persons whose contributions to society have been recognized" are subjective and open to interpretation, which could result in biased or arbitrary appointments. Similarly, the inclusion of representatives from area or resident welfare associations and individuals with mediation experience offers little guidance on the necessary qualifications or standards required. The provision to include "any other person deemed appropriate" further exacerbates this ambiguity, leaving the process vulnerable to favouritism or the appointment of underqualified individuals. Additionally, while the consideration of women's representation or other categories of persons is mentioned, it is framed as optional rather than mandatory, which may undermine efforts toward inclusivity and diversity within the panel. Overall, the lack of clear, objective criteria could compromise the credibility and effectiveness of the mediation process.

11. Interim Relief Provisions- The Act allows parties to seek interim relief from courts in exceptional cases before or during mediation.²¹ However, the Act lacks clarity on the criteria for granting such relief, leading to potential judicial inconsistencies. Incorporating guidelines like Section 9 of the Arbitration and Conciliation Act, of 1996 could provide more predictable outcomes.

12. Costs and Accessibility- The Act mandates equal sharing of mediation costs unless otherwise agreed.²² While this promotes fairness, it may disincentivize weaker parties from pursuing mediation if they are unable to afford their share of the costs. Introducing provisions for cost waivers or subsidized mediation through government schemes, particularly in community disputes or cases involving economically weaker sections, would enhance the Act's inclusivity.

13. Conclusion and Recommendations

While the Mediation Act, of 2023 represents a progressive shift toward institutionalizing mediation in India, its effectiveness hinges on striking the right balance between flexibility and regulation. To enhance its utility the following suggestions are made:

1. **Mandatory pre-litigation mediation** for specific disputes should be considered to reduce court burdens.
2. **Broaden the scope** to include select regulatory and tax disputes where appropriate.

²⁰ See Section 43. (1) Any dispute likely to affect peace, harmony and tranquillity amongst the residents or families of any area or locality may be settled through community mediation with prior mutual consent of the parties to the dispute. (2) For sub-section (1), any of the parties shall 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. (3) To facilitate settlement of a dispute for which an application has been received under sub-section (2), the concerned Authority constituted under the Legal Services Authorities Act, 1987 or the District Magistrate or Sub-Divisional Magistrate, as the case may be, shall constitute a panel of three community mediators. (4) For this section, the Authority or District Magistrate or the Sub-Divisional Magistrate, as the case may be, shall notify a permanent panel of community mediators, which may be revised from time to time. (5) The following persons may be included in the panel referred to in subsection (4)— (a) a person of standing and integrity who is respectable in the community; (b) any local person whose contribution to society has been recognised; (c) representative of area or resident welfare associations; (d) person having experience in the field of mediation; and (e) any other person deemed appropriate. (6) While making the panel referred to in subsection (4) the representation of women or any other class or category of persons may be considered.

²¹ See Section 7. (1) Notwithstanding the non-settlement of a dispute under sub-section (1) of section 5, the court or tribunal may, at any stage of the proceeding, refer the parties to undertake mediation. (2) If the court or tribunal refers the parties to undertake mediation, it may pass a suitable interim order to protect the interest of any party if deemed appropriate. (3) The parties shall not be under obligation to come to a settlement in the mediation under a reference under sub-section (1).

²² See 25. (1) The cost of mediation, other than community mediation shall be such as may be specified. (2) Unless otherwise agreed by the parties, all costs of mediation, including the fees of the mediator and the charges of the mediation service provider shall be borne equally by the parties.

3. Introduce **greater flexibility** in timelines and mediator appointment procedures.
4. Expand grounds for challenging mediated agreements to include **duress** and **unconscionability**.
5. Clarify **jurisdictional issues** in online mediations and cross-border enforcement.
6. Strengthen **ethical standards** and conflict-of-interest guidelines for mediators.
7. Introduce **exceptions to confidentiality** in cases of public interest or illegality.
8. Provide **financial support mechanisms** to improve accessibility, particularly for vulnerable parties. If these refinements are implemented, the Act could serve as a **robust framework** for promoting a culture of mediation in India, reducing judicial backlogs, and fostering **efficient, amicable dispute resolution**.

