The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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SILENCE THAT SPEAKS: TESTING THE MEDIATION ACT, 2023'S CONFIDENTIALITY SHIELD AGAINST EVIDENTIARY NECESSITY IN SUBSEQUENT ARBITRATION

~ Parthivi Garv

ABSTRACT

Confidentiality is indispensable to effective mediation because parties must be able to communicate candidly, acknowledge weaknesses and explore settlement without fearing subsequent evidentiary use of their communications. The Mediation Act, 2023 attempts to establish a strong statutory framework of protection through sections 22 and 23. Section 22 creates a general evidentiary exclusion by prohibiting the use of certain mediation communications in court or tribunal proceedings, including arbitral tribunals. However, as of September 2026, sections 22 and 23 had not been brought into force and remain non-operative. This paper therefore examines them as an enacted legislative framework rather than presently operative law.

The paper identifies an evidentiary gap where mediation fails, the dispute proceeds to arbitration, and a protected mediation communication contains a specific factual assertion that is directly material but otherwise unavailable through reasonably available evidence. It distinguishes such assertions from settlement offers, bargaining positions and hypothetical concessions, which should remain categorically protected.

Through doctrinal and comparative analysis of the Indian framework and the Uniform Mediation Act (UMA), particularly its distinction between categorical exceptions and limited conditional exceptions and safeguards of evidentiary unavailability, in-camera review and limited disclosure, the paper argues against diluting Indian confidentiality through a general impeachment or judicial balancing exception. Instead, Parliament should consider a narrowly defined evidentiary gateway for exceptional cases involving failed mediation, a specific non-

hypothetical factual assertion, direct materiality, absence of reasonably available alternative evidence, and demonstrated necessity. In-camera scrutiny, minimum disclosure and reasoned determination should constrain its application, preserving predictability while addressing cases where categorical exclusion may impair adjudicative accuracy.

Keywords: *Mediation confidentiality; Mediation Act 2023; mediation privilege; Uniform Mediation Act; arbitration; evidentiary exclusion; settlement privilege*

INTRODUCTION

Mediation depends upon candour. Parties must be able to acknowledge weaknesses, discuss difficulties and explore settlements without fearing that their statements will later become evidence. Confidentiality, therefore, creates the conditions necessary for meaningful participation. The Supreme Court recognised this principle in *Moti Ram (D) Thr LRs v Ashok Kumar*, holding that unsuccessful mediation should ordinarily be reported without disclosing proposals, counter-proposals or discussions.[1] It subsequently reaffirmed the centrality of mediation confidentiality in *Perry Kansagra v Smriti Madan Kansagra*, while recognising a distinct departure in the child-welfare context.[2]

The Mediation Act, 2023 seeks to provide a comprehensive statutory foundation. Section 22 protects specified mediation communications and, under section 22(3), prohibits their use or introduction as evidence before courts or tribunals, expressly including arbitral tribunals.[3] Section 23 separately addresses admissibility and privilege against disclosure.[4] However, sections 22 and 23 had not been brought into force as of September 2026 and therefore remain an enacted but non-operative framework.[5]

The central problem arises where mediation fails and the dispute proceeds to arbitration, but a protected mediation communication contains a specific factual assertion that is directly material and otherwise unavailable. Confidentiality should protect the communication, not automatically immunise the underlying fact where independent evidence exists. Yet categorical exclusion may impede adjudicative accuracy where the communication is the only reasonably available evidence.

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[1] *Moti Ram (D) Thr LRs v Ashok Kumar* (2011) 1 SCC 466 [2]-[3].
[2] *Perry Kansagra v Smriti Madan Kansagra* (2019) 20 SCC 753 [27].
[3] Mediation Act 2023, ss 22(1), 22(3).
[4] Mediation Act 2023 (n 3) s 23.
[5] Ministry of Law and Justice (Department of Legal Affairs), Notification S.O. 4384(E) (9 October 2023) Gazette of India, Extraordinary, pt II, s 3(ii) (bringing into force only ss 1, 3, 26, 31-38, 45-47, 50-54 and 56-57 of the Mediation Act 2023).

The paper therefore examines whether the statutory framework should accommodate a narrowly defined evidentiary gateway for exceptional factual communications. It rejects general impeachment or 'interests of justice' exceptions and argues that any departure from confidentiality should remain tightly confined and legislatively defined.

CONFIDENTIALITY, PRIVILEGE AND ADMISSIBILITY: DEFINING THE LEGAL PROBLEM

The Candour Rationale for Mediation Confidentiality

The effectiveness of mediation depends substantially upon the parties' willingness to communicate with a degree of openness that may not be possible in adversarial proceedings. Parties may acknowledge weaknesses, disclose commercial or factual difficulties, consider alternative positions and make concessions in order to explore settlement. If such communications could routinely be used against them in subsequent proceedings, parties would have an incentive to withhold information and adopt defensive positions. Confidentiality therefore serves a functional purpose: it protects the communicative environment necessary for mediation to operate effectively.[6]

Indian courts have recognised this rationale. In *Moti Ram (D) Thr LRs v Ashok Kumar*, the Supreme Court held that mediation is confidential and directed that, where mediation fails, the mediator should report only the fact of failure without disclosing the proposals or discussions exchanged.[7] The Supreme Court reiterated the importance of protecting mediation communications in *Perry Kansagra v Smriti Madan Kansagra*, although that case arose in the distinct context of child-welfare proceedings and should not be treated as establishing a general exception to confidentiality.[8]

Confidentiality, however, should not be understood as making everything connected with mediation substantively immune from proof. A distinction must be drawn between the communication made during mediation and the underlying fact to which that communication relates.

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[6] Ellen E Deason, '*The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?'* (2001) 85 Marquette Law Review 79, 81-82; Lawrence R Freedman and Michael L Prigoff, 'Confidentiality in Mediation: The Need for Protection' (1986) 2 Ohio State Journal on Dispute Resolution 37, 43-44.

[7] *Moti Ram* (n 1) [2]-[3].

[8] *Perry Kansagra* (n 2) [27].

The Communication-Fact Distinction

Suppose a party states during mediation: 'The goods were delivered to me on 15 March.' The statement is a mediation communication and may therefore attract the statutory protection contemplated by section 22. But the fact that the goods were delivered on 15 March is not transformed into a confidential fact merely because it was discussed during mediation. If the delivery can independently be established through invoices, delivery receipts, correspondence or witness testimony, those sources should not become inadmissible merely because the same factual matter was also discussed in mediation.

This distinction is important because otherwise confidentiality could inadvertently become a shield against proving facts that exist independently of the mediation process. The policy justification for confidentiality is strongest when protecting the settlement function of the communication, for example, an offer to pay a particular amount, a counter-offer, a hypothetical concession or an expressed willingness to compromise. Such statements are generated by the negotiation itself and may lose their usefulness if parties fear subsequent evidentiary exposure.

A specific factual assertion presents a different analytical problem. It may concern an independently existing state of affairs rather than a bargaining position. The question is therefore not whether the underlying fact is confidential, but whether the particular mediation communication asserting that fact should remain excluded even when it is directly material to a subsequent dispute.

This communication-fact distinction finds explicit comparative support in section 4(c) of the Uniform Mediation Act, which preserves the admissibility or discoverability of evidence that is otherwise available merely because it was disclosed or used during mediation.[9] The proposed inquiry therefore concerns the evidentiary status of the communication, not the creation or destruction of the underlying fact.

The Mediation-Arbitration Interface

This distinction assumes greater significance where mediation is unsuccessful and the same dispute subsequently proceeds to arbitration. The parties may have invested considerable time in mediation before resorting to arbitration, and a factual assertion made during mediation may, in an exceptional case, become highly relevant to an issue before the tribunal. If equivalent evidence is reasonably available outside the mediation process, exclusion of the mediation

[9] Uniform Mediation Act 2001 (as amended 2003) (UMA) s 4(c).

communication causes little difficulty: the fact can be established independently while confidentiality remains intact.

The harder case arises where the protected communication contains a material factual assertion and reasonably available alternative evidence does not exist. A categorical exclusion may then prevent the tribunal from considering potentially significant evidence, even though admitting the communication would not necessarily expose settlement offers or bargaining positions, creating the narrow evidentiary problem examined in this paper.

THE MEDIATION ACT'S CONFIDENTIALITY ARCHITECTURE

Section 22: From Confidentiality to Evidentiary Exclusion

The Mediation Act, 2023 adopts a broad conception of confidentiality. Section 22(1) requires the mediator, mediation service provider, parties and participants to keep confidential acknowledgements, opinions, suggestions, promises, proposals, apologies, admissions, acceptances or willingness to accept proposals, documents prepared solely for mediation, and 'any other mediation communication'. This final category makes the protection wider than formal settlement offers alone.[10] Section 22(2) further prohibits audio or video recordings of mediation proceedings.[11]

More significantly, section 22(3) converts confidentiality into an evidentiary exclusion. It prohibits a party from relying upon or introducing information or communications covered by section 22(1), including electronic or verbal communications, as evidence before any court or tribunal, expressly including an arbitral tribunal. The tribunal is correspondingly directed not to take cognisance of such information or evidence.[12] Thus, section 22 regulates not merely disclosure but subsequent evidentiary use.

The provision nevertheless contains limited qualifications. Section 22(4) permits general, non-identifying information concerning matters subject to mediation to be compiled or disclosed for research, reporting or training. The Explanation also permits disclosure of a mediated settlement agreement where necessary for registration, enforcement or challenge.[13]

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[10] Shalaka Patil and Kartikey Bhalotia, 'The Mediation Act, 2023: India Paves the Way for A New Mediation Law-Part II' (*Kluwer Mediation Blog*, 12 February 2025) https://legalblogs.wolterskluwer.com/mediation-blog/the-mediation-act-2023-india-paves-the-way-for-a-new-mediation-law-part-ii/ accessed 15 November 2026.
[11] Mediation Act 2023 (n 3) s 22(1)-(2).
[12] Mediation Act 2023 (n 3) s 22(3).
[13] Mediation Act 2023 (n 3) s 22(4) and Explanation.

Importantly, this is settlement-agreement-specific and does not create a general exception based on adjudicative necessity.

Section 23: Admissibility and Privilege Against Disclosure

Section 23 operates alongside section 22 by addressing admissibility and privilege against disclosure. It protects mediators, participants, experts, advisers and persons involved in administering mediation from being permitted or compelled to disclose mediation communications, including negotiations, offers, counter-offers and the contents or conditions of documents.[14]

The protection is subject to expressly defined exceptions. The proviso removes protection where information is sought or provided to prove or dispute professional misconduct or malpractice by a mediator. Section 23(2) further excludes threats or plans to commit offences, information relating to domestic violence or child abuse, and statements indicating a significant imminent threat to public health or safety.[15] These exceptions show that the legislative model can identify circumstances where confidentiality must yield, but Parliament specified them rather than creating a general judicial balancing power.

The Unaddressed Factual-Assertion Problem

This framework creates a significant question at the mediation-arbitration interface. Section 22(3) establishes a categorical evidentiary exclusion for communications covered by section 22(1), subject to the qualifications contained elsewhere in the Act. Such communications cannot be relied upon or introduced before an arbitral tribunal. The enacted text does not provide an exception based on evidentiary unavailability, materiality, or the absence of alternative proof.[16]

The statutory exclusion is directed at the mediation communication; it does not, by its terms, transform the underlying fact into confidential information merely because the fact was discussed during mediation. Where a fact discussed during mediation can be established independently, that evidence remains distinguishable from the protected communication. The difficulty arises where the communication itself is the only reasonably available means of proving a material factual assertion.

[14] Mediation Act 2023 (n 3) s 23(1).
[15] Mediation Act 2023 (n 3) s 23(1) proviso and s 23(2).
[16] Mediation Act 2023 (n 3) s 22(3).

The framework therefore provides predictability through a bright-line exclusion but does not expressly address this exceptional evidentiary situation. The concern is not inadequate protection of confidentiality, but the absence of a mechanism where categorical exclusion may materially affect adjudication.

Limits on Arbitral Discretion

Section 19(4) of the Arbitration and Conciliation Act, 1996 permits an arbitral tribunal to determine the admissibility, relevance, materiality and weight of evidence.[17] However, procedural discretion does not ordinarily authorise disregard of a mandatory statutory exclusion. If sections 22 and 23 are brought into force in their present form, section 19(4) cannot itself create an exception that Parliament has not enacted.

The practical stakes of this boundary are not merely theoretical. In *Eco Green Buildtech Pvt Ltd v Vikartan Infrastructure Pvt Ltd*, decided on 10 September 2026, the Delhi High Court, while exercising jurisdiction under section 34 of the Arbitration and Conciliation Act, 1996, held that material emerging from unsuccessful conciliation proceedings could not be relied upon in adjudicating the underlying arbitral dispute and set aside the impugned award and additional award, among other grounds.[18] The Court relied upon *Moti Ram* and *Perry Kansagra* in reaffirming the confidentiality of unsuccessful conciliation proceedings. The decision illustrates that settlement-stage material cannot simply be treated as ordinary evidence merely because the same tribunal later adjudicates the dispute. Although the case concerned conciliation undertaken by the arbitral tribunal at the parties' request and was decided under the Arbitration and Conciliation Act, 1996 rather than the Mediation Act, 2023, its relevance is reinforced by section 3(h) of the Mediation Act, 2023, which includes conciliation within the statutory concept of mediation.[19]

The issue is therefore one of legislative design rather than ordinary evidentiary discretion: whether section 22's categorical exclusion should remain absolute, or whether Parliament should expressly provide a narrowly controlled gateway for an exceptional factual communication without exposing the wider substance of settlement negotiations.

THE UNIFORM MEDIATION ACT: A COMPARATIVE MODEL FOR STRUCTURED EXCEPTIONS

[17] Arbitration and Conciliation Act 1996, s 19(4).
[18] *Eco Green Buildtech Pvt Ltd v Vikartan Infrastructure Pvt Ltd* O.M.P. (COMM) 293/2023 (Del HC, 10 September 2026) [8]-[8.3], [22] (Avneesh Jhingan J).
[19] Mediation Act 2023 (n 3) s 3(h).

The UMA's Privilege Framework

The Uniform Mediation Act (UMA), promulgated in the United States by the Uniform Law Commission and the American Bar Association, adopts a structured approach to mediation confidentiality. Section 4 establishes a privilege against disclosure and provides that mediation communications are generally neither discoverable nor admissible in evidence, subject to waiver and the exceptions contained in section 6. The privilege operates in favour of mediation parties, mediators and non-party participants.[20]

The UMA nevertheless draws an important boundary around the privilege. Section 4(c) provides that evidence or information which is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery merely because it was disclosed or used during mediation.[21] This provision reinforces the distinction between protecting a mediation communication and immunising the underlying information from independent proof. The latter is not ordinarily transformed into privileged material merely by passing through the mediation process.

Categorical and Conditional Exceptions

The UMA then adopts two different mechanisms for departing from confidentiality. Section 6(a) identifies categorical exceptions, including communications relating to certain public mediations, threats or plans of bodily injury or violent crime, attempts to plan or conceal ongoing criminal activity, mediator misconduct or malpractice, and specified proceedings concerning abuse, neglect or exploitation.[22] These exceptions operate without requiring the tribunal to conduct a general balancing exercise.

Section 6(b), by contrast, creates limited conditional exceptions. Following an in-camera hearing, the proponent must establish that the evidence is not otherwise available and that the need for it substantially outweighs the interest in protecting confidentiality. The provision applies only to specified proceedings, including certain felony proceedings and contract-validity disputes arising from mediation.[23] Section 6(d) further limits the consequences of an exception by providing that only the portion of the communication necessary for the permitted purpose should be admitted.[24]

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[20] UMA (n 9) s 4(a)-(b).
[21] UMA (n 9) s 4(c).
[22] UMA (n 9) s 6(a).
[23] UMA (n 9) s 6(b).
[24] UMA (n 9) s 6(d).

The UMA therefore does not establish a general exception permitting mediation communications to be used whenever they are relevant, probative or inconsistent with later testimony. Its model is instead one of enumerated exceptions, heightened necessity and controlled disclosure.

Why the UMA Should Not Be Transplanted Wholesale

The UMA provides a useful drafting model for the present inquiry, but its exceptions cannot simply be imported into Indian law. Its conditional exceptions respond to specific American procedural contexts and do not create a general failed-mediation-to-arbitration exception of the kind considered here. The relevant comparison is, therefore, not between an American exception and an Indian prohibition in the abstract, but between the institutional safeguards that can accompany any departure from confidentiality. The Indian framework should not be expanded into an open-ended judicial balancing test merely because the UMA permits limited departures from privilege.

The comparative value of the UMA lies elsewhere. For India, the more useful lesson is structural rather than substantive: any departure from confidentiality can be made exceptional, subject to demonstrable evidentiary unavailability, a heightened need, in-camera scrutiny and disclosure limited to what is necessary. These safeguards offer a potential legislative architecture for addressing the factual-assertion problem identified above without converting mediation into routine evidence for arbitration.

WHEN CONFIDENTIALITY MEETS ARBITRATION: THE CASE FOR A NARROW EVIDENTIARY GATEWAY

The Limits of Categorical Exclusion

The case for a narrow evidentiary gateway does not favour adjudicative accuracy over mediation confidentiality. Predictable confidentiality is itself essential to effective mediation, as uncertainty about later use of communications may discourage candour. The objection to categorical exclusion therefore arises only at the margins: where mediation has failed, the dispute proceeds to arbitration, and a protected communication contains materially relevant evidence that is otherwise unavailable.

This difficulty is significant because arbitration requires determination of disputed facts on the evidence before the tribunal. Section 19(4) of the Arbitration and Conciliation Act, 1996 permits the tribunal to determine the admissibility, relevance, materiality and weight of

evidence. International practice similarly recognises settlement confidentiality: Article 9.2(b) of the International Bar Association Rules on the Taking of Evidence in International Arbitration 2020 (IBA Rules) requires a tribunal to exclude evidence where a legal impediment or privilege applies, while Article 9.4 allows it to take into account the confidentiality of settlement communications and the parties' expectations.[25] These provisions, however, cannot resolve a statutory exclusion. The question is therefore whether legislation should permit a narrowly defined departure where categorical exclusion would materially impair determination of the dispute.

Factual Assertions Are Not Settlement Positions

Any exception must distinguish communications facilitating bargaining from those containing factual representations. Settlement offers, counter-offers, proposed concessions and willingness to compromise are inherently connected to negotiation. Their subsequent use may cause parties to moderate their bargaining positions and should therefore remain categorically protected.

A specific factual assertion is different. Statements that goods were delivered, payment was made, a document was executed or an event occurred may concern an independently existing state of affairs rather than a negotiating position. Their relevance arises from their potential bearing on a fact the tribunal must determine.

The distinction must remain narrow. A communication should qualify only where it is a specific, non-hypothetical factual assertion concerning an existing or past state of affairs and made as a representation of fact. Opinions, legal assessments, hypothetical concessions, negotiating positions and statements made solely to explore settlement should remain protected.

Necessity, Evidentiary Unavailability and Proportionality

Even a qualifying factual assertion should not become admissible merely because it is relevant or probative. The party seeking admission should establish cumulatively that mediation has failed; the subsequent proceeding concerns the same dispute; the communication contains a qualifying factual assertion; that assertion is directly material to an issue requiring

[25] International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (adopted 17 December 2020) arts 9.2(b), 9.4(b)-(c).

determination; reasonably available alternative evidence is absent; and use of the communication is necessary for determining that issue.

Necessity prevents mediation from becoming an informal discovery mechanism. Where invoices, contracts, correspondence, witnesses or other reasonably available evidence can establish the same fact, the mediation communication should remain excluded.

These requirements perform distinct functions: unavailability excludes cases where alternative proof exists; necessity addresses the evidentiary significance of the communication; and proportionality controls the extent to which the confidentiality interest may be displaced.

The approach draws upon the UMA's safeguards concerning evidentiary unavailability and the weighing of evidentiary need against confidentiality.[26] For India, however, these principles should operate through a specifically defined statutory gateway rather than an unrestricted judicial balancing power.

The proposed proportionality requirement would therefore not confer a free-standing judicial power to disregard confidentiality. Rather, it would operate only as a closed statutory condition, defined by Parliament and applicable after the other cumulative requirements of the gateway have been satisfied. The proposal thus rejects open-ended judicial balancing while retaining a narrowly circumscribed proportionality inquiry within the legislative framework.

Protecting Candour Through Strict Procedural Safeguards

Even a narrow exception may create a chilling effect if parties fear that factual statements could later be disclosed. The gateway must therefore not become a general impeachment rule.

First, inconsistency alone should never suffice. A party should not be permitted to introduce a mediation statement merely to impeach credibility or expose a contradiction. Secondly, the burden should rest entirely on the party seeking admission, which must establish every statutory condition before the tribunal considers the communication. Thirdly, the tribunal should conduct an in-camera review before determining admissibility. Finally, only the minimum portion of the communication necessary to resolve the identified material issue should be disclosed or admitted, with the remainder continuing to receive full protection.

Exclusion remains the rule; the exception arises only where necessity, evidentiary unavailability and materiality converge. This preserves the incentive for candid mediation

[26] UMA (n 9) s 6(b).

while addressing cases where categorical exclusion may impose a disproportionate evidentiary burden on subsequent arbitration.

LEGISLATIVE REFORM: DESIGNING A NARROW EVIDENTIARY GATEWAY

Why the Exception Should Be Legislative

The proposed gateway should be created by legislation rather than judicial interpretation. Section 22(3), as enacted, categorically prohibits reliance upon or introduction of covered mediation communications before courts or tribunals, including arbitral tribunals. Reading an implied necessity or fairness exception into this language would undermine predictability and create uncertainty about later exposure.

A legislative solution permits Parliament to define both the circumstances in which protection may yield and the safeguards governing such departure. It also prevents tribunals from developing divergent standards based on undefined fairness or necessity. The objective should therefore be an express exception that remains subordinate to the general rule of confidentiality.

A Cumulative Statutory Gateway

A narrowly framed statutory amendment to section 22 should permit use of a protected communication only where all of the following conditions are satisfied:

1. *Failed mediation:* the mediation concluded without settlement.
2. *Same underlying dispute:* the subsequent proceeding concerns the mediated dispute.
3. *Qualifying factual assertion:* the communication contains a specific, non-hypothetical representation concerning an existing or past state of affairs.
4. *Direct materiality:* the assertion is directly material to an issue requiring determination.
5. *Evidentiary unavailability:* the fact cannot reasonably be established through other available evidence.
6. *Strict necessity:* use of the communication is necessary to determine that issue.
7. *Proportionality:* the evidentiary need substantially outweighs the confidentiality interest in the circumstances.

These conditions must operate cumulatively; failure to satisfy any one should preserve exclusion. Relevance or probative value alone should never suffice.

Settlement offers, counter-offers, bargaining positions, hypothetical concessions, willingness to compromise and statements made solely to explore settlement should remain categorically protected because they directly perform the bargaining function of mediation.

Procedural Safeguards and Limited Disclosure

The party seeking admission should bear the burden of establishing every statutory condition. The tribunal should first examine the material in camera, preventing unnecessary disclosure of the wider mediation record. If the gateway is satisfied, only the portion necessary to determine the identified issue should be admitted; the remaining mediation communications should retain full protection. The tribunal should provide a reasoned determination identifying the conditions satisfied and explaining why less intrusive evidence was inadequate.

The amendment should also make clear that inconsistency alone cannot trigger disclosure for impeachment.

Preserving the Rule While Addressing the Exception

The amendment should operate as a safety valve, not a competing evidentiary regime. Exclusion must remain the rule, with the gateway available only where the cumulative statutory conditions are satisfied. Independent evidence of an underlying fact would remain unaffected merely because the fact was discussed during mediation; the gateway becomes relevant only where the protected communication itself is genuinely necessary because equivalent evidence cannot reasonably be obtained elsewhere.

Therefore, the reform preserves the certainty and candour-promoting function of mediation confidentiality while addressing the exceptional case in which categorical exclusion may materially impair determination of a material factual issue. Its purpose is not to make mediation communications generally available, but to ensure that statutory protection remains proportionate to the policy it is designed to serve.

CONCLUSION

Mediation confidentiality deserves strong protection because meaningful mediation depends upon the confidence that parties can communicate candidly without creating evidentiary consequences in subsequent proceedings. Sections 22 and 23 of the Mediation Act, 2023 establish a strict regime of protection. However, this paper shows that, even within that framework and its expressly defined exceptions, an unresolved evidentiary problem arises where mediation is unsuccessful, the same dispute proceeds to arbitration, and a specific factual

assertion contained in a protected communication is directly material to the dispute but cannot reasonably be proved otherwise.

The appropriate response is neither to weaken confidentiality nor to permit arbitral tribunals to create ad hoc exceptions. Any impeachment exception or ‘interest of justice’ exception would undermine the predictability on which meaningful confidentiality depends and risk turning mediation into an informal discovery process.

Accordingly, any evidentiary gateway should apply only when all its requirements are cumulatively met: failed mediation, the same underlying dispute, a concrete and non-speculative factual assertion, direct materiality, the unavailability of reasonably accessible alternative evidence and strict necessity. In-camera inspection, minimal disclosure, reasoned determination and exclusion of mere impeachment can provide additional safeguards. Settlement offers, counter-offers, bargaining positions and hypothetical concessions should remain categorically protected.

The objective is not to make confidentiality subservient to adjudicative accuracy, but to prevent categorical exclusion from producing an exceptional and unnecessary evidentiary wrong. Confidentiality should remain the general rule, since predictable protection is necessary for the candour that mediation requires.

Any exception should therefore be narrowly drawn to cases in which failed mediation is followed by arbitration concerning the same dispute, the protected communication contains a specific and non-hypothetical factual assertion, reasonably available alternative evidence is absent, and the communication is strictly necessary to determine a material issue, subject to in-camera scrutiny and minimal disclosure.