

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 3 | Issue 4

2021

© 2021 *International Journal of Legal Science and Innovation*

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for free and open access by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at International Journal of Legal Science and Innovation, kindly email your Manuscript at editor.ijlsi@gmail.com.

Enforcement and Practicability of Opt-in Mediation Settlement Agreements in India

Issues and Challenges

ARJUN SANGWAN¹

ABSTRACT

The Indian justice system has paired itself with undue delays, high-cost litigation and an abundance of cases put on ice. Other forms of dispute resolution have not been the traditional go-to for parties, but that has started to change for better over recent times. Based on the ease of use, requirement of resource provisions, time sensitivity and utility of the process, particular dispute resolution methods provide distinct advantages to the parties that outperform litigation.

This paper seeks to address the lack the of a mediation legislation in India, questions the Opt-in model and proposes a statute backed Opt-out model for mediation proceedings. It argues that the while the Opt-out model would not be suitable for cases that do not have elements of settlement, for example criminal matters generally, the Opt-out model can be a transformative device that rallies mediation as a successful dispute resolution method, in limited specified civil and commercial disputes, and achieve efficient outcome enforcement through the backing of a statute. Mandatory pre-litigation mediation for suitable cases can also prove to be a champion in reducing the litigation burden on civil courts.

I. INTRODUCTION

ADR methods such as Arbitration, Conciliation and Lok Adalat have a legal backing of statutes that give the parties a sense of certainty and efficient enforcement of awards/settlements.² However, Mediation proceedings and settlement are not governed by any statute in India, to allow freedom and flexibility in the process. Apart from certain cases like matrimonial disputes (also an example of Opt-in model)³ and commercial court

¹ Author is a Student at O.P. Jindal Global University, India.

² The Arbitration and Conciliation Act, 1996, and The Legal Services Authorities Act, 1987

³ K. Srinivas Rao v D.A. Deepa (2013) 5 SCC 226 (Matrimonial Disputes are also an example of the Opt-in model as mediation is only initiated at the behest of the court after the proceedings are started in court)

disputes⁴, where the parties have to exhaust the avenue of mediation, there is an Opt-in model where the parties can choose to go for mediation or pursue other dispute resolution methods like litigation. If the parties to mediation manage to reach a settlement agreement, and they need to enforce it, they have to make substantial efforts to take the agreement back to court to enforce it by converting the agreement into a judgment. There is no self-enforcement mechanism as in the case of arbitration and conciliation. The current position on mediation in India results in uncertainty regarding enforceability of settlement agreements and inefficiency in going back to the court which defeats the purpose of swift and speedy resolution to the dispute.

II. VIABILITY OF THE OPT-IN MODEL COMPARED WITH THE OPT-OUT MODEL

The Opt-in model of mediation includes voluntary mediation proceedings or court referred mediation. This collective Opt-in model has not been particularly successful in India or elsewhere.⁵ The Opt-out model mandates parties to attend one compulsory pre-litigation mediation session, and the parties are allowed to move to the court only if the mediation process fails. If either of the parties, or if both the parties mutually decide to discontinue with the proceedings, they can ‘opt-out’ of the mediation and the mandatory condition under law for mediation will stand fulfilled.⁶

An argument could be made that one of the most important facets of a mediator is to build trust and rapport with the parties, and if the party does not want the mediation in the first place, then this trust will not be built. Be that as it may, this is where a competent mediator excels in showing the parties the benefits of mediation and building their trust irrespective of their voluntariness through a collaborative style of assertiveness and cooperation. The first compulsory mediation session of the Opt-out model can afford this opportunity to a mediator to convince the parties to continue with the mediation process.

One criticism of the Opt-out model can be that it takes away the autonomy of the parties by making it mandatory to have recourse to mediation as the first stage of the dispute resolution process. However, this argument does not hold as the parties still have the option of leaving the mediation process at any stage after the first session if it is not being conducive to their stance, and in this sense, mediation is always voluntary. Moreover, we have to make a distinction between autonomy outside the process and autonomy inside the process. In an Opt-out model, the parties may not have autonomy outside the process, essentially in having

⁴ Section 12A, the Commercial Court Act, 2015

⁵ Vidhi Centre For Legal Policy, ‘The Future of Dispute Resolution in India’ (2020)

⁶ Ibid.

a choice to go for mediation, but they still retain autonomy inside the process of mediation in styling the process and taking decisions.

Commentators who support the idea of initial consent of the parties to start the mediation process argue that if the parties do not give the initial consent, they will most likely not give the final consent of reaching a settlement in the mediation process. But statistics do not agree with this stance as the Opt-out model leads to a higher number of settlements compared to the Opt-in model. The parties are already aware of the mandatory mediation mechanism and they put more effort in resolving the dispute in the first instance. An example of the Opt-out model is Italy. After the introduction of the opt-out mediation model in Italy, about 180,000 mediations were initiated and on an average the parties voluntarily agreed to continue with the full mediation process in almost 50% of the sessions.⁷ Recourse by Voluntary Agreement during a Required Initial Mediation Session was an incredible 90% of mediations in the total matters of mediation and only 10% were either completely voluntary mediation or court referred.⁸ India can use the Italian Opt-out model of identifying specific dispute areas for compulsory first pre-litigation mandatory mediation session, and create its own model of mediation which incentivizes mediation for all stakeholders.

III. SCOPE OF OPT-OUT MODEL AND MEDIATION LEGISLATION IN INDIA

In India, the scope of mandatory pre-litigation is boundless and can prove to be very successful in reducing the backlog of cases in civil courts. Currently there is a pendency of approximately 38.7 million cases before the district courts and 5.8 million cases before the High Courts.⁹ Mandatory pre-litigation mediation session can help settle disputes efficiently and in a timely manner. Some positive steps have already been taken in this regard such as mandatory mediation in matrimonial disputes and commercial court disputes, but there is much left to be desired. The Supreme Court in *Afcons Infrastructure Ltd v Cherian Varkey Construction* held that the court-initiated mediation proceedings will be deemed as Lok Adalat and hence settlements reached through such proceedings are enforceable under S. 21 of Legal Services Authorities Act, 1987.¹⁰ However, no such enforcement is available for mediation settlement agreements that are not initiated by courts. For these proceedings, settlements can only be enforced as an agreement between the parties and any breach of such

⁷ Leonardo D'Urso, 'Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation' (2018) 36

Alternatives 49 <https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/07/Italys-Required-Initial-Mediation-Session-byLeonardo-DUrso.pdf> accessed 01 May 2021

⁸ Ibid.

⁹ 'E-Courts Services' <https://ecourts.gov.in/ecourts_home/> accessed 10 May 2021

¹⁰ *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* (2010) 8 SCC 24

agreement will result in further judicial processes required to convert the agreement into a judgment.¹¹ Furthermore, there is a requirement to mandate pre-litigation mediation to more disputes where there is an element or possibility of settlement. For example, the Law Commission recommended that the participatory model of dispute resolution should be introduced for disputes and litigation under the Rent Act.¹² Also in *M.R. Krishna Murthi v. The New India Assurance Co. Ltd.*¹³, the Supreme Court held that in cases of motor accident claim, pre-litigation mediation as a part of dispute resolution would be of great significance and the time is ripe to have such mechanisms. The court also pointed out the dire need to enact a Mediation Act as well to strengthen the mediation process in India. The Supreme Court, in January 2020, formed a panel to draft a legislation that can give legal backing and sanctity to mediation settlement agreements.

IV. REQUIREMENT OF A MEDIATION LEGISLATION IN INDIA

The lack of an umbrella legislation has led to several issues including an uncertainty regarding enforcement of outcomes and empanelment of mediators.¹⁴ Due to lack of certainty as regards enforcement, the demand for mediation is low and consequently, the capacity in mediators and mediation centres has been slow to build up.¹⁵ A legislative framework for mediation, as and when drafted, would go a long way in augmenting the ADR ecosystem in India.¹⁶ It will give a statutory backing and certainty to the enforcement of settlement agreements achieved by mediation processes, irrespective of whether the proceedings were court enforced or not. This potential legislation, without compromising the flexibility and autonomy of the parties, should also aim to bring about uniformity across some key aspects for mediation practice like training standards for mediators.

V. INTRODUCTION OF AN OPT-OUT MODEL IN INDIA

The most significant cause for mediation not taking place in many cases is the lack of cooperation between parties to the dispute, or failure of the parties to turn up for mediation in the first place.¹⁷ An Opt-out model should be introduced that mandates parties to attend first pre-litigation mediation session for suitable cases. Specific civil and commercial disputes should be identified for which the first mediation session is made mandatory. This specific

¹¹ Designing the Future of Dispute Resolution: The ODR Policy Plan for India The NITI Aayog Expert Committee on ODR [October 2020]

¹² Law Commission of India, 129th Report on Urban Litigation – Mediation As Alternative to Adjudication

¹³ *M.R. Krishna Murthi v. The New India Assurance Co. Ltd.* (2020) 15 SCC 493

¹⁴ Designing, Supra, note 5.

¹⁵ Vidhi Centre For Legal Policy, 'The Future of Dispute Resolution in India' (2020)

¹⁶ Designing, Supra, note 5.

¹⁷ Vidhi Centre For Legal Policy, 'Strengthening Mediation in India' (2016)

identification of disputes not only removes any ambiguity and discretion pertaining to the procedure but also reinforces the value and suitability of mediation for these disputes.¹⁸ This Opt-out model for specific disputes with compulsory first session of mediation can work with the support of the existing two recourses of mediation in India i.e., completely voluntary mediation initiated by parties and court referred mediation based on its discretion. A strong Opt-out model framework will encourage parties to embrace mediation and strive towards achieving settlement agreements in mediation, eventually assisting in reducing the litigation load on courts in India.

¹⁸ Vidhi Centre For Legal Policy, 'The Future of Dispute Resolution in India' (2020)