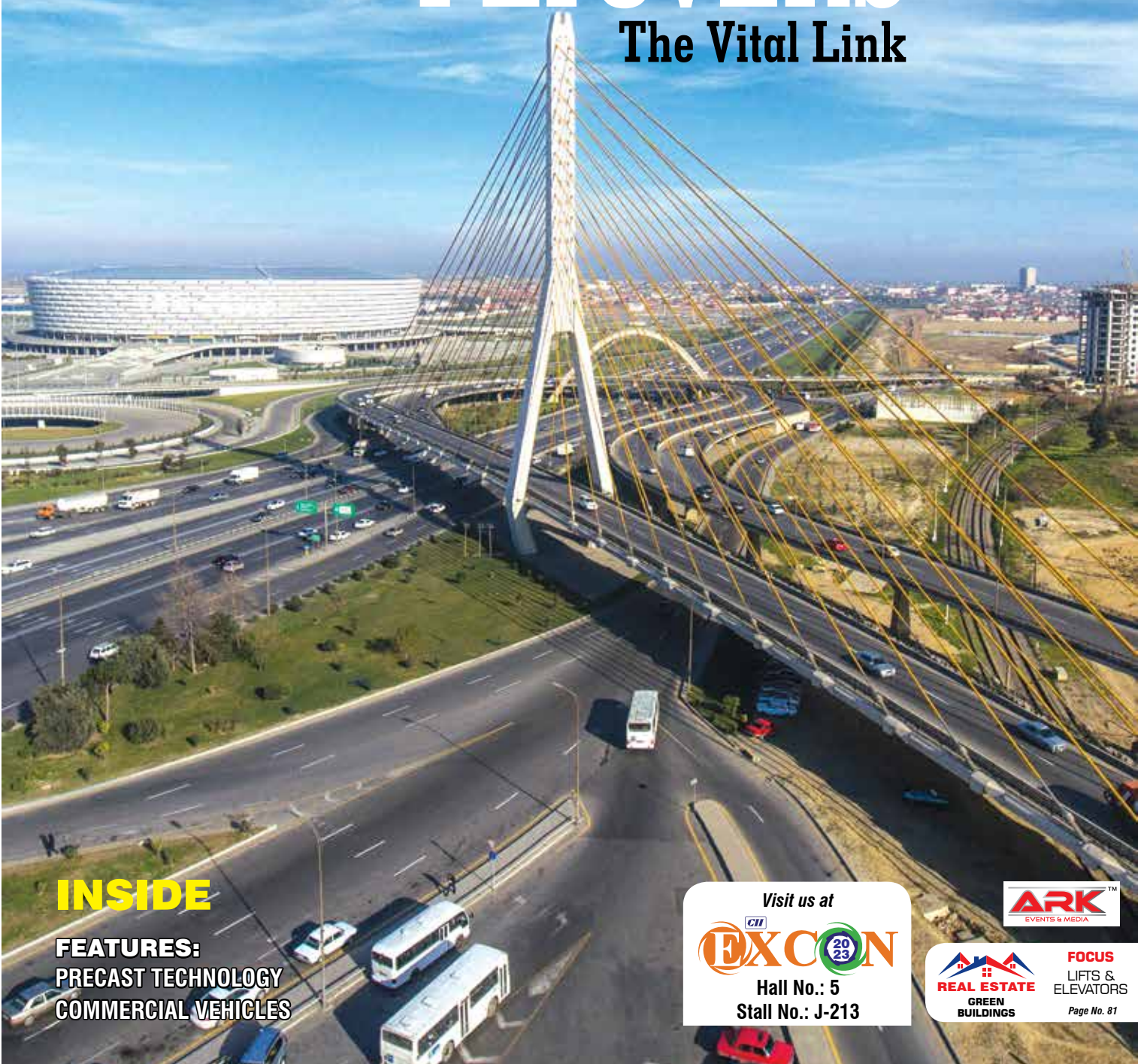


# CONSTRUCTION **TIMES**

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# MEDIATION in India at a GLANCE



**M**ediation allows the parties to reach a mutually agreeable arrangement to settle their disputes and saves them from the rigours of adversarial dispute resolution in terms of time, cost, and their business relationship.

While mediation is often encouraged as a pre-cursor of adversarial means of dispute resolution, it is seldom preferred in India unless mandated by law. There are reasons for this aversion to mediation in India, including lack of trained mediators, quality of service, concerns of delay, etc.

To address these challenges, India has enacted the Mediation Act 2023 (Act) (provisions whereof are being notified for implementation of the Act in a phased manner), a dedicated legislation for regulating mediation, which provides for a comprehensive legal framework for mediation, secure the enforcement of settlement agreements, and increase the role of mediation institutions.

Parties in construction disputes which are complex, costly, and time consuming to resolve are specially positioned to benefit from the Act by making use of an efficient enforcement mechanism.

## SCOPE & APPLICABILITY OF THE ACT

The Act provides a broad definition of “mediation” to encompass all its forms, including conciliation. Part III of the Arbitration and Conciliation Act, 1996, which was applicable to conciliation (or mediation) proceedings, has been completely substituted and rendered ineffective to give effect to the Act.

Certain types of disputes provided in the non-exhaustive list in the First Schedule—including those which have any “effect on rights of a third party” — are not capable of resolution through mediation.

The applicability of the Act is attracted when the mediation is “conducted in India” and any of the following conditions is met: (i) the parties in the mediation are habitual residents of India, have their place of business in India, or are incorporated in India; (ii) the parties undertake “international mediation” under the Act, i.e., where one of the parties does not meet (i) above; or (iii) the Act becomes applicable by a stipulation in the mediation agreement. Notably, where one of the parties is the Government or its instrumentality, the Act only applies to commercial or notified disputes.

### THE THREE MAIN PILLARS OF THE ACT

While the Act contains 69 sections and 10 schedules, there are three main pillars of the Act, as identified by the authors in the ensuing paragraphs, which form its sum and substance.

Enforcement of mediated settlement agreements: First, a mediated settlement agreement under the Act shall be enforced “in the same manner as if it were a judgment or decree passed by a court.” This dispenses the need to enforce it as a contract after a lengthy process. Any party may file an application to challenge the settlement agreement on the limited grounds of fraud, corruption, impersonation, or when it involves disputes not fit for mediation, and within 90 days (extendable by further 90 days upon the court being satisfied of sufficient cause for delay) from the date of receipt of the settlement agreement.

The Mediation Council of India and mediation service providers: Second, the Act establishes the Mediation Council of India (MCI), which will be a body responsible for inter alia framing various guidelines and regulations related to mediation as well as the manner of conducting mediation proceedings, framing various standards and criteria for Mediation Service Providers (MSP) and mediators, overseeing the registration of mediators, and recognizing MSPs. The MSPs will provide mediation services, accredit mediators, and maintain a panel of mediators, and also oversee critical functions including appointment of mediators and deciding on applications for termination of mediator’s mandate for conflict of interest and providing replacement mediators. While the functions of MSP are crucial, the Act does not bar conduction of a mediation without an MSP.

Provision on territorial jurisdiction with the appropriate court or tribunal: Third, the Act provides territorial jurisdiction over the mediation to the court or tribunal of competent jurisdiction, i.e., which has the jurisdiction to determine the subject matter of the dispute. This would be relevant for the purpose of registration of the mediated settlement agreements as well as making an application to the court of competent jurisdiction to challenge the same under limited grounds of fraud, corruption, impersonation, or when it involves disputes not fit for mediation.

### KEY FEATURES AND TIMELINES

In addition to the three main pillars as discussed above, the key features of the Act

which would instill confidence of parties in mediation are highlighted in Table 1.

<b>FEATURE</b>	<b>DESCRIPTION</b>
Formal requirements of a mediation agreement	The Act provides for the form requirements for a mediation agreement, viz. it must be in writing in a document signed by the parties, exchange of communications in electronic form, or in pleadings, albeit parties may voluntarily agree to pre-litigation mediation irrespective of its existence. This would encourage parties to include mediation agreements in their contracts, making them one of the boilerplate clauses.
Role and responsibilities of a mediator under the Act	A mediator has an obligation to disclose any conflict of interest under the Act. If a conflict of interest exists, it may result in the termination of the mediator’s mandate by the MSP or by the parties, as the case may be. The MSP will first decide if “justifiable doubts” to the independence or impartiality of the mediator exist. This will ensure the integrity of the process.
Limitation period	The clock on limitation will halt from the commencement of mediation until the submission of a non-settlement report by the mediator or termination of mediation. This clarification will allow parties to pursue mediation without any hesitation.
Referring parties to mediation and power of the court to pass an interim order	While the Act does not create a new or separate requirement for mandatory mediation, it empowers the courts and tribunals to direct the parties to undertake mediation at any stage of the proceedings, irrespective of any erstwhile failure of a pre-litigation mediation, and pass an interim order to protect the interests of any party if deemed necessary.
Protection of confidentiality and professional privilege	The Act contains a strict provision requiring confidentiality to be maintained by mediators, MSPs, parties, and participants. It also provides for professional privilege, preventing any court or tribunal to compel disclosure of information.

The Act also provides for online mediation, community mediation, and contains other novel provisions as well. Lastly, it prescribes certain timelines, which are covered in Table 2.

### CONCLUDING REMARKS

The Act is a welcomed move and marks a significant stride towards promotion of mediation and qualitative improvement of mediation-related services in India. The Act allows parties to

<b>TABLE 2</b>	
<b>PARTICULARS</b>	<b>TIMELINE</b>
Appointment of the mediator by MSP	7 days from an application for appointment made by a party
Communication by the mediator for accepting his appointment	7 days from the date of receipt of communication of such appointment
Disclosure of any conflict of interest by the mediator	Prior to the conduct of mediation During mediation, without delay (No timeline prescribed)
Application to MSP for terminating the mandate of a mediator	Upon disclose (No timeline prescribed)
Appointment of a mediator after termination of the mandate of the previous mediator	7 days from the termination of the mandate of the previous mediator
Conclusion of mediation proceedings	120 days (extendable by up to 60 days (i.e., 180 days) if parties agree) from of first appearance before the mediator
Registration of the settlement agreement by the parties or the MSP	180 days from date of receipt of the settlement agreement
Submission of the non-settlement report by the mediator	(No timeline prescribed)
Application by a party to challenge the settlement agreement	90 days (extendable by up to 90 days (i.e., 180 days) upon showing sufficient cause) from the date of receipt of the settlement agreement

reach a settlement whose terms may be beyond the issues referred to mediation. The quick enforcement of settlement agreements provides an even greater incentive for capital-intensive industries to undertake mediation. Furthermore, availability of mediators with specialised knowledge will increase the desirability to mediate disputes in specific industries requiring technical knowledge.

Construction disputes often involve complex and technical issues, and require steady cash flow. The Act is therefore expected to make a significant impact in the construction industry. It would have perhaps had an even greater impact if its scope were extended to other forms of dispute resolution, such as negotiation, adjudication, expert determination, etc., which lack an efficient enforcement mechanism. This could have given a wide range of options to cater to parties across industries.

It is pertinent to note that despite its benefits, the Act is drafted in the same fashion as an arbitration legislation, giving the impression that mediation would be procedurally heavy despite its intent being otherwise. This would likely result in legal challenges and issues, which may arise from the existing gaps and consequent interpretation of some of the provisions of the Act. Such challenges and pitfalls, however, are outside the scope of this article and will be discussed by the authors elsewhere. ■



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