

Kluwer Mediation Blog

Confidentiality in Mediation: An Indian Perspective

Shraddha Bhosale (Weikfield) · Monday, January 18th, 2016 · Young Mediators Initiative (YMI)

A huge incentive for parties to opt for mediation is the aspect of confidentiality. Why is confidentiality important? In my opinion, it plays a crucial role in enabling parties to reach settlement. To be able to settle, parties need to put their cards on the table. And they can only do so if they are comforted by the fact that confidentiality is at the core of any settlement discussions between them.

While parties are free to agree on terms pertaining to confidentiality in a mediation agreement, rules of most institutions that administer mediation cases make provisions for the same. For example, the Mediation Rules of the International Chamber of Commerce (ICC) provide that unless otherwise agreed by the parties or required by applicable law, the mediation (but not the fact that it is taking place, has taken place or will take place) is private and confidential. Consequently, submissions made by another party or by the mediator in mediation may not be produced as evidence in any arbitration, litigation or similar proceedings, unless they can be obtained independently by the party seeking to produce them in those proceedings. The same is made applicable to views expressed, suggestions made regarding settlement, or any admissions made by another party in mediation.

India enacted the Arbitration and Conciliation Act, 1996 in line with the UNCITRAL Model Law. Section 75 of the said Act provides that the Conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings including the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement. Bear in mind that the terms “mediation” and “conciliation” are often used interchangeably in India.

Indian courts and quasi judicial bodies have upheld the important role that confidentiality plays in mediation. Take the interesting case of **Moti Ram (D) Thr. L.Rs. and Anr. vs. Ashok Kumar and Anr.**. The Supreme Court of India in this case had referred the matter for mediation to a Mediation Centre to attempt to resolve the dispute between the parties. Subsequently, a report by the Mediator was placed before the Court that mentioned the various settlement proposals made by the parties, among other things. As a result, the Supreme Court stressed that mediation proceedings are strictly confidential. It observed that when successful, the mediator should send the settlement agreement signed by the parties to the Court without mentioning what transpired during the mediation proceedings. When unsuccessful, the mediator should simply state that mediation has been unsuccessful. The Supreme Court was of the view that any disclosure of the happenings in a mediation proceeding destroys the confidentiality of the mediation process.

In the case of **Rama Aggarwal vs. PIO, Delhi State Legal Service Authority** that came up before the Central Information Commission (CIC), the CIC held that a party cannot seek information pertaining to mediation proceedings under the Right to Information Act, 2005 as the same attracts exceptions under provisions of the said Act. The CIC observed that “Information regarding negotiation, mediation, conciliation and counseling will fall under exempted clause of information of other spouse, being personal and given in fiduciary capacity and, no public interest is established in disclosure, while there is larger public interest in protecting that information as that would help mediation to flourish, hence such information shall not be disclosed.”

Under powers vested with them, certain High Courts in India have also framed rules applicable in its jurisdiction. One such set of rules are the Mediation and Conciliation Rules, 2004 by the Delhi High Court. The Rules require parties to maintain confidentiality in respect of events that have transpired during the course of mediation and prohibit parties from relying and/or introducing such information in any other proceedings.

Overall, I find that Indian laws sufficiently provide for confidentiality in mediation, in line with international standards. More importantly, it was reassuring to observe that Indian judiciary has strengthened the role of confidentiality in mediation. This should certainly catalyze the growth of mediation in India.

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