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## **ANALYSIS OF THE BINDING NATURE AND ENFORCEABILITY OF MEDIATION SETTLEMENT AGREEMENTS IN THE LAW OF LAND**

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### **ABSTRACT**

*Mediation is one of the alternative dispute resolution methods that parties can use to settle their disputes. Mediation is a voluntary process in which disputing parties work together to find a mutually beneficial and amicable solution to their legal dispute. The mediator is present during the mediation to make suggestions, facilitate the free flow of ideas, provide an unbiased perspective to the session, and so on. The parties, however, are not bound by any suggestion made by the mediator and may accept or decline the suggestion at their discretion. The parties' role is to discuss and negotiate a solution to the dispute openly and honestly. To maintain the highest level of confidentiality, this process takes place behind closed doors. By the means of this paper the authors intent to divulge into a particular issue in ADR realm which is the binding nature and enforceability of the mediation settlement agreements under the Indian Law. The authors have researched and brought out the relevant points regarding the binding nature of the Mediation Settlement Agreement in consonance with the applicable laws.*

### **INTRODUCTION: MEDIATION; A CONSTRUCTIVE REDRESSAL OF DISPUTES**

A vital and inevitable phenomenon of social life includes a sequence of agreements or disagreements among people or social groups, and they will effortlessly entail a battle. Resolving those conflicts includes entrusting their conventional justice and battle decision at the precept of win-loss answer nevertheless unresponsive to the diverse conflicts we recognize withinside the modern society, particularly due to financial diversification and social relationships and the very rapid rhythm of our present life.

Based on these considerations, dispute resolution can be achieved through mediation. Mediation comes in the case of family disputes, divorces, group labour disputes, inheritance, contracts, student disputes, employees, political parties, and even the most successful States. It is fully acceptable that mediation is an alternative way to resolve a dispute without resorting to

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the court of Law. This is a voluntary, party-centric, structured negotiation process that helps neutral third parties resolve disputes in a friendly manner using professional communication and negotiation techniques. Mediation addresses both factual / legal issues and the root cause of the dispute and provides an efficient, effective, fast, convenient and inexpensive way to resolve the dispute with dignity, mutual respect and courtesy. The purpose of mediation is to find amicable solutions that adequately and legally meet the needs, desires and interests of the parties.

Mediation first got here to be legally known as a technique of dispute decision within the Industrial Disputes Act, 1947. In 1999, the Code of Civil Procedure Amendment Act turned into exceeded via way of means of the Parliament. It furnished for Section 89 of the Code of Civil Procedure, 1908 which allowed the courts to consult ADR strategies to settle pending disputes. Under this, consent of the events turned into made obligatory and the court may want to refer instances for arbitration, conciliation, judicial agreement via Lok Adalat, or mediation.

In 2014, in the case of **Vikram Bakshi vs. Ms. Sonia Khosla**, the Supreme Court of India pointed out the benefits of mediation and how it can create a favourable environment for achieving a situation that is mutually beneficial to the parties. Mediation has great potential not only to reduce the burden of delinquency, but also to fundamentally qualitatively shift the focus of the legal system from arbitrage to dispute resolution.

## **NATURE AND SCOPE OF MEDIATION SETTLEMENT AGREEMENTS**

In simple words, a settlement agreement can be understood as a contract between the parties to settle a dispute. Mediation is the process by which the parties choose to be voluntarily involved, so a mediation agreement can be reached after mediation by both parties. In other words, in an arbitration agreement, everything that the parties have mutually agreed upon is returned in writing. This is a document that requires the parties to comply with the terms and conditions agreed upon as a result of mediation.

On November 5, 2021, the Ministry of Justice announced The Mediation Bill, 2021<sup>2</sup>; for public comments and consultation. As India is a party to sign The United Nations Treaty on The

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<sup>2</sup><https://timesofindia.indiatimes.com/readersblog/political-reforms/the-mediation-bill-2021-lacunae-observed-40732/>.

International Dispute Resolution Agreement (Singapore Treaty<sup>3</sup>), this Bill aims to consolidate its position of mediation as a coveted alternative dispute resolution method in India.

Its many objectives include facilitating, encouraging, and promoting mediation, especially institutional mediation, and the implementation of national and international mediation agreements, especially making online mediation an acceptable and cost-effective process.

Section 21 of the Bill defines a 'mediated settlement agreement' as a written or provisional agreement between some or all parties resulting from arbitration, resolving some or all of the disputes between these parties and authenticated by the arbitrator. In accordance with Section 28 of the bill such agreements are final and are binding on the parties and persons calling them and can be enforced in the same manner as a court decision or order.

Since such agreements are mutually agreed, the bill provides only a limited reason for the challenge. Section 29 (2) here sets out four reasons: fraud, corruption, gross impropriety, and impersonation.

The Bill additionally recognises on line mediation performed via using programs and computer networks, resorted to both completely or in part, at a positive level of the mediation process. It in addition states that the behaviour of all such mediations will be ruled through the provisions of the Information Technology Act, 2000.

## SCOPE OF VIRTUAL MEDIATION

In the midst of the COVID 19 epidemic, the Government of India announced a complete lockdown nationwide in March 2020. As a result, the judiciary announced the continuation of proceedings using the video conference facility solely for "urgent hearings." However, the Indian judiciary is already upset under the proceedings in dispute, and there is no slowdown in proceedings during proceedings that hinders such emergencies. Therefore, investigating the alternative dispute resolution mechanism in a given situation can ensure that the interests of the parties move forward<sup>4</sup>.

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<sup>3</sup>Nadja Alexander (ed), 'Singapore Convention on Mediation', Kluwer Mediation Blog, 24 July 2018, <http://mediationblog.kluwerarbitration.com/2018/07/24/singapore-convention-mediation/> (accessed 19 May 2019).

<sup>4</sup><https://viamediationcentre.org/readnews/MTE1NQ=/Mediation-and-its-Transition-to-Virtual-Mediation-in-Light-of-COVID-19.>

According to recent news reports, the Supreme Court has appointed a panel led by mediator Mr. Niranjan Bhat to finalize a bill that gives legal sanctity to the disputes settled by mediation. There are domestic laws that provide for alternative dispute resolution, but due to discrepancies such as overlapping mediation and arbitration, these provisions cannot be successful.

The momentum of Online dispute resolution is gaining in India in this era<sup>5</sup>. In fact, many proceedings pending in Indian courts relate to family law disputes, Section - 138 of Negotiable Instrument Act and Cases of Road Traffic Accidents; therefore, forcibly clarifying these issues through "arbitration" without the parties being obliged to be present in one place leads to relief. The "agreement" reached by the parties through private mediation during the blockade must take the form of a formal, signed agreement. Therefore, one can use an online source such as DocuSign to sign the "Settlement Agreement". Thus, it's very common to engage in "pre mediated dialogue" with the platform to build trust between the parties, ensure data protection, and learn more about the software features used.

Listed below are agencies, institutions or organizations that provide online mediation services with a regulated framework for conducting mediation procedures on a variety of issues –

1. **Online Consumer Mediation Centre (OMC):** It was established in NLSIU Bangalore with the support of the Ministry of Consumer Affairs, Government of India, OMC's mission is to provide consumers and organizations with innovative dispute management and resolution technologies as the first choice for consumer dispute resolution. To promote online mediation, the main features of OMC's online platform are: A strict code of ethics for qualified web mediators to ensure neutrality and integrity at all stages of accessibility, data security, confidentiality, cost effectiveness and online mediation.<sup>6</sup>
2. **ODR Ways:** It was launched in 2015 and DOMAIN is one of India's first online securities platforms. The technical features of the platform include online pre-arbitration software that determines the time and place of arbitration, voice conferencing, online case progress tracking, arbitration database, and web interface design.

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<sup>5</sup> Derric Yeoh, 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?', Kluwer Arbitration Blog, March 29<sup>th</sup>, 2018. Also available at: <http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/>; Last seen on 07/04/2020.

<sup>6</sup> Online Dispute Resolution Advisory Group, 'Online Dispute Resolution for Low Value Civil Claims' (Civil Justice Council, 2015) 15 accessed 31 August 2020.

3. **Bangalore International Mediation, Arbitration and Conciliation Center (BIMACC):** It uses the video conference feature to conduct online arbitration, mediation. Disputes related to e-commerce are easily handled through email exchanges and secure video conferences. Several e-commerce companies in India and abroad use BIMACC's online ADR service.
4. **Other Online Dispute Resolution (ODR) Platforms:** Center for Alternative Dispute Resolution Excellence (CADRE), Center for Online Dispute Resolution (CODR), SAMA resolves disputes between businesses and customers, employers and employees, landlords and tenants, professionals and customers, or other media. It's a whole new way to do it, fast and cheap. Extensive use of video conferencing platforms such as Zoom / Skype / other apps can host mediation proceedings between a party to a dispute and a third party acting as an “mediator”.

## **ENFORCEABILITY OF MEDIATION SETTLEMENT AGREEMENTS**

Article 30 of the UNCITRAL Model Law on International Commercial Arbitration encourages the resolution of disputes through mediation between the parties. However, unlike the UK and Singapore, India is not a mediation-friendly country. Because of –

### **1. Absence of Proper Law or Mechanism for Enforcement of Settlement Agreements:**

India has no direct law governing the enforcement of agreements entered into as a result of mediation between the parties. The 1996 Indian Arbitration & Conciliation Act, based on Section 30 in line with the UNCITRAL Model Law on International Commercial Arbitration, encourages dispute resolution through arbitration if the arbitral tribunal finds an element of agreement between the parties to the dispute<sup>7</sup>. In such scenarios, the arbitral tribunal may record a settlement between the parties in the form of a ruling on agreed terms. This may be enforced like any other ruling under section 36 of the Act.

Section 30 is valid only if the parties choose to resolve the dispute by initiating arbitration. If the parties choose to mediate privately in accordance with the mediation clause or otherwise,

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<sup>7</sup> UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002.

the settlement agreement will not be treated as an arbitral award. Therefore, they are executed merely as a contract between the parties.

Also, in the context of commercial mediation, the most applicable laws are the Code of Civil Procedure 1908 and the 2015 Commercial Court Act. Section 89 of the Code of Civil Procedure 1908 empowers the court to refer to a dispute for an out-of-court settlement, including mediation. The problem is that in the mediation incidental to the court, if the court orders or decides on the validity of the written settlement, the settlement will be enforced by the court.

## **2. Preference of Conciliation to Mediation:**

There has been tremendous debate at the variations among mediation and conciliation. While jurisdictions the world over use the phrases interchangeably, Indian courts have often distinguished between them. The landmark judgment on this context become rendered with the aid of using Hon`ble Delhi High Court in **Shri Ravi Aggarwal v. Shri Anil Jagota**<sup>8</sup>. In this case, the events had reached a settlement agreement vide personal mediation and sought enforcement below Sections 30, 73 and 74 of the Act. The Court refused to do so, reasoning that Part III of the Act most effective applies to settlement agreements drawn in pursuance to duly constituted conciliation proceedings.

This is also evident in the decision of the **Salem Advocate Bar Association v. Union of India (2005) 6 SCC344**. This discriminatory treatment becomes very difficult when consensus is sought and achieved throughout the mediation process.

In contrast to the arbitral award executed, the settlement achieved through mediation does not enjoy the status of a Court Order. However, if the mediator is nominated as conciliator and reaches the same settlement, the settlement is considered a resolution. Therefore, Indian political parties prefer conciliation over mediation.

## **3. Setting Aside of Settlement Agreements:**

The Hon'ble Delhi High Court in case of **Surinder Kumar Beri v Deepak Beri & Anr. 2018 (171) DRJ 414** has settled a settlement agreement under Section 34 of the Act as a violation of India's public order and morals. Similarly, at **Hayward v Zurich Insurance Company (2016)**

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<sup>8</sup> (2009) SCC Online Del 1475

UKSC 48, the UK Supreme Court has set aside a settlement agreement between an insurance company and a policyholder on the basis of fraudulent claims.

### **LESSONS FROM AROUND THE WORLD**

The Singapore Arbitration Act treats mediation and conciliation proceedings equally and makes no distinction. In Singapore<sup>9</sup>, parties to private arbitration can appeal directly to the court and record the arbitration agreement as a court "order." This allows the court to enforce the contract directly in the event of a one-sided breach. Similar provisions are set out in the Code of Civil Procedure of France, where parties to private or contractual mediation may request the court to approve a settlement of mediation.

The German Civil Code also allows for certification in enforcement documents that can be directly enforced in special procedures with the consent of both parties. There are similar laws in other countries such as Spain and Belgium.

### **BINDING NATURE OF MEDIATION SETTLEMENT AGREEMENTS**

In layman's terms, a settlement agreement is a contract reached by the parties to resolve their disputes. Now, because mediation is a voluntary process in which both parties participate, a mediated settlement agreement can be reached after mediation by both parties. In other words, in a mediated settlement agreement, whatever the parties have mutually decided is reduced in writing. It is a document that binds the parties to the agreed-upon terms and conditions as a result of mediation.<sup>10</sup>

Because the settlement is a special type of contract, it includes the main content of the contract as well as various other requirements for making the contract effective. A valid contract must include the following elements: proposal, acceptance, review, the legal capacity of the parties, the legality of the subject, and so on. Section 73 of the Arbitration and Conciliation Act requires a written settlement agreement to be drafted and signed. The parties must also confirm the settlement agreement by signing it and providing the consent thereto. This decision is final and

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<sup>9</sup> On the development of the Singapore Mediation Convention (SMC), see The Singapore Mediation Convention: An Overview, <https://www.globalpound.org/2018/07/12/the-singapore-mediationconvention-an-overview/> (accessed 19 May 2019)

<sup>10</sup> By Arjaa, Are mediated settlement agreements enforceable in India, Blog ipleaders, [(04<sup>th</sup> February 2022, 10:42 AM)] <https://blog.ipleaders.in/mediated-settlement-agreements-enforceable-india/>.

legally binding on the parties who request it. The mediator must authenticate the settlement agreement and provide the parties with a copy of it.

According to the Arbitration and Conciliation Act and the Commercial Court Act, mediation agreements have the same legal standing as an arbitral award and can be challenged for the same reasons. Fraud, coercion, corruption, political party incompetence, or agreements that violate basic principles of public order or Indian law are all fatal factors. Mediation evidence or so-called agreements in litigation or arbitration are not required in India. This provision contributes to the confidentiality of the entire proceeding.<sup>11</sup>

A settlement agreement is an agreement drafted by a mediator based on his notes from the mediation proceedings, written statements from the parties, and documentary evidence. The agreement is then forwarded to the parties, and once both parties agree to the terms and sign it, it is sent to the conciliator for authentication.

Only when all of the components are met does it become final and binding on both parties and those claiming under them. Under Section 30 of the Arbitration & Conciliation Act of 1996, the settlement agreement has the same legal standing as an arbitral award.<sup>12</sup>

"An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute," Section 30(4) states. This means that the settlement award, like an arbitral award, could be challenged on the grounds as categorically mentioned.

## **REASONS WHETHER TO ENFORCE MEDIATED SETTLEMENT AGREEMENTS OR NOT**

**Article 30 of the UNCITRAL Model Law on International Commercial Arbitration** encourages dispute resolution through mediation between parties. A settlement between the parties ensures that disagreements are resolved amicably, leaving each party satisfied.

There is no appropriate law or mechanism for enforcing settlement agreements. The goal of party autonomy, which is generally the foundation of a settlement agreement, is to eliminate

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<sup>11</sup> By Arjaa, Are mediated settlement agreements enforceable in India, Blog ipleaders, [(04<sup>th</sup> February 2022, 10:42 AM)] <https://blog.ipleaders.in/mediated-settlement-agreements-enforceable-india/>.

<sup>12</sup> By Bimacc, Binding nature of Arbitration awards and mediation settlement agreements, BIMACC, [(04<sup>th</sup> February 2022, 10:56 AM)] <http://www.bimacc.org/a-z-of-adr-binding-nature-of-arbitration-awards-and-mediation-settlement-agreements/>.

the traditional enforcement stage. Unfortunately, what happens when one of the parties unilaterally decides to breach the settlement agreement is a very perplexing question.

There is no law in India that allows for the enforcement of agreements reached through mediation between parties.

Section 30 of the Indian Arbitration and Conciliation Act 1996 ("Act"), which is aligned with the UNCITRAL Model Law on International Commercial Arbitration, if the arbitral tribunal finds elements of settlement between the disputing parties, it encourages dispute resolution through mediation.<sup>13</sup>

Section 30 is only applicable when the parties have chosen to settle a dispute after initiating arbitral proceedings. Settlement agreements are not treated as arbitral awards if the parties have chosen private mediation, whether in accordance with a mediation clause or otherwise. As a result, they are enforced as simple agreements between the parties.

If one party defaults, this causes numerous problems for the parties:

1. the settlement agreement is not enforceable as a court decree; at best, it may form the basis of a civil suit; and
2. it reagitates litigation despite the fact that the matter has been settled.

Conciliation is preferred over mediation.

There has been much discussion about the differences between mediation and conciliation. While the terms are used interchangeably in many jurisdictions around the world, Indian courts have frequently distinguished between them. This is demonstrated by the decision of the Hon'ble Supreme Court of India in the case of **Salem Advocate Bar Association v. Union of India (2005) 6 SCC 344**. When attempting to enforce a mediated settlement agreement, this differential treatment creates enormous difficulties.

While both mediation and conciliation settlement agreements can be recorded in the form of an arbitral award on agreed terms under Section 30, and thus treated equally, Part III of the Act

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<sup>13</sup> By Ved Thakur and Yash More, Mediated Settlement Agreements in India- To enforce or Not, Mediate India, [(04<sup>th</sup> February 2022, 11:24 AM)] <https://www.mediate.com/articles/thakur-more-india-content.cfm#:~:text=In%20India%2C%20there%20exists%20no,conclusion%20of%20mediation%20between%20parties..>

provides statutory recognition for the enforcement of settlement agreements drafted as part of private conciliation.

Section 73 of the Act gives a conciliator the authority to draught a settlement agreement that is final and binding on the parties. Section 74 elevates this settlement agreement to the status of an arbitral award.<sup>14</sup>

### **PUTTING SETTLEMENT AGREEMENTS ASIDE**

While private mediation suffers from a lack of statutory recognition, the picture is not as rosy when settlement agreements are treated as arbitral awards. Before they can execute their agreement as awards, the parties must survive an attack of setting aside under Section 34 of the Act.

At first glance, it may appear that because settlement agreements contain the terms of consent reached by parties, there appears to be no reason to grant a petition to vacate an arbitration award made on agreed-upon terms (settlement agreements) However, because settlement agreements have been given the status of an arbitral award, courts have ruled that applications under Section 34 of the Act are logical.

### **ANALYSIS**

The lack of a statutory mechanism for enforcement, as well as a strong conciliation framework, has rendered India's mediation regime ineffective and less significant in nature. This gives parties choosing mediation in India a significant lack of confidence and uncertainty. Only a comprehensive statute, such as 'Indian Mediation Act' or an Arbitration and Conciliation Act, can clear the muck). Singapore, for example, can serve as a model for the evolution of mediation law in India.

Because the Indian regime distinguishes between mediation and conciliation, it is unavoidable that the law places both on the same level in terms of uniform enforceability and recognition. Only when mediation is on par with conciliation and arbitration will it be considered a viable ADR process.

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<sup>14</sup> By Ved Thakur and Yash More, Mediated Settlement Agreements in India- To enforce or Not, Mediate India, [(04<sup>th</sup> February 2022, 11:34 AM)] <https://www.mediate.com/articles/thakur-more-india-content.cfm#:~:text=In%20India%2C%20there%20exists%20no,conclusion%20of%20mediation%20between%20parties>

Section 30 of the Arbitration and Conciliation Act of 1996, which encourages dispute settlement, is only effective when the parties have chosen to settle a dispute after initiating arbitration proceedings. Settlement agreements cannot be treated as arbitral awards if the parties have chosen private mediation, whether through a mediation clause or otherwise. As contracts between parties, they are both just and compelled.<sup>15</sup>

This raises a number of issues because the settlement agreement cannot be enforced as a court decree, but it may form the basis of a civil suit, which would negate the entire purpose of using alternative dispute resolution. Even if the parties have reached an agreement, this can occur. As a result, the ineffective compliance mechanism negates the goal of mediation, rendering the entire process ineffective. As a result, private mediation is not preferred in India. According to the Arbitration and Conciliation Act and the Commercial Court Act, mediation agreements have the same legal standing as an arbitral award and can be challenged for the same reasons. Fraud, coercion, corruption, political party incompetence, or agreements that violate basic principles of public order or Indian law are all fatal factors.

## CONCLUSION

Because the Indian regime distinguishes between mediation and arbitration, the law will inevitably bring them to the same level in terms of uniform applicability and acceptance. Mediation, when compared to arbitration, is only a viable alternative dispute resolution procedure. Until and unless the government passes a mediation law, there will be gaps that will necessitate periodic court intervention. Even if the government passes a mediation law, India is still a long way from realising the full potential of alternative dispute resolution.

Finally, when enacting legislation governing a mediated settlement agreement, the legislature must ensure that the scope of the challenge is limited to the mediation agreement. Otherwise, even if they are regarded as arbitration awards, they will be null and void.<sup>16</sup>

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<sup>15</sup> By Arjaa, Are mediated settlement agreements enforceable in India, Blog ipleaders, [(12<sup>th</sup> February 2022, 10:42 AM)] <https://blog.ipleaders.in/mediated-settlement-agreements-enforceable-india/>.

<sup>16</sup> By Arjaa, Are mediated settlement agreements enforceable in India, Blog ipleaders, [(12<sup>th</sup> February 2022, 11:15 AM)] <https://blog.ipleaders.in/mediated-settlement-agreements-enforceable-india/>.