Kluwer Mediation Blog

The Mediation Act, 2023: India Paves The Way For A New Mediation Law – Part II

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I. Introduction

Part I of this 2-part series, dealt with the following aspects of the Act: 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 that definition; and lastly, the meaning of a “mediation agreement” as provided under the Act.

Part II, goes further and looks into various other aspects of the Act, *inter alia*, 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.

II. Scheme of the Mediation Act, 2023 – Continued

A. What is the Idea of “Pre-litigation Mediation” Under the Act?

Pre-litigation mediation (**PLM**) means a process where prospective litigants to a commercial or civil dispute attempt to resolve their dispute using mediation before they approach any court in India for filing a suit or proceeding. As per Section 5 of the Act, irrespective of the existence or non-existence of a mediation agreement, the parties may voluntarily and with mutual consent opt to settle their dispute (before filing any civil or commercial suit or proceedings) through mediation under the provisions of the Act. This is a critical feature of the Act and one that hopefully many parties will avail themselves of without having to go through the rigors of litigation.

Although the process of PLM has been made voluntary under the Act, Section 7(1) of the Act empowers courts and tribunals to refer the parties to a dispute to mediation, at any stage of the proceedings. Section 7(2)empowers such courts and tribunals to pass any suitable interim order to protect the interest of the parties, in cases where such court or tribunal has referred the parties to mediation under Section 7(1). While the Act provides for such a power, it does not lay down the scope of the interim orders that may be passed, unlike Section 9 of the Arbitration and Conciliation Act, 1996 which sets out the framework of an interim order of protection in an arbitration proceeding. Empowered with Section 7, in many cases where Courts feel parties can sit across the table and settle their disputes, Courts may take this opportunity to encourage mediation much more than prior to this Act coming into force. It remains to be seen how often Courts will use this tool.

B. How is a Mediator Appointed Under the Act?

Section 8 of the Act gives complete autonomy to the parties in appointing mediators (of any nationality). The only condition imposed in appointing a mediator of a foreign nationality is that such person shall possess such qualifications, experience and accreditations as may be specified under the Act. In the event the parties fail to name a mutually agreed mediator, the party seeking mediation shall approach a “mediation service provider” in other words, a mediation institution, making an application for the appointment of a mediator. Upon such application, the said mediation service provider shall within 7 days of the application, appoint a mediator as agreed by the parties or from the panel of mediators maintained by the mediation service provider (as the case may be). It must be noted that the Government has not yet notified and / or published a list of recognized mediation service providers.

C. What is the Time Limit for Completion of Mediation Under the Act?

Section 18 of the Act provides that mediations conducted as per the provisions of the Act shall be completed within 180 days (including the time of any extension agreed to by consent between the parties). While the idea behind such defined time limits is ensuring the efficiency of the process and preventing any delaying tactic that may be adopted by parties, the Act does not speak of what happens at the end of the 180 days. Perhaps it should provide for, like in the case of arbitrations, how parties may continue mediating – perhaps by an application to the prothonotary or registrar of courts instead of to a court.

D. Is the Settlement Agreement Arrived at as a Result of Mediation Binding?

As per Section 27 of the Act, a settlement agreement arrived at as a result of mediation conducted under the provisions of the Act is binding on the parties. Such settlement agreement shall be

enforceable in the same manner as if it were a judgment or decree passed by a court. The said settlement agreement, may, therefore, be relied on by the parties by way of defence, set off or otherwise in any legal proceeding.

E. Challenge to Mediated Settlement Agreement

The Act also provides a mechanism for challenging a mediated settlement agreement under Section 28 of the Act. As per Section 28(1) of the Act a party to a mediated settlement agreement may challenge the same by filing an application under Section 28 of the Act before the court or tribunal (notified by the central and / or the state governments) having jurisdiction on the grounds of:

- Fraud;
- Corruption;
- Impersonation; or
- Where the subject matter of the dispute was not fit for mediation as per Section 6 of the Act.

Section 28(3) imposes a limitation of 90 days for challenging a mediated settlement agreement from the day the party seeking to challenge has received the said agreement under Section 19(3) of the Act. This limitation is extendable by 90 days where the court is satisfied that there existed sufficient cause for the delay.

It is important to note that a conjoint reading of Sections 27 and 28 would lead one to think what would happen to enforcement proceeding under Section 27 where a simultaneous proceeding challenging the mediated settlement agreement has been initiated under Section 28. Does the effect of initiation of Section 28 proceedings lead to an automatic stay on the Section 27 proceedings? The provision is silent on the point. Under the Arbitration and Conciliation Act, 1996 (as amended in 2015), such challenge proceedings do not automatically stay enforcement. This is something which has not been dealt under the Act and would be open to the interpretation of the Courts in India.

F. Does the Act Recognize Online Mediations and / or ODR?

The Act has been able to keep pace with the technological advancements in the space of dispute resolution, and hence, recognizes online mediation under the Act. Section 30 of the Act provides that a mediation can (at any stage) be conducted online where the parties have arrived at such a decision through written consent. Such online mediations may be conducted *inter alia*, with video

or audio conferencing, secure chat rooms, encrypted electronic mail, as long as, the confidentiality and integrity of the process is maintained. It, therefore, means that a mediation settlement agreement arrived at as a result of such online mediations shall have the same mandate and enforceability as that of the one arrived at through an in-person process.

G. What Disputes are Considered Unfit for Mediation Under the Act?

There are certain disputes and / or subject matter that have been explicitly declared as unfit for mediation under the Act. Section 6 provides that disputes or matters set out in the First Schedule shall not be referred to mediation under the Act. The First Schedule provides for an indicative list of such disputes and subject matter. Disputes considered to be unfit for mediation under the Act include Disputes involving:

- Serious and specific allegations of fraud;
- Claims against minors, persons of unsound mind;
- Prosecution for criminal offences;
- Claims against minors;
- Matters in conflict with public policy or opposed to the basic notions of morality or justice under any law for the time being in force; and
- An effect on the rights of a third party.

H. Mediation Council of India

Section 31 of the Act seeks to promote institutional mediation in the country by establishing a central authority for mediation known as the "*Mediation Council of India*" (**MCI**). As per Section 38 of the Act, the MCI shall perform various duties like, registering mediators, recognising mediation service providers and institutes, grading of mediation service providers etc. Further, Section 40 of the Act recognises "*mediation service providers*" and mediation institutions and provides that all such service providers and / or institutions recognised by the MCI shall be graded by the MCI. These mediation service providers shall be responsible for appointing mediators in terms of Section 8 of the Act. We believe this would amount to over-regulating the process and can ultimately affect the efficiency of the process. In our view, there is no requirement for a council. Mediations should be left as an open, autonomous process, may it be institutional or otherwise.

I. Confidentiality

Sections 22 and 23 of the Act, read together, lay down the framework for maintaining confidentiality in a mediation process. Section 22 provides that all parties and participants including the mediator and mediation service provider are bound not to disclose any matter in relation to a mediation proceeding. This includes, acknowledgements, opinions, suggestions, promises, proposals, apologies, and admissions made; acceptance, or willingness to accept, proposals; documents prepared to facilitate the mediation; any other communication in relation to the mediation. Further, it is prohibited to make and / or maintain audio and / or video recordings of a mediation proceeding, whether conducted in person or online.

The Act also prohibits the parties from introducing as evidence in any proceeding before any court and / or tribunal, any information and / or communication in relation to a mediation proceeding and the relevant court and / or tribunal is also prohibited from taking any such evidence into account, Further, no stakeholder in a mediation proceeding including experts and advisers shall be compelled to disclose any communication or information in relation to a mediation proceeding, including the content of negotiations or offers or counteroffers.

The only exceptions to the confidentiality obligations laid down under the Act are:

- Where such disclosure is required for the purpose of registration, enforcement and challenge of a mediated settlement agreement (Section 22(4) of the Act);
- Information sought to be provided to prove or dispute a claim or complaint for the professional misconduct of a mediator (Section 23(1) of the Act); and
- Disclosure of information which qualifies as (Section 23(2) of the Act):

- (i) A threat or statement of a plan to commit an offence under any law;
- (ii) Information in relation to domestic violence or child abuse; and
- (iii) Statements showing imminent threat to public health or safety.

III. Conclusion

India is a party to the Singapore Convention on Mediation (not ratified), which provides for a uniform framework for enforcement of settlement agreements arising from international mediations. Despite this, in the present scheme of the Act, where a settlement agreement has been given parity with a decree, the scope of applicability of the provisions of the Act have been restricted to only such international mediations which are conducted in India (Section 2 of the Act). Perhaps, parliament should consider accounting for enforcement of mediation (settlement) agreements that may be made between parties (whether Indian or otherwise) outside India as well. Section 2 when read with Section 27 does not seem to provide for enforcement of such settlement

agreements. This can be achieved by ratifying the Singapore Convention on Mediation and passing necessary amendments to the Act giving effect to the said Convention.

Further, the Act under Section 5 sought to make PLM mandatory for the parties seeking to litigate their civil or commercial disputes. This Section was however amended to be an optional one.

It may be argued that in the adversarial justice system in India, making PLM mandatory would have been more suitable to tackle the situation of judicial delay. By mandating prospective litigants to take their dispute to mediation, (i) it introduces and encourages parties to use the mediation mechanism, which may, hitherto, have been a completely foreign concept for them; and (ii) such mandated mediation increases the chances of the dispute in question being settled at the pre-litigation stage.

However, there are valid counterviews to this position. It has been pointed out that mandating mediation would be against the concept of mediation itself which is that it is essentially a voluntary process. Further, it is feared also feared that in the event mediation is mandated, the parties to a dispute may use the requirement to mediate a dispute before approaching courts as another tool to delay the proceedings in a dispute, in addition to the already existing tools to delay a civil and / or commercial proceeding before the courts. Further, mandating mediation may not necessarily ensure amicable settlement of disputes between parties, for the parties may conduct mediation as a mere formality to comply with the Act and proceed with litigating the matter before the courts.

Another important feature of the Act pertains to its applicability to cases where the Government is a party. Section 2(iv) provides that the Act shall not apply where one of the parties to the dispute is the Government except in situations where the matter is a commercial one. It is important to note here that the Government has been termed as the "biggest litigant" accounting for almost 50% of the total pending cases across the country. Therefore, restricting the Government from the applicability of the Act and consequently from PLM under Section 5 of the Act might be fatal to the aims and objectives of the Act. This is also a bit of a mixed message.

All in all, though, this Act is a welcome step for the enhancement of ADR in India which keeps court involvement minimal.

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This entry was posted on Wednesday, February 12th, 2025 at 9:51 pm and is filed under Enforcement of a Mediation Clause, Future of mediation, India, Mandatory mediation
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