

ANALYSIS OF THE KEY PROVISIONS OF THE MEDIATION ACT 2023

INTRODUCTION

While mediation as a means of dispute resolution was always ingrained in Indian jurisprudence, the parliament for the first time has attempted to streamline mediation and legitimize its increasing relevance in the life of a dispute, by codifying mediation as a process of alternate dispute resolution. The Mediation Bill 2021 (“**Bill**”) was introduced in the Rajya Sabha on 20 December 2021 with the objective to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, encourage community mediation and make online mediation an acceptable and cost-effective process. The Bill finally came to be passed by Rajya Sabha on 1 August 2023 and thereafter by the Lok Sabha on 7 August 2023. On 14 September 2023, the President of India gave her assent, and the Mediation Act, 2023 (“**Act**”) came into being.

KEY PROVISIONS OF THE ACT

i) Applicability:

The Act is applied to a wide range of disputes including those that arise between:

- (a) all or both parties who habitually reside or are incorporated or have their place of business in India; or
- (b) parties to a mediation agreement which provides for disputes to be resolved in accordance with the provisions of the Act; or
- (c) parties where there is an international mediation.

Interestingly though, the applicability of the Act does not include any and all non-commercial disputes wherein, one of the parties is the Central Government or a State Government, or agencies, public bodies, corporations and local bodies, including entities controlled or owned by such Government. Thus, any commercial dispute with the Government can be the subject matter of mediations. It is also pertinent to note that while the terms ‘habitually reside’ and ‘place of business’ were not originally defined in the Bill, the Act defines the term ‘place of business’.

ii) Mandatory Pre-litigation Mediation:

- a. The Act seeks to mandate pre-litigation mediation between the parties. While the Act does not define the term ‘*disputes*’, the definition of the term ‘*pre-litigation mediation*’ includes settlement of disputes prior to the filing of a suit or proceeding of civil or commercial nature before a court or notified tribunal.

- b. Further, the Act also envisages an indicative list of disputes or matters not fit for mediation.

iii) Mediators:

- a. Under the Act, the parties are free to decide on the mediator as well as the procedure to appoint a mediator.
- b. The Act does not specify any qualification/s for the person to be appointed as a mediator, however, it categorically states that where the mediator is of a foreign nationality, he or she must possess such qualification, experience and accreditation as may be specified.
- c. In the event that the parties fail to come to consensus on the appointment of the mediator and the procedure for such appointment, they may apply to a mediation service provider for the appointment of a mediator.

iv) Mediation Proceedings

- a. The Act specifies that, unless otherwise agreed on mutual consent, the mediation shall be undertaken within the territorial jurisdiction of the court or tribunal of competent jurisdiction.
- b. The Act does not bind the mediator by the provisions of Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872.
- c. Further, while the Bill originally permitted a party to withdraw from mediation at any time after the first two mediation sessions, the Act **excludes** this provision.
- d. The Act also seeks to conclude the entire mediation in a time bound manner within 120 days which may be extended by a further period of 60 days. This is a stricter timeline when compared to the timeline provided in the Bill which provided for 180 days to conclude the entire mediation proceedings subject to an extension of a further period of 180 days.

v) Enforcement of Mediated Settlement Agreement

- a. As per the provisions contained in the Act, a Mediated Settlement Agreement will be final, binding and enforceable in the same manner as if it were a judgement or decree passed by the court. While the Code of Civil Procedure, 1908 as such is not applicable to the mediation proceedings, the provisions

thereof will govern the enforcement of Mediated Settlement Agreement to the extent they are relevant to such enforcement.

- b. It is also pertinent to note that a Mediation Settlement Agreement may be challenged; however, the Act provides for limited grounds for such challenge, namely, fraud, corruption, impersonation and where the dispute and/or matter was not fit for mediation.
- c. The Mediation Settlement Agreement is a confidential document subject to any disclosure requirements arise to meet the objectives of registration, enforcement, or challenge.

vi) Online Mediation

The Act allows for pre-litigation meditation to be conducted online thereby eliminating geographical barriers for the parties involved; however, this is subject to the parties ensuring the confidentiality of such mediation.

vii) Community Mediation

The Act has introduced the concept of community mediation whereby any dispute affecting the peace, harmony and tranquillity amongst the residents or families of any area or locality may be settled through mediation with the prior mutual consent of the parties to the dispute.

KEY FEATURES OF THE ACT

- i. **Wide Applicability** – The Act is applicable to all disputes between the parties except for where one of the parties is the Central Government or a State Government, or agencies, public bodies, corporations and local bodies, including entities controlled or owned by such Government. Further, the Act is only applicable to the commercial disputes. Furthermore, Section 43 of the Act introduces the concept of community mediation, requiring the prior agreement of the parties involved. This provision enables the resolution of disputes that have the potential to disrupt the peace, harmony, and tranquility among residents or families in a specific region or neighbourhood. It grants authority to the relevant governing body, District Magistrate, or Sub-Divisional Magistrate to establish a group of three mediators tasked with conducting the process of community mediation.

- ii. **Party Autonomy** – The Act upholds and encourages party autonomy. It stipulates that the parties are at liberty to agree upon a mediator as well as the process of appointment of such mediator. It also permits online mediation as a valid form of dispute resolution if preferred by the parties. The Act presently does not mandate the registration of Mediated Settlement Agreements, thereby allowing the parties to keep their confidentiality. The Act also permits parties to mediation proceedings to mediate in a language or languages of their choosing.
- iii. **Comfort of Confidentiality** – Section 15(3) of the Act is intended to preserve the confidentiality of the mediation proceedings, the information the mediator may obtain about parties, and on the subject matter of mediation. Further, Section 22 of the Act provides that the mediator, mediation service provider, parties and participants in the mediation shall keep information and communication relating to the mediation proceedings confidential and no party to the mediation shall in any proceedings before a court or tribunal including arbitral tribunal, be at liberty to rely on or introduce as evidence any such information or communication. Nevertheless, the Act also stipulates that this confidentiality does not extend to the mediated settlement agreement when its disclosure becomes essential for the objectives of registration, enforcement, or challenge.
- iv. **Time Bound Mechanism** – In a contemporary era, a prompt resolution of disputes not only conserves the valuable time and finances of the parties involved but also fosters an atmosphere which is conducive to contract enforcement and consequently business growth. The Act has been drafted keeping in mind this need of the hour. As stated hereinabove, the Act provides for mediation proceedings to conclude within a span of 120 days.

CONCLUSION

In the backdrop of the rising pendency of cases/disputes before the courts in India, the Act has codified yet another alternative yet effective dispute mechanism in addition to arbitration and conciliation. While its implementation going forward will no doubt decide its success, the Act is definitely viewed

as a progressive legislation which will potentially bring about win-win scenarios and allow businesses to thrive.

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