Mediation in India: Is it as simple as **"let's talk it out"?**

The premise of mediation (or any other form of consensual dispute resolution) has always been simple: let the parties talk it out! After the enactment of the Mediation Act, 2023 (Act) (provisions whereof are being notified for implementation of the Act in a phased manner), which is a dedicated legislation for regulating mediation, we ought to explore if that remains true for India.

The authors, in a previous article published in November 2023 edition of the Construction Times Magazine, discussed the scope and applicability, main pillars, notable features, and timelines of the Act. The authors also discussed the positive strides following the enactment of the Act made with respect to mediation in India and highlighted its potential to contribute to speedy resolution of business disputes (particularly for the many construction disputes that arise in India).

In continuation of the above, this article recognises the need to ensure that the process contemplated under the Act and the interpretation of its provisions stays true to the consensual underpinnings of mediation. Procedural claptrap and untested provisions ought not make simple discussions difficult.

Notably, in addition to the courts and tribunals, the Mediation Council of India (MCI) and Mediation Service Providers (MSP) will have a significant role to ensure that the Act is implemented as intended.

This article focuses on the potential challenges which may arise in the implementation of the Act.

POTENTIAL CHALLENGES

The Act, without any doubt, marks a significant stride towards promotion of mediation and qualitative improvement of mediation-related services in India. Amidst its promising prospects, it grapples with some potential challenges that necessitate thoughtful consideration, which are discussed below:

1. The Act does not provide an efficient enforcement mechanism for foreign settlement agreements. Notably, not long ago on 7 August 2019, India became one of the 56 signatories to the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention). However, the Singapore Convention has not been ratified by the Act. The Act is not based on the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (Model Law), which was drafted inter alia for the mediation legislation across the globe to achieve harmonisation with the Singapore Convention.
2. The Act provides for all costs of the mediation, including the fees of the mediator and the charges of the MSP, to be borne equally by the parties. Such fees and charges may differ depending on the mediator, with no objective criteria or maximum cap in place. It is therefore suggested that the MCI should regularise the fee of mediators through guidelines/ regulations, similar to the model fee structure for arbitrators set out in the Arbitration and Conciliation Act, 1996.
3. An *"international mediation" must be*

"undertaken under this Act" and relate to *"a commercial dispute arising out of a legal relationship […] under any law for the time being in force in India"*. It is unclear whether the phrase "international mediation undertaken under this Act" points to a requirement of an express stipulation in the mediation agreement that it is to be undertaken under the Act or permits an inference, and, in case of the latter, the manner of application of the conflict of law rules requires clarification. The ensuring sentence of the definition, as quoted above, may point to either a commercial dispute in India and/or under the Indian law, or a legal relationship in India and/or under the Indian law. It is difficult to extrapolate the concept of *"seat"* to mediation.

4. The Act prescribes form requirements for a mediation agreement but is silent on the issue of stamping. In any case, it contains no provision which would allow the parties to approach a court or tribunal before or during the mediation (i.e., until a settlement agreement is signed). This raises a question as to the consequences which would ensue from non-stamping or inadequate stamping of a mediation agreement (or non-compliance with the form requirements) for the parties. It is unclear whether MSP or a mediator would deny services in such cases.
5. The settlement agreement may, in any case, require stamping, although the Act is silent on the same. It further remains to be seen whether courts would deny enforcement of a settlement agreement where the mediation agreement is unstamped or inadequately stamped.
6. In institutional mediation, MSP will determine if justifiable doubts exist as to the independence or impartiality of the mediator. However, if a party is of the opinion that the independence or impartiality of the mediator is compromised, even with the MSP determining otherwise, the entire process of mediation becomes redundant. It will lead to hesitation in communicating critical considerations and, as a result, the settlement discussions would be rendered a mere formality.
7. The Act provides that a mediator shall not act as an arbitrator or counsel in any arbitral or judicial proceeding pertaining to the same subject matter. Unlike the Model Law, the language of the provision leaves no room for party autonomy by *de jure* barring the mediator from switching hats. Further, the consequences of not complying with the above provision are unclear, especially if parties waive conflict despite the Act not providing this option. But one may infer that it could threaten the accreditation of the mediator and compromise the enforceability of the award.
8. If the mediator is of a foreign nationality, he must meet the eligibility criteria which is expected to be laid down by the MCI. However, the consequences of non-compliance with such requirements are still unclear. The MCI may provide further guidance with respect to the same.
9. The MCI is introduced as a *"quality-control"* mechanism, which will regulate mediation by *inter alia* recognising MSPs and mediation institutes. However, it is unclear if the parties will be prevented from pursuing institutional mediation before institutes not recognised by the MCI. It is also unclear if foreign institutions would be allowed to administer mediations under the Act.
10. The Act contains many provisions which are not capable of enforcement by the parties. For example, non-disclosure of any conflict of interest by a mediator seems to have no consequences on the enforcement of the settlement agreement, which may only be challenged on limited grounds. There is also no special mechanism under the Act regarding breach of confidentiality.
11. A 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, within the stipulated limitation from the date of receipt of the settlement agreement. Set out below are some issues in challenging settlement agreements:
    i) While disputes involving third-party rights are excluded as not being fit for mediation, there is no provision for a non-party to challenge a settlement agreement concerning such rights.
    ii) The limited grounds of challenge do not include coercion and duress, which may occur in in relation to mediation proceedings as well.
    iii) Lastly, it may be possible that fraud is discovered by a party after the expiry of the limitation period for challenging the settlement agreement. The Act, however, expressly provides that such

application "*shall not be made after*" the limitation period.

12. Mandatory mediation under the Commercial Courts Act, 2015 is reserved for suits which "[do] *not contemplate any urgent interim relief.*" In practice, however, interim relief is contemplated in most suits. If at all a view is taken that mandatory mediation is, in fact, required in India to unburden the courts and encourage amicable resolution of disputes, simply seeking an interim relief should not be sufficient to dispense with the requirement of mandatory mediation. The Act, however, neither provides for mandatory mediation nor addresses the aforesaid challenge. The Act leaves it up to the courts and tribunals to direct the parties to mediation (irrespective of any erstwhile failure of a pre-litigation mediation) and pass an interim order to protect the interests of any party, if required. It is to be seen whether the courts would play an active role to refer parties to mediation where an application for urgent interim relief does not hold water or is dismissed.
12. The Act does not provide any provision for a party to apply to courts for the grant of such interim order. There could have been more court assistance extended to parties to encourage the use of mediation, such as an option to apply for a status quo order during the pendency of a mediation.
13. An amendment has been introduced to the Indian Contract Act 1872, carving out mediation as an exception to the contracts in restraint of legal proceedings being void. However, no party, in any case, is either restricted absolutely from enforcing its rights under a contract or has such rights extinguished by entering into a mediation agreement, especially with the limitation period halted.

It is pertinent to note that many of the aforesaid concerns may soon be addressed by the guidelines and regulations framed by the MCI. Others, however, can only be addressed by way of an amendment.

CONCLUDING REMARKS

The main feature which underscores the very existence of this Act is the enforcement of settlement agreements *"in the same manner as if it were a judgment or decree passed by a court."* By its very nature, the process of mediation should be simple, and the only facet requiring legislative intervention is the speedy enforcement of settlement agreements, which has been achieved by this enactment.

Many provisions included in the Act may be a result of *"pitting"* mediation against arbitration. However, we must appreciate that mediation isn't and has never aimed to be a process akin to arbitration. Although a private dispute resolution mechanism, mediation remains consensual and not adversarial. Both methods of dispute resolution are unique in their own right and designed to handle different scenarios. Mixing the concepts of arbitration and mediation will only convolute the process and deter parties from mediating their disputes. It is for this reason that pre-arbitration amicable settlement agreements where the discussions become no more than a mere formality are often not enforceable.

Furthermore, despite its benefits of the Act, we must remain cognisant of the fact that mediation, at the end of the day, and even with all its notable benefits, is a compromise and not a final determination of rights by a court or tribunal (albeit persistently promoted as an alternative to litigation and arbitration). It may also be prone to misuse: some may use it to obtain information, to delay the final adjudication, or simply as a procedural step to check a box.

The above can hamper efficient and effective resolution of disputes. It is therefore important for businesses to have a sound legal strategy all the way from contract drafting to the resolution of their disputes (should any arise), which would enable them to agree upon, have in place, and carefully use such mode(s) of dispute resolution that is/are most suitable in their particular case.

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