

Mediation Act, 2023: Salient Features

On September 15, 2023, the Central Government notified the Mediation Act, 2023 (“Act”) in India¹. The Act is introduced to promote and facilitate mediation as a means of dispute resolution (commercial or otherwise), enforcement of mediated settlement agreements, and to provide for a body for registration of mediators. The Act also aims to encourage community mediation and to make online mediation an acceptable and cost-effective process.

In a nutshell, the Act:

1. recognizes online, community and institutional mediations in India;
2. lays down a time-bound procedure for conducting mediations in India (timelines, appointments, confidentiality, etc.);
3. provides for the enforcement and challenge of (only) domestic mediated settlement agreements;
4. establishes a regulator to regulate mediators and mediation institutions (Mediation Council of India) and introduces, *inter alia*, disclosure safeguards for mediators.

Salient features of the Act

India has always had a mediation regime in the core of many civil commercial legislations. However, the Act institutionalizes the mediation regime in India.

What is “Mediation”?

Under the Act, Mediation is defined expansively to include any process where parties request a third person (mediator) to assist them in reaching an amicable settlement and includes (a) pre-litigation mediation; (b) online mediation; (c) community mediation; (d) conciliation; or any other expression having a similar meaning.

Applicability of the Act

1. The Act only applies to mediations conducted in India, and
 - a) where all, or both, parties reside / are incorporated / have their place of business in India; or
 - b) the mediation agreement² provides for the disputes thereunder to be resolved by the Act; or

¹ The Act was introduced in the Rajya Sabha for the first time on December 20, 2021 and was referred to the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice (“**Standing Committee**”) for a detailed examination. The Standing Committee gave its report on July 13, 2022. It was passed in the Rajya Sabha on August 1, 2023 and passed in the Lok Sabha on August 7, 2023. The Act finally received presidential assent on September 14, 2023 and has come into force by Gazette Notification No.35 dated September 15, 2023.

² A “mediation agreement”, much like an arbitration agreement, is any written document which records the parties’ intention to submit disputes to mediation. It is valid in the form of a clause to an agreement, or a separate agreement or in a series of communications.

- c) where there is an international mediator; or
 - d) commercial disputes where the central / state government is a party; or
 - e) any other dispute notified subsequently.
2. The First Schedule sets out the list of disputes which are not fit for mediation:
 - a) These are disputes involving criminal prosecutions, land acquisitions or pertaining to minors, deities and persons with intellectual disabilities.
 - b) Even disputes involving persons who are not parties to the mediation are not covered by the Act.
 - c) Disputes in regulated subjects like competition, telecom, electricity, securities, environment, and taxation.
 - d) Non-commercial disputes by or against the government (or their agencies).
 3. This Act does not apply to Lok Adalat and Permanent Lok Adalat proceedings under the Legal Services Authorities Act, 1987.

Mediator(s)

1. A mediator is a person who is appointed to undertake mediation – (a) by the parties or (b) by a mediation service provider. This includes a person registered as a mediator with the Mediation Council of India.
2. **Qualification:** Unless the agreement between the parties provides otherwise, a mediator must be registered with the Mediation Council or be empanelled with (a) a court annexed mediation centre; (b) an authority constituted under the Legal Services Authorities Act, 1987; or (c) a mediation service provider.
3. **Appointment:** Parties may appoint a mediator by – (a) reaching an agreement; or (b) making an application to mediation service provider for appointment³.
4. **Termination:** A mediation service provider may terminate the term of a mediator upon (a) receipt of an application from either party; (b) receipt of information about the mediator's conflict of interest; or (c) the mediator's withdrawal from the proceedings. If and when terminated, the mediator may be replaced in the manner set out under the Act.
5. **Admissibility and privilege against disclosure:** Subject to just exceptions⁴, no mediator (or participant including experts and advisers) will at any time be permitted, or compelled to disclose to any court, tribunal, or in any adjudicatory proceedings, any communication, contents, conditions or any information of which they have been acquainted during the mediation.

The Mediation Process & Procedure

1. Pre-litigation mediation

The process of undertaking mediation for settlement of disputes prior to the filing of a suit or proceeding of civil or commercial nature⁵ before a court or notified tribunal is as mentioned briefly below:

- a) Parties may voluntarily and with mutual consent take steps to settle the disputes by pre-litigation mediation in accordance with the Act.
- b) **Jurisdiction:** Unless agreed otherwise, mediation must be undertaken within the territorial jurisdiction of the court or tribunal of competent jurisdiction to decide the subject matter of dispute.

³ After receipt of application for appointment of mediator, the mediation service provider will appoint a mediator within a period of 7 (seven) days.

⁴ Exceptions to the disclosure safeguard is laid down in the Proviso to Section 23(1) and Section 23(2).

⁵ Proviso to Section 5(1) provides that pre-litigation mediation in matters of commercial disputes of Specified Value must be undertaken in accordance with the provisions of section 12A of the Commercial Courts Act, 2015, and the rules made thereunder.

- c) **Timelines:** The mediation process is required to be completed within 180 (one hundred eighty) days from the date fixed for first appearance before the mediator, with a further 180 (one hundred eighty) days period extendable by the consent of parties.
- d) **Withdrawal or non-appearance:** A party may withdraw from the mediation after the first 2 (two) sessions. In case the party fails to attend even the first 2 (two) mediation sessions, costs may be imposed at the time of the subsequent litigation on the same subject matter.
- e) Even if the parties fail to reach a settlement through pre-litigation mediation, the court or tribunal may at any stage refer the parties to mediation if they request.
- f) **Costs:** Unless otherwise agreed by the parties, all costs of mediation, including the fees of the mediator and the charges of the mediation service provider will be borne equally by the parties.
- g) **Confidentiality:** A mediator, mediation service provider, the parties and participants in the mediation will keep confidential matters relating to the mediation proceedings (list of these matters are set out under Section 22(1)). No party can rely on or introduce as evidence any information or communication.

2. Mediated settlement agreement (and its enforcement)

- a) An agreement between some or all of the parties, settling some or all of the disputes between such parties as a result of the mediation. The terms of a mediated settlement agreement can extend beyond the terms of reference.
- b) **Form:** The agreement must be in writing, signed by the parties and authenticated by the mediator.
- c) The mediated settlement agreement will be final and binding upon the parties.
- d) **Registration:** The mediated settlement agreement must be registered with an authority constituted under the Legal Services Authorities Act, 1987 within 180 (one hundred eighty) days of the authenticated copy from the mediator.⁶
- e) **Enforcement:** It will be enforceable in accordance with the provisions of Code of Civil Procedure, 1908 as if it was a decree passed by a court.

3. Non-Settlement Report

In case there is no settlement between the parties under mediation, the mediator will prepare a non-settlement report (without disclosing any details for the reasons thereof, parties' conduct, etc.) and submit the same to the parties, or the mediation service provider (in case of institutional mediation).

4. Interim reliefs by courts pending pre-litigation mediation

The court or tribunal referring the parties to mediation may pass suitable interim order to protect the interest of any party if deemed appropriate.

5. Challenge to a mediated settlement agreement

A mediated settlement agreement can be challenged by either party before the court or tribunal of competent jurisdiction by filing an application within 90 (ninety) days⁷ on the grounds of – (a) fraud; (b) corruption; (c) impersonation; and (d) dispute not being fit for mediation.

6. Statutory exclusion of certain period under limitation

The period of time from commencement of the mediation till, either (i) submission of non-settlement report, or (ii) termination of mediation, will be excluded while computing limitation while initiating proceedings relating to the same dispute.

⁶ Such registration will not be mandatory till the time regulations under Section 22(7) of the Act are not made.

⁷ Period of 90 (ninety) days for challenge of a mediated settlement agreement is extendable by a further period of 90 (ninety) days by the court or tribunal upon finding sufficient case (Proviso to Section 28(3) of the Act).

Corresponding amendments to other legislations

Since the Act now applies to all civil and commercial disputes in India, naturally, the Act incorporates corresponding amendments to existing statutes in this field, including the Indian Contract Act, 1872, the Code of Civil Procedure, 1908, the Legal Services Authorities Act, 1987, the Arbitration and Conciliation Act, 1996, the Micro, Small and Medium Enterprises Development Act, 2006, the Companies Act, 2013, the Commercial Courts Act 2015 and the Consumer Protection Act, 2019.

The Regulator: Mediation Council of India

The central government will establish the Mediation Council of India (“**Council**”) as per the constitution prescribed under the Act. The Council has been constituted to register, recognize and regulate mediation institutions and mediators in India. The Council is also tasked to promote international and domestic mediation in India, facilitate and conduct continuous training, education and certifications in mediation, and also maintain a depository of mediation settlement agreements made in India.

JSA Comment

While mediation in India is not new and there are several legislations that already contemplate mediation as a means for dispute resolution / pre-litigation dispute resolution, the Act institutionalizes the mediation regime in India demonstrating the growth and recognition of mediation as an effective (alternate) dispute resolution mechanism.

1. **A welcome framework to the mediation regime in India:** The Act manages to streamline, structure and create a regulatory framework for mediations in India in the endeavour to resolve civil and commercial issues before they become a dispute that requires judicial resolution. The significant provisions of the Act, viz., the mediated settlement enforcement agreements, its finality and binding effect, its enforceability and its amenability to challenge gives more credence to the mediation process. This pre-litigation resolution framework can be presented to foreign investors as a factor for ease of doing business in India in as much as it mitigates the risk, expense and delays in judicial adjudication in India.
2. **Lacunae:** The most significant and glaring lacuna is that the Act does not provide for enforcement of mediated settlement agreements from international mediations conducted outside India. The other aspects which leave too much room for interpretation are the provisions for interim reliefs and appointment of mediators (especially when compared to the provisions under the Arbitration and Conciliation Act, 1996).
3. **Judicial Intervention – a necessary evil:** The Act provides that the enforcement and challenge of a mediated settlement agreement lies before the court or tribunal of competent jurisdiction. While these elements are essential for making the mediated settlement agreements final, binding and enforceable, judicial interference in India threatens the expedited timelines of resolution of any disputes in India (much like what is happening to the arbitration regime in India today).
4. **The Act departs from the Singapore Convention on Mediation – a warranted miss or a fundamental lacuna?:** In 2019, India was amongst the first to sign the United Nations Convention on International Settlement Agreements resulting from Mediation, also called the Singapore Convention on Mediation⁸. However, in 2023, when India promulgated its first standalone legislation on mediation, it chose not to incorporate the Singapore Convention.

Fundamentally, the Singapore Convention contemplates enforcement of mediated settlement agreements in the courts of the home country of the counter party. However, as stated above, the Act does not provide for enforcement of mediated settlement agreements from international mediations conducted outside India.

⁸ The Singapore Convention on Mediation is a uniform framework for international settlement agreements resulting from mediation. This was introduced to facilitate international trade and commerce by enabling disputing parties to easily enforce and invoke settlement agreements across borders. It applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute. The Singapore Convention is to mediation what the New York Convention is to foreign arbitration awards.

The Centre explains this departure by stating that since the Singapore Convention has only just recently come into force, India would prefer to wait for greater acceptance. As only 11 (eleven) non-major economies have ratified the Singapore Convention, India would prefer to observe the course of implementation by other major economies. However, we were wondering in India's decision to be overtly conscious, whether we lost an opportunity to promulgate an all-encompassing regime where mediated settlements between parties from any part of the world could be enforced in India.

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