

# Kluwer Mediation Blog

## The Mediation Act 2023: India Paves The Way for a New Mediation Law – Part 1

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### I. Background

That India is a litigious country and that the courts have a backlog of a huge number of cases is a well-worn *cliché*. Against such a backdrop, the stage has been set for a mediation law for India which will aim to encourage parties to mediate and resolve disputes instead of stepping through the door of court houses. As a litigator for the past 13 years, this can be said with some emphasis: India needs to adopt and participate in mediation. Disputes germinate from differences of opinion, family matters, a sense of being treated unfairly, a measure of revenge (“*let’s teach the counterparty a lesson!*”) or sometimes just because parties do not know any better. Disputes of this nature can be resolved far more efficiently and dare we say, more effectively with mediation. A dispute does not have to be a zero-sum game – which is what typically results from adversarial litigation.

Mediation can enure for the benefit of all with both parties feeling like they gained something. With specialized training in mediation, mediators can make a real and systemic difference to parties who actively choose mediation over litigation. Currently the attitude towards mediation (even when statutorily mandated such as under the Commercial Courts Act, 2015) is casual and a step that parties just want to get over as an empty formality to move to the next stage of litigating. This has resulted in mediation often not being taken seriously.

Additionally, there is no formalized way for a mediation agreement to be recognized in the manner that an arbitration award is, unless parties choose to go down the route of conciliation under the (Indian) Arbitration and Conciliation Act, 1996 where a conciliation award is recognized as an arbitration award (under Section 74) or if the parties pass a consent award (under Section 30). The new law that will be introduced solves this problem (as we discuss later in this piece). India badly needs a culture of mediation. Perhaps a new law will introduce that culture.

The Mediation Bill, 2021 (**Bill**) was tabled before the Rajya Sabha on December 20, 2021. Following its introduction before the Rajya Sabha, the Bill got referred to the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice (**Standing Committee**). The Standing Committee after reviewing the Bill, submitted its report on July 13, 2022 (**Standing Committee Report**) consisting of its recommendations. Based on these recommendations, the union cabinet, on July 19, 2023, gave a nod to the Bill with certain important amendments. The Rajya Sabha, on August 1, 2023 and the Lok Sabha on August 7, 2023, passed the Bill along with

the cabinet's amendments. Finally, the Bill received the President's assent and was notified in the official Gazette on September 15, 2023, as the Mediation Act, 2023 (**Act**).

This 2-part series analyses various important aspects of the Act. Part I of the article deals with the underlying objective behind enforcement of the Act; the scope of applicability of the Act; how does the Act define the term "Mediation" and the significance of such a definition given under the Act; and lastly, Part II attempts an understanding the meaning of a "mediation agreement" as provided under the Act.

## **II. Scheme of the Mediation Act, 2023**

### **A. What does the Act Seeks to Achieve?**

The Act, under Section 5, seeks to give formal recognition to mediation in India by laying down a framework for the conduct of mediation in India and in doing so promote mediation as a default pre-cursor to any civil and / or commercial litigation in India. Section 27 of the Act seeks to give formal recognition to settlements arrived at because of a successful mediation process, by providing for its enforceability as a decree of an Indian court. The Act, under Section 31, also intends to institutionalize mediation by establishing a central body called the "*Mediation Council of India*". The Act, under Section 30, gives formal recognition to online mediations, thereby attempting to keep pace with the technological advancements in this arena of dispute settlement.

### **B. What is the Scope of Applicability of the Act?**

As per Section 1 of the Act, it applies to both domestic and international mediations provided they are conducted within the territorial boundaries of India. Section 2 of the Act, states that all mediations which are conducted in India, shall be regulated by the provisions of the Act where all the parties to the mediation are Indian, or there exists a mediation agreement between the parties providing for the mediation to be conducted in accordance with the provisions of the Act, or the mediation is an international mediation having at least one of the parties to the said mediation being a foreign national.

This essentially means that there is no recognition of cross-border mediation settlement agreements, i.e., a mediation settlement agreement arrived at because of a mediation conducted outside India. India is a signatory to the Singapore Convention on Mediation (from August 7, 2019), however, has not ratified it. Therefore, unlike the New York Convention, which has been adopted under the Arbitration and Conciliation Act, 1996, for recognition of foreign arbitral awards, the Singapore Convention on Mediation has not been adopted into the Act.

The applicability of the Act is restricted by Section 2(iv), which exempts the Act's applicability to such non-commercial disputes where the Central or any of the State Governments (including agencies, public bodies, corporations etc. controlled by such government(s)) is a party. The Act incorporates the definition of the term "*commercial*" from the Commercial Courts Act 2015, s 2(1)(c). The government being exempt from the applicability of the Act can continue to litigate if the disputes are non-commercial. This is a feature of the Act which requires reconsideration given that the government is the largest litigant in the country, and it would help to have even non-commercial matters mediated. This is discussed in more detail later in the article.

### C. What does the term “Mediation” Mean According to the Act?

As per Section 2(h) of the Act, “mediation” is defined to be a process which “*includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute;*”.

The following are some important takeaways from the above definition:

- Part III of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) which lays down the provisions for regulating ‘conciliation’ will become redundant since this part of the law collapses into this Act;
- The definition is extremely broad and covers for example, technological advances in the form of online mediation. ODR centers can now offer mediation with arbitration; and
- Considering that the definition is an inclusive / liberal definition, it would mean that so long as even an implied intent to mediate can be seen from a dispute resolution clause, parties can opt for or be referred to mediation.

### D. What Qualifies as a “Mediation Agreement” Under the Act?

The Act requires that a mediation agreement to be recognized as such shall be in writing (either as an independent agreement or as a clause in a contract) for the purpose of submitting the dispute between the parties concerned to be resolved through mediation. What is interesting to note in this context is the ambit of what can be an “*agreement in writing*”. According to Section 4(3), a mediation agreement shall be deemed to be in writing if it is recorded in any of the following ways:

- a document signed between the parties;
- physical and / or electronic correspondence exchanged between the parties; and
- a pleading in any suit or any other proceeding wherein one of the parties has alleged the existence of a mediation agreement between the parties and the same has not been denied by the other party / parties involved.

A perusal of the above would further indicate the intent of the legislature to give the broadest possible application to of the Act to prospective litigation in the country. While mediation is a voluntary dispute resolution mechanism, considering the aforesaid legislative intent, it can be said that the courts on seeing a mediation clause can recommend the parties to attempt mediating their dispute and even during the proceeding, in accordance with Section 7 of the Act, Courts can refer parties to mediation.

While the Act provides for a wide ambit for what may be a valid mediation agreement, it will be interesting to see the effect of the aforesaid provision on the interpretation of multi-tier arbitration clauses where mediation is prescribed as a pre-arbitration procedure. While the parties to such an arbitration clause, may rely on the provisions of the Act, especially Section 4, to contest the initiation of an arbitration, another important question of law that may come before the Indian courts would be in relation to the power of the said parties to approach the courts to seek interim measures of protection under Section 9 of the Arbitration Act prior to mediation taking place.

Given the overall voluntary nature of the mediation process, which is clear from an overall review of the Act, the courts in the country are likely to conclude that a party would not be estopped from

approaching the court under Section 9 of the Arbitration Act at a pre-arbitration stage. However, considering Section 7 of the Act, the courts may recommend mediation to the parties when it appears to the court that the dispute could be settled through mediation, rather than going into an adversarial process.

The next part of this 2-part series investigates some other interesting aspects of the Act. Part-II, *inter alia*, talks about the concept of “pre-litigation mediation”; the process for appointing a mediator; time limits to complete a mediation; enforcement and challenge to a mediation settlement agreement; provisions attempting to institutionalize mediation; online mediation and confidentiality in a mediation.

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