Alternative Dispute Resolution

A means for resolving Civil Disputes without resorting to the traditional court litigation

NEED FOR ADR

COMPLEXITY OF LAW AND LEGAL ACTION

DELAY IN RESOLUTION

ADVERSARIAL NATURE OF COURT ACTION

HIGH COST

TYPES OF ALTERNATIVE DISPUTE RESOLUTION

Negotiation

Arbitration

Conciliation

Mediation

What is Arbitration?

A mechanism of settling disputes between two parties by an impartial and neutral third-party, whose decision the contending parties agree to abide by.

HISTORY OF ARBITRATION LAW IN INDIA

PHASE – I & II

PRE-1940 PHASE

1. Scattered in multiple statutes and there was no consolidated law governing arbitration.
2. First enactment - the Indian Arbitration Act, 1899. However, its application was limited only to the Presidency Towns of Calcutta, Bombay and Madras.
3. Other dedicated laws for arbitration was the Second Schedule of Civil Procedure Code, 1908. Reference of arbitration was also found in the Indian Contract Act, 1872 (Sections 10 and 28) and Specific Relief Act, 1877 (Section 21)

1940-1996 PHASE

1. The Arbitration Act of 1940
2. Was based on the English Arbitration Act, 1934 and was a complete code for domestic arbitrations. However, the Act did nt contain any provisions related to enforcement of foreign awards.
3. Was severely criticized before different fora. It failed to achieve its desired objective of providing a speedy and efficacious dispute resolution mechanism. The working under the regime was slow, complex, expensive, hyper-technical and fraught with judicial interference.
4. Supreme Court was highly critical of the working of the 1940 Act

PHASE – III: POST 1996 – CURRENT REGIME

1. Arbitration and Conciliation Act, 1996 was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980.

2. 1996 Act was enacted with the following key purposes:
    a. Creating a consolidated legal framework dealing with arbitrations (both domestic and international) and conciliation
    b. Minimising judicial interference and supervision
    c. Creating a speedy and cost-effective dispute resolution mechanism
    d. Providing a robust enforcement system for arbitration awards

1. Despite the introduction of a consolidated framework, the 1996 Act could not fully cater to its objectives, which led to Amendments.

PHASE – III: POST 1996 – CURRENT REGIME

FIRST AMENDMENT - The Arbitration and Conciliation (Amendment Act), 2015 - Salient features

1. Restricting Judicial Intervention: Powers of the Court and its interference in arbitral proceedings was curtailed through express provisions.
2. Expediting the process of arbitration: With the key object to eradicate the delays and turn arbitration into a speedier and an effective dispute resolution mechanism, specific timeframes were introduced for different stages of arbitral process. A time-frame of 12 months (extendable by further 6 months) was prescribed for completion of the entire arbitration proceeding, failing which parties had to approach court for extension. The courts were also given liberty to issue appropriate directions while granting such extension, including directions for replacement of arbitrators.
3. Improving the overall functioning of arbitration: To make it more appealing to the public at large, a model fee schedule for arbitrators to limit expenses was introduced, and mechanisms to ensure neutrality and impartiality of arbitrators were set up.

SECOND AMENDMENT – The Arbitration and Conciliation (Amendment) Act 2019 – Salient Features

1. Expediting the Process: The process of appointment of arbitrators was expedited. Arbitrators will now be appointed by Arbitral Institutions designated by the High Court for domestic arbitrations and Supreme Court for International Commercial Arbitrations.
2. Timeline extension for ICA: Time period required to make an award for all arbitration proceedings is now removed for international arbitrations, which earlier was 12 months.
3. Arbitration Council of India (ACI): In order to encourage institutional arbitrations, the Arbitration Council of India (ACI) was introduced. The main tasks of ACI are to promote and encourage ADR in the country, grade the arbitral institutions and arbitrators in the country, and help in boosting the institutional arbitration in the country.

CONDUCT OF ARBITRATION

Pre-Requisite – An Arbitration Agreement

1. "Arbitration agreement" means an agreement by the parties (to an Agreement) to submit to an arbitrator certain disputes which have arisen (in present) or which may arise (in future) between the parties to agreement.
2. An arbitration agreement *must* be in writing and duly signed by both the parties. It may be in the form of an arbitration clause in a contract or by way of a separate agreement.
3. In the case of ***Bihar State Mineral Dev. Corpn.*** **v** ***Encon Builders (I) Pvt. Ltd.***, AIR 2003 SC 3688, the Supreme Court of India laid down the essential elements of an arbitration agreement which are as follows:

   (i) Existence of present or possibility of future differences.

   (ii) Intention to resolve differences through arbitration.

   (iii) Written agreement to be bound by the decision of arbitration.

   (iv) Consensus ad idem.

   (v) Concluded consent to refer the dispute to arbitration.

Effective Arbitration Clause

1. Three Kinds of Laws:

- In case of a contract/agreement involving an arbitration agreement, three kinds of law are applicable:
  - the law governing the substantive contract for determining the rights and obligations of the parties ('**the Substantive law**' applicable for the Contract)
  - the law governing the agreement to arbitrate and performance of such agreement ('**juridical seat**' or 'les arbitri')
  - the law governing the procedure of Arbitration ('Curial law'or '**Procedural law**')
- Parties entering into an Arbitration Agreement are free to chose any substantive law, juridical seat and procedural law.

2. Arbitral Tribunal – Number of Arbitrators

3. Place of Arbitration (Venue) vis-à-vis Seat of Arbitration

Institutional
v.
Ad hoc Arbitration

Institutional Arbitration

1. A specialised institution - the role of administering the arbitration process
2. Own set of rules which provide a framework for the arbitration and its own form of administration to assist in the process
3. Advantages:
   - availability of pre-established rules and procedures
   - administrative assistance from the institution, which will provide a secretariat or court of arbitration
   - a list of qualified arbitrators to choose from
   - assistance in encouraging reluctant parties to proceed with arbitration
   - remote case management systems

Ad-hoc Arbitration

1. an arbitration where the procedure is either agreed upon by the parties or in the absence of an agreement, the procedure is laid down by the arbitral tribunal.
2. parties and the arbitrators independently determine the procedure, without the involvement of an arbitral institution.
3. ad hoc process places a heavier burden on the arbitrator to organise and administer the arbitration
4. A distinct disadvantage of the ad hoc process is that its effectiveness is dependent on how willing the parties are to agree on the arbitration procedures at a time when there may already be a dispute

Success of SIAC

Sample Arbitration Clause

"In the event of any dispute arising out of or in connection with the present contract, including any question regarding its existence, validity or termination, the parties shall refer the same for arbitration to be finally resolved under the administration of International Arbitration and Mediation Centre ("IAMC") in accordance with the Arbitration Rules of International Arbitration and Mediation Centre ("IAMC Rules") for the time being in force. The seat of Arbitration shall be _____. The Tribunal shall consist of one or more arbitrators appointed in accordance with the said Rules. The language of the arbitration proceedings shall be English. The law governing the arbitration agreement shall be _____. The law governing the contract shall be _____."

Commencement of Arbitral Proceedings

Notice of Arbitration

1. Upon there arising a dispute which is capable of being resolved via arbitration, a notice is to be addressed to one party by the other for referring the dispute to arbitration.
2. Arbitral Proceedings would be deemed to have commenced on the date on which a request for that dispute to be referred to arbitration is received by the Respondent.

Appointment of Arbitrators

1. Tribunal to be constituted as per the procedure agreed upon between the parties (either institutional or ad-hoc)
2. If parties fail to agree upon the arbitrators within thirty days from receipt of a request by one party from the other party, the Chief Justice of the High Court or persons designated by him shall, upon request of a party, appoint the arbitrator(s).

Chronology of procedure in an Arbitration

S. NO.	ACTION
1.	Pre-Hearing Procedural Conference for fixing the timeline for arbitration and procedure for conduct thereof.
2.	Statement of Claim together with supporting exhibits, fact witness statements, expert reports, relevant legal authorities and other documentary evidence relied upon.
3.	Statement of Defence and Counterclaim (if any) together with supporting exhibits, fact witness statements, expert reports, relevant legal authorities and other documentary evidence relied upon.
4.	Reply to Statement of Defence limited to any new points of fact, argument and law raised in the Respondent's Statement of Defence.
5.	Agreed List of Issues or Parties' respective List of Issues.
6.	Production of Documents
7.	Witness examination – Chief Examination & Cross Examination
8.	Opening Written Submissions
9.	Oral Hearing
10.	Closing Written Submissions
11.	Arbitral Award

Arbitral Award

1. Award is a determination on the merits by the arbitral tribunal. It is analogous to a judgment in a court of law.

2. Award can be in terms of monetary relief granted to one party or in terms of declaration and injunctory reliefs.

3. Essentials of an Arbitral Award:
   i. in Writing.
   ii. Signed by all the members of the arbitral tribunal.
   iii. State the reasoning on which it is based.
   iv. Date and place of arbitration should be mentioned.

Termination of Arbitral Proceedings

Arbitral proceedings are terminated either by the final arbitral award or by an order of the arbitral tribunal terminating the arbitral proceedings.

Termination of the arbitral proceedings terminates the mandate of the arbitral tribunal and the arbitral tribunal becomes functus officio.

Timeline for Conduct of Arbitration

1. Pleadings shall be complete within a period of 6 months from the date of appointment of the arbitrators (Sec. 23).
2. The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings. (Sec. 29A)
3. The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.
4. If the award is not made within the period specified or the extended period specified, the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period. (Sec. 29A)

POST ARBITRAL AWARD

ENFORCEMENT OF THE AWARD

CHALLENGE – SETTING ASIDE

CONCILIATION

What is Conciliation

1. An alternative out-of-court dispute resolution instrument which is a voluntary, flexible, confidential, and interest-based process.
2. Parties seek to reach an amicable dispute settlement with the assistance of the conciliator, who acts as a neutral third party
3. Process allows the parties to define the time, structure and content of the conciliation proceedings
4. They are interest-based, as the conciliator will when proposing a settlement, not only take into account the parties' legal positions, but also their; commercial, financial and / or personal interest
5. Procedure for undertaking conciliation between parties is provided under Chapter III (Section 61 to Section 81) of the Arbitration and Conciliation Act.

Salient Features of Conciliation

1. No formal agreement required to commence conciliation
2. Number of conciliators – 1 or 2 or 3
3. Communication between conciliator and parties
4. Place of meetings with the conciliator
5. Submission of written statement to conciliator
6. Duties of the Conciliator
7. Conciliator not bound by CPC or Evidence Act
8. Disclosure of information and confidentiality
9. Restriction to resort to arbitral or judicial proceedings during conciliation
10. Restriction on introduction of evidence in other proceedings
11. Termination of conciliation proceedings – Settlement Agreement
12. Authentication of settlement agreement

Nature and Enforceability of Settlement Agreement

1. Final and binding on the parties and persons claiming under it respectively.

2. Same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30 of the Act

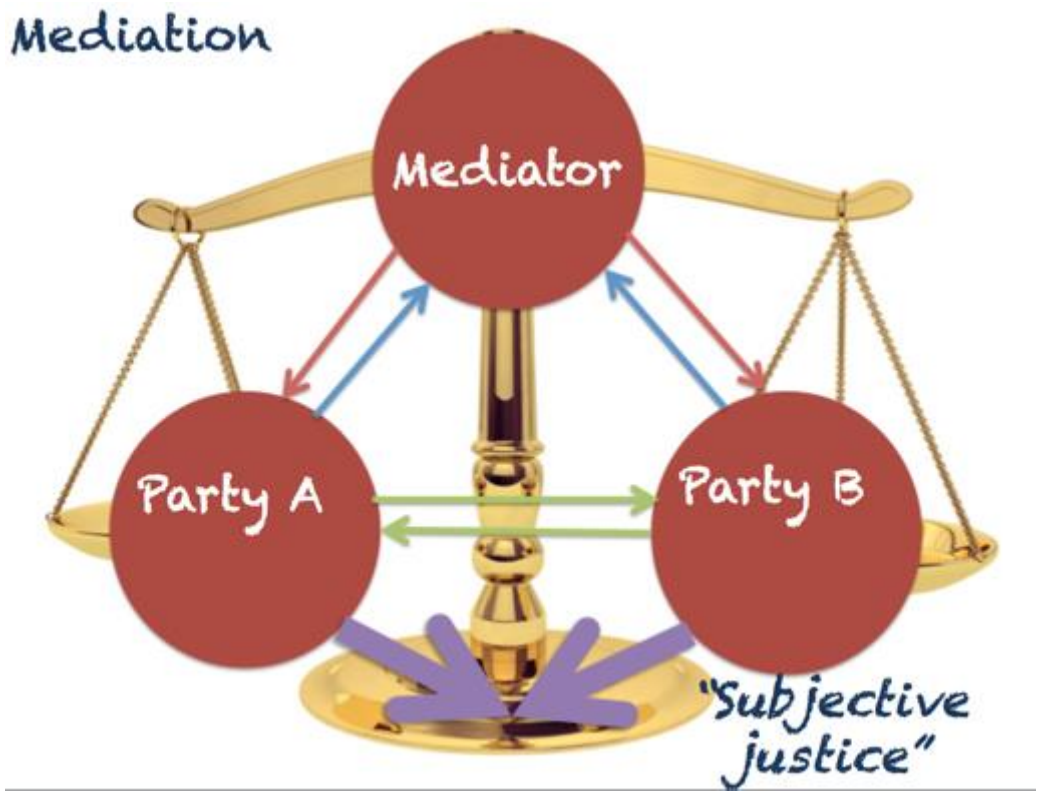
3. Enforceable as if it is a decree of the court

Why Conciliation?

1. More flexible, informal, expeditious and cost-effective.
2. Parties are assured of confidentiality.
3. A non-binding procedure in which the conciliator acts a facilitator to assists the parties to reach an amicable settlement rather than pronouncing a judgement.
4. Gives the parties an opportunity to put across their grievances and solve the issues amicably and in a congenial manner without any hostility towards the other.
5. Despite the conciliation proceedings being voluntary and non-binding, its outcome, i.e. the settlement agreement is final and binding on the parties and persons claiming under them.
6. Chances of any further litigation pursuant to finalization of settlement agreement are relatively less as mutual settlement is arrived at between the parties.

Mediation


LET'S IGNORE IT UNTIL HE GETS A LAWYER



WHAT IS MEDIATION?

Mediation is a **voluntary, party-centered** and structured negotiation process where a **neutral third party assists the parties in amicably resolving their dispute** by using specialized communication and negotiation techniques.

In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the **parties always retain control over the outcome of the dispute**.

TYPES OF MEDIATION

Court Referred Mediation under Section 89 of CPC

Private Mediation

HISTORY OF MEDIATION IN INDIA

- Much before the adoption of the formal British judicial system, the traditional ***Panchayat* system** prevailed in India whereby community issues were resolved by a group of village elders.

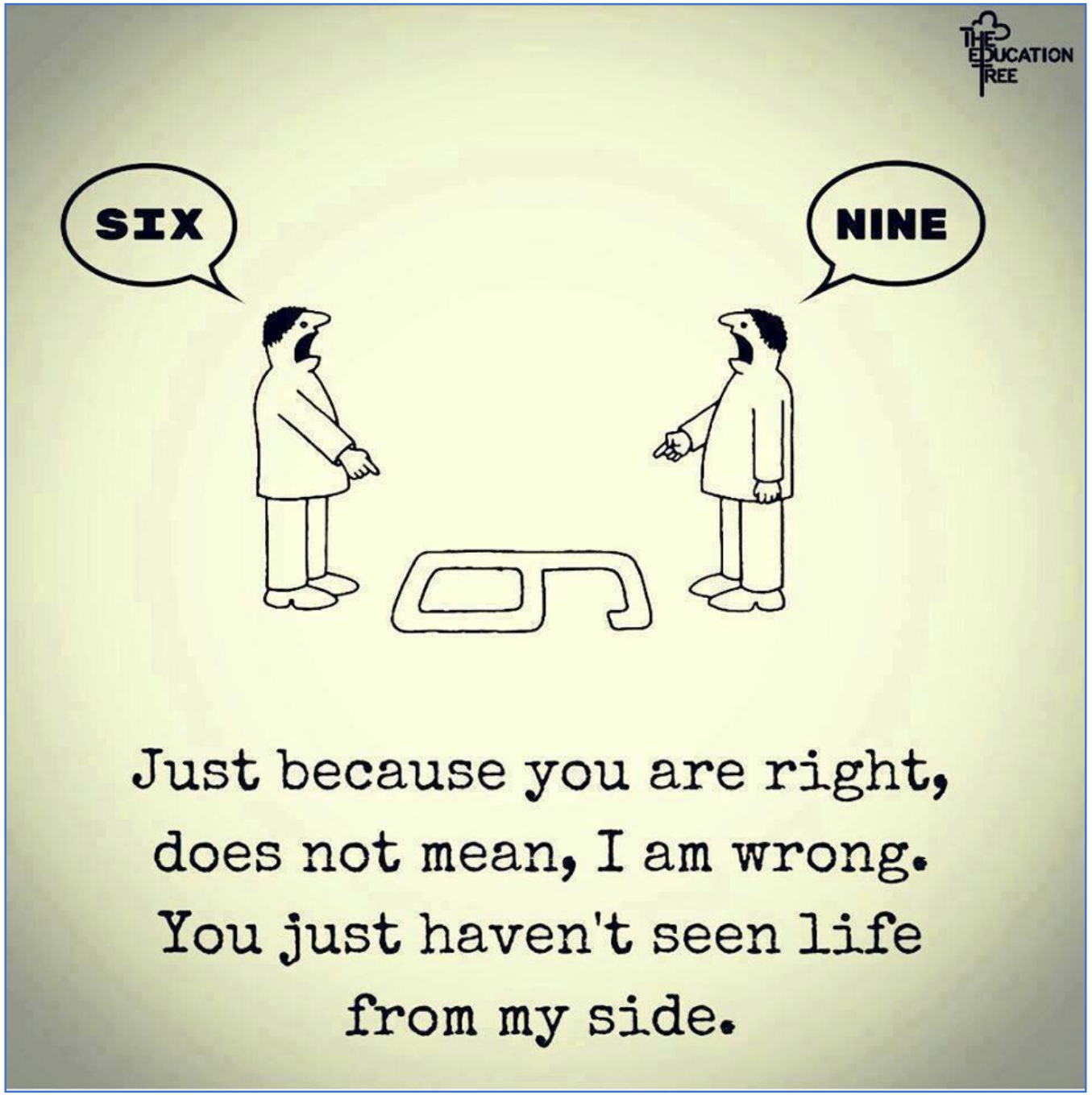
- The formal integration of mediation into the Indian legal system during the post-British era can be traced to the **Industrial Disputes Act, 1947, wherein detailed procedures were prescribed for settling disputes out of court**.

- Subsequently the enactment of the **Legal Services Authority Act, 1987** provided for the establishment of ***Lok Adalats***, which gave further impetus to the concept of mediation.

- Further, commercial mediation was given a statutory flavour through the introduction of **Section 89** into the Code of Civil Procedure, 1908.

- The enactment of the **Commercial Courts Act, 2015**, providing **mandatory pre-institutional mediation** in certain classes of Commercial Suits, where no urgent relief is sought, was also an important step in favour of commercial mediation. The Hon'ble **Supreme Court** has also recently held **that this provision is not merely procedural**, and must be complied with before any remedy can be availed under the said Act; and in the event of **failure to invoke** pre-institutional mediation, a **commercial suit is liable to be dismissed.**

Mediation is about understanding that…..



STAGES IN MEDIATION

STAGE - 1

Introduction and Opening Statement: The mediator introduces herself/himself. Then she/he furnishes information about his appointment as mediator, the assignment of the case to her/him for mediation and her/his experience if any in successfully mediating similar cases in the past. Thereafter, the mediator declares that she/he has no connection with either of the parties and he has no interest in the dispute. She/He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality. Thereafter, the mediator requests each party to introduce themselves.

STAGE - 2

Joint Session: The mediator invites the parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. The mediator asks questions to elicit additional information where she/he finds that facts of the case and explores the perspectives that have not been clearly identified and understood by the parties earlier. The mediator would then summarize the facts to each of the parties to demonstrate that the mediator has understood the case of both parties. Thereafter, the mediator identifies the areas of agreement and disagreement between the parties and the issues to be resolved.

Mediation Requires You To

Think Outside The Box

To Explore Solutions

STAGE – 3

Separate Session(s): In the private session, the mediator will again re-affirm the confidentiality of the information shared. Thereafter, she/her will gather further information which will be helpful for settlement. Then she/he goes through a process of Reality-Testing, whereby she/he asks effective questions, discusses the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality, then makes them consider the consequences of any failure to reach an agreement, thereby trying to see if the parties may choose to settle instead of litigate.

SETTLEMENT AGREEMENT

STAGE – 4

Closing: If the parties have reached an amicable settlement, the terms are recorded in a settlement agreement which will be signed by both the parties and will be binding on them. If there is no settlement, then, the Mediator closes the case by passing the "*closure report"*. The closure report would not record any information shared or discussed by the parties during the Mediation process.

Law to Govern Mediation In India?

- In 2014, the United Nations Commission on International Trade Law ('UNCITRAL') first considered a proposal for the development of a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation. The goal of this project was to encourage international mediation in the same way that the New York Convention facilitated the growth of arbitration.

- The work of UNCITRAL Working Group II has resulted in two instruments – the Singapore Convention on Mediation; and Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.

- In Asia, where continued growth of cross-border trade is expected, the potential for these UNICTRAL instruments to facilitate the resolution of cross-border commercial disputes and support economic growth is immense. With a focus on jurisdictions such as China, India, Hong Kong and Singapore, this article discusses the convention and amended model law, and examines how far down Asia is on the path towards convergence in the enforcement of international mediated settlement agreements.

- **India was one of the first prominent signatories to the Singapore Convention on Mediation ("SCM")** which resulted in the promulgation of the **draft of the Mediation Bill, 2021 ("Bill")**, which emphasises on the need to further promote ADR, inter alia, by institutional mediation.

The Mediation Bill, 2021

The Mediation Bill, 2021 was introduced in the Rajya Sabha with the Parliamentary Standing Committee being tasked with a review of the Bill. The Key features of the Bill are:

- **Aim**:
  - To promote, encourage, and facilitate mediation, especially institutional mediation.
  - To resolve disputes, commercial and otherwise.

- **Mandatory mediation**: Before litigation.

- **Rights of litigants:** It safeguards the rights of litigants to approach competent adjudicatory forums/courts for urgent relief.

- **Mediation Settlement Agreement (MSA):** It will be legally enforceable and can be registered with the State/district/taluk legal authorities within 90 days.

- **Mediation council of India:** The Bill establishes the Mediation Council of India and also provides for community mediation.

- **The Bill contains a list of disputes which are not fit for mediation.** These include disputes:

    i. relating to claims against minors or persons of unsound mind,
    ii. involving criminal prosecution, and
    iii. affecting the rights of third parties

WHY MEDIATION?

Advantages of Mediation

- ✓ Quick and responsive
- ✓ Economical
- ✓ Harmonious settlement
- ✓ Creating solutions and remedies
- ✓ Confidential and informal
- ✓ Parties controlling the proceedings

Mediation vs Litigation

- ✓ No loss of time in mediation.
- ✓ No financial investment is required mediation
- ✓ Mediation preserves ongoing business or personal relationships.
- ✓ Mediation allows flexibility, control and participation of the disputing parties.

Practical and Policy Implications

India ranks 163rd in the 'Contract Enforcement' indicator of the 2020 Ease of Doing Business Report

- World Bank

Only 28 cases settled out of 1918 pending cases under Pre-Institution Mediation and Settlement, Commercial Courts Act, 2015 in Delhi during December, 2022. 977 cases are non-starters.

- Department of Justice, India

Cost of judicial delays is estimated at 0.5% to 1.5% of GDP

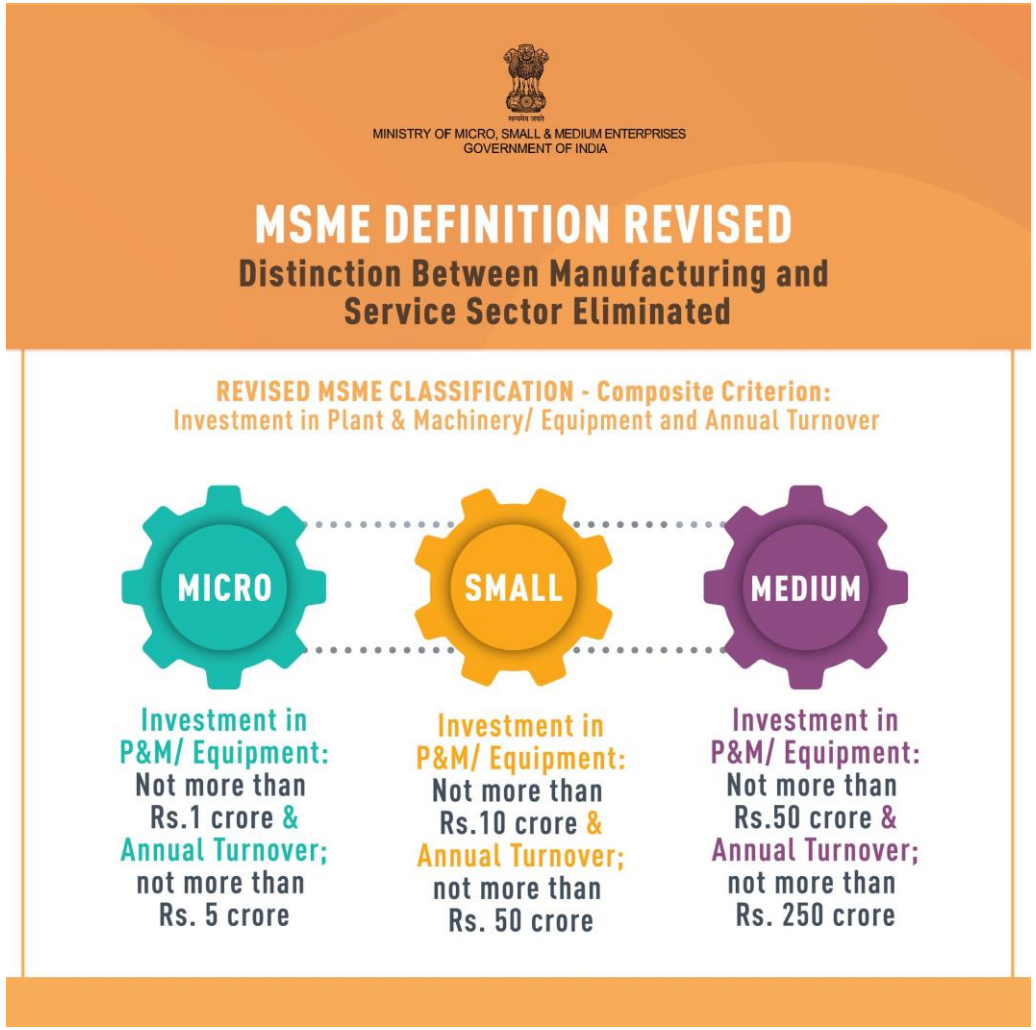
- State of Indian Judiciary, DAKSH

Banking and Insurance Sector

Banking Sector	Insurance Sector	Critique
➢ Provides for Ombudsman under the Reserve Bank - Integrated Ombudsman Scheme, 2021.	➢ Provides for Ombudsman under the Insurance Ombudsman Rules, 2017.	➢ As a remedial measure, the Ombudsman option is virtually non-existent.
➢ The scheme envisages mediation, but role is essentially quasi-judicial in function.	➢ The rules require mutual written consent of both the parties for mediation. If such consent not received, the Ombudsman acts as a quasi-judicial authority.	➢ Requires complainant to have personal knowledge as advocates are prohibited from participation. Complainants hesitant to participate without legal advice as Award is binding.
➢ First step is facilitation, based on documents. If it fails, mediation is mandatory.	➢ Option of mediation through video-conferencing	➢ Requires trained mediators. Role of Ombudsman as quasi-judicial authority hinders mediation.
➢ No video-conference option.		

MSME Sector

- Existing mechanism provides for Micro and Small Enterprises Facilitation Council under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006.
- Conciliation is voluntary and timelines provided for arbitration are not strictly adhered to.
- Proposed Alternatives:
  - In disputes between MSME's, parties have to mandatorily participate in mediation and arbitration. No other remedies in alternate forums.
  - Strict timelines similar to Commercial Courts Act, 2015.
  - Mediation Panel and Arbitration Panel has to be different.



Consumer Sector

- Department of Consumer Affairs launched Integrated Grievance Redressal Mechanism. But the mechanism does not involve any supervisory role.
- Alternative is Consumer Commission, where costs of litigation are high.
- Mediation provided under the Consumer Protection Act, 2019.
  - Voluntary and requires consent of both parties.
  - Referral to be made by Consumer Commission on application of party.
  - No provision for video-conferencing.

Nav Ratna Companies

- Permanent Machinery of Arbitration (“PMA”) - For settling all commercial disputes (excluding disputes on income -tax, customs and excise) between PSEs and a Government Department.
- Disputes are required to be referred to the Department of Public Enterprises for its reference to the Arbitrator of PMA. Secretary, DPE on being satisfied with the prima facie existence of a dispute, refers the dispute to the Arbitrator of the PMA for arbitration.
- The Arbitration Act 1996 is not applicable in these cases. No outside lawyer is allowed to appear on behalf of either party for presenting/defending the cases. But the parties can take help of their own full time law officers.
- The Arbitrator issues notices to parties concerned for submission of facts of the case and their claims and counter claims. The parties argue their case before the Arbitrator. Based on written records and oral evidence, the Arbitrator publishes an award.
- An appeal against the award of the Arbitrator can be made before the Secretary, Ministry of Law, for setting aside or revision of the award. The decision of the Secretary, Ministry of Law is final and binding on the parties. No further appeal can be made in any Court of Law/Tribunal against the decision.