



**Authors: Kavita Sarin and Vishal Bhardwaj<sup>1</sup>**

## **THE MEDIATION ACT, 2023: UNDERSTANDING THE KEY FEATURES**

### **INTRODUCTION**

The Mediation Bill, 2023 ('Mediation Bill') was passed by the Rajya Sabha on 2<sup>nd</sup> August 2023 and by the Lok Sabha on 7<sup>th</sup> August 2023. It received the President's assent on 15<sup>th</sup> September 2023 to be known as the Mediation Act, 2023 ('Mediation Act'). This article briefly explains the salient features of the Mediation Act and outlines the scope, applicability, key features, procedure, and possible challenges of the Mediation Act.

### **BACKGROUND**

#### **WHAT IS MEDIATION?**

Mediation is a structured process where a neutral person uses specialized communication and negotiation techniques to assist the parties in arriving at an amicable settlement of their disputes. The concept of Mediation is an ancient and deeply rooted practice in our country. It has been practised in the form of the panchayat system for centuries, in which certain respected elders of the village acted as mediators between the conflicting parties and helped to resolve their disputes.

#### **MEDIATION IN THE INDIAN LAWS**

Section 89(1) of the Code of Civil Procedure, 1908 allows courts to recommend various dispute resolution methods like arbitration, conciliation, judicial settlement, or mediation. Indian courts have been actively using this provision. As per the "Survey of Dispute Resolution in India, 2023," conducted collaboratively by the Federation of Indian Corporate Lawyers (FICL) and the Centre for Trade and Investment Law (CTIL), Mediation/Conciliation has been rated as the second most preferred way to

<sup>1</sup> Ms. Kavita Sarin is a Partner and Mr. Vishal Bhardwaj is a Senior Associate in the dispute resolution and arbitration team of the Firm's Delhi office.

resolve disputes in India. In India, there are mediation centres established throughout the country. However, private mediation lacked a clear structure and legal recognition, which made people hesitant to participate. To address these issues and make mediation more effective, the Mediation Act has been introduced, aiming to provide a solid legal framework and improve the overall mediation process. The Mediation Act seeks to institutionalise and formalise the mediation process, which is likely to improve the efficiency and effectiveness of the same.

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## SCOPE & APPLICABILITY

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### ❖ *Scope*

The Mediation Act extends the scope of mediation to civil and commercial disputes while providing an indicative list of disputes which are not suitable for mediation. The disputes involving minors or individuals with intellectual disabilities, criminal offenses, tax-related issues, land acquisition issues, and certain regulatory matters are considered unfit for mediation under the Mediation Act.

### ❖ *Applicability*

The Mediation Act applies to mediations conducted in India, including cases where all parties are based in India; where the mediation agreement specifies its applicability; or in international mediations involving at least one party from a country other than India. However, when one of the parties is the Central or State Government, it applies only to commercial disputes or to such disputes as may be notified.

It is important to note that the Mediation Act does not cover mediations conducted outside India.

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## KEY FEATURES OF THE MEDIATION ACT

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### 1. **DEFINITION OF MEDIATION**

The Mediation Act provides for a comprehensive definition of mediation which includes pre-litigation mediation, online mediation, community mediation, and conciliation within the umbrella of 'mediation.'

This aligns with international practice, where the terms 'mediation' and 'conciliation' are often used interchangeably, as previously recognized by the Supreme Court of India, and documented in the Singapore Convention. Consequently, the Mediation Act renders the conciliation procedure as provided in the Arbitration and Conciliation Act, 1996, insignificant.

**Prelitigation mediation:** The Mediation Act recognizes the mediation process where irrespective of any mediation agreement, the parties voluntarily undertake for settlement of dispute prior to filing of any case of civil or commercial nature before the court.

**International mediation:** Mediation undertaken between parties relating to commercial dispute where at least one of the parties resides or has place of business outside India.

**Community mediation:** The Mediation Act provides for community mediation where mediation is undertaken to resolve disputes likely to affect the peace and harmony amongst residents of a locality. Community mediation is required to be conducted by a panel of three mediators.

**Online mediation:** Mediation undertaken electronically, through internet based communication tools. Online mediation can take place pursuant to written consent of parties at any stage of mediation under this Mediation Act. The Mediation Act clarifies that even if the parties agree to undertake online mediation, for the purpose of enforcement, challenge, and registration of the mediated settlement agreement, the same shall be deemed to have been undertaken within the territorial jurisdiction of the court of competent jurisdiction.

## 2. **MEDIATION COUNCIL OF INDIA**

The Mediation Council is yet to be set up by the central government. The Mediation Act provides for establishment of a regulator i.e., the Mediation Council to register, recognize and regulate mediation institutions and mediators in India. The Mediation Council would also be tasked to promote international and domestic mediation in India, facilitate and conduct continuous training, education, and certifications in mediation, and also maintain a depository of mediation settlement agreements made in India.

## 3. **INSTITUTION OR AUTHORITY FOR CONDUCTING MEDIATION**

Mediation proceedings may be conducted by a Mediation Service Provider which includes:

- a. a body or an organization which conducts mediation in accordance with rules and regulations framed under the Mediation Act and is recognised by the Mediation Council of India;
- b. an authority constituted under the Legal Services Mediation Act, 1987;
- c. a court annexed mediation centre; and
- d. any other body as notified by Central Government.

The authorities constituted under the Legal Services Act, 1987, court annexed mediation centres and bodies notified by Central Government are deemed to be mediation service providers recognised by the Mediation Council.

#### **4. MEDIATION AGREEMENT**

The Mediation Act provides for mediation agreement to be 'in writing' to mean either (a) any document signed by the parties, or (b) an exchange of communications or letters including through electronic form, or (c) any pleadings or any other proceedings in which existence of mediation agreement is alleged by one party and not denied by the other. Mediation agreement may be in the form of a clause in an agreement or separate agreement.

#### **5. MEDIATOR UNDER THE MEDIATION ACT**

Any person, regardless of nationality, can be chosen as a mediator through a process agreed upon by the parties. However, when it comes to foreign mediators, there are specific qualifications, experience, and accreditations that need to be met, as prescribed. The disputing parties are free to agree upon the name of the mediator and the procedure for their appointment. If there is no agreement, the parties can request for appointment of a mediator from the panel maintained by the Mediation Service Provider, taking into account their preferences and the mediator's suitability for resolving the dispute.

The proposed mediator must disclose in writing any circumstances, be it personal, professional, financial, or otherwise, that could potentially create a conflict of interest or raise doubts about their independence or impartiality.

Additionally, a mediator appointed in this manner cannot simultaneously serve as an arbitrator or act as a counsel/representative for any party involved in an arbitration or judicial proceeding that is the subject of the ongoing mediation. They cannot be presented as a witness in any such proceeding.

#### **6. ROLE OF MEDIATOR:**

The mediator's role is to assist the parties independently, neutrally, and impartially, guided by principles of objectivity and fairness. The mediator can meet with the parties separately or together as needed.

Importantly, the mediator is not bound by the procedural rules of the Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872. This flexibility allows for a more tailored approach in reaching a mutually agreeable settlement, respecting party autonomy in the process.

**7. PLACE OF MEDIATION PROCEEDINGS:**

Mediation proceedings must be typically conducted within the jurisdiction of the competent court or tribunal responsible for deciding the disputed subject matter. However, parties can agree to hold mediation at another location by mutual consent. Additionally, parties have the option to conduct mediation online, provided they formally agree to it in writing.

**8. COMMENCEMENT OF PROCEEDINGS:**

Mediation officially begins when a party receives notice initiating mediation, as specified in a mediation agreement. If there is no prior agreement, mediation starts from the date of the mediator's appointment or consent to be appointed, whichever comes first.

**9. TIME PERIOD FOR CONCLUDING MEDIATION:**

The mediation process must be concluded within 120 days from the mediator's first appearance, with an option to extend it by up to 60 days if all parties agree. Similar changes are proposed in the Commercial Courts Act, 2015, to align pre-litigation mediation timelines.

**10. CONFIDENTIALITY:**

Section 22 of the Mediation Act categorically provides that the Mediator, Mediation Service Provider as well as the parties to mediation proceedings are obligated to keep confidential several aspects, including statements, proposals, documents, and any other communication exchanged during the mediation. Moreover, recording mediation proceedings through audio or video is prohibited to ensure confidentiality.

Importantly, the information discussed during mediation cannot be used as evidence in court, arbitration, or any legal proceedings. This extends the protection under “without prejudice privilege” to parties to encourage them to engage in candid discussions towards an amicable settlement.

**11. MEDIATED SETTLEMENT AGREEMENT**

Mediated Settlement Agreement is the understanding or agreement arrived at between the parties, recorded in writing the settlement of some or all disputes. The key features of the Mediated Settlement Agreement are:

- a) The agreement must be written, signed by parties, and authenticated by the mediator.
- b) It is final and binding on the parties.
- c) Registration of the agreement is not mandatory. The Parties have an option to register a Mediated Settlement Agreement (*other than those arrived in a court or tribunal referred mediation or under the Legal Services Authorities Act, 1987*), with the authority under the Mediation Act or as may be specified, within 180 days (subject to extension) of receiving the authenticated copy of the Agreement.

## **12. ENFORCEMENT AND CHALLENGE TO MEDIATED SETTLEMENT AGREEMENT**

A Mediated Settlement Agreement can be enforced following the Code of Civil Procedure, 1908, like a court decree.

A Mediated Settlement Agreement can be challenged within 90 days before a competent court on four grounds including fraud, corruption, impersonation, and if the dispute's subject matter was not eligible for mediation under the Mediation Act. The parties can file an application to challenge the settlement agreement within 90 days from receiving a copy of the same, with the possibility of an extension of further period of 90 days, if the court believes that there is a valid reason to do so. While the Mediation Act aims to limit the grounds for challenge, there is a concern that errant parties might misuse these provisions, undermining the purpose of the Mediation Act.

## **13. NON-SETTLEMENT REPORT**

If the mediation does not lead to a settlement within the time period stipulated under the Mediation Act, the mediator is required to prepare a non-settlement report without disclosing the cause of non-settlement and share signed copy with the parties and, in case of institutional mediation, submit the same in writing with the Mediation Service Provider.

## **14. INTERIM ORDERS BY COURTS**

The courts referring parties to mediation may pass interim orders to protect any party's interests, if necessary. However, unlike section 9 of the Arbitration and Conciliation Act, 1996, the Mediation Act does not specify the nature and extent of such power.

**15. EXCLUSION OF PERIOD IN RESPECT OF WHICH A MEDIATION HAS BEEN UNDERTAKEN UNDER THE MEDIATION ACT**

In computing the period of limitation fixed for any proceeding relating to disputes in respect of which a mediation has been undertaken under the Mediation Act, the period from the date of commencement of mediation under the Mediation Act and up to submission of non-settlement report by the mediator or termination of mediation under the Mediation Act, shall be excluded.

**16. FEE / EXPENSES FOR MEDIATION**

The cost of mediation, other than community mediation would be such as may be specified in rules and regulations framed under the Mediation Act. Unless otherwise agreed by the parties, all costs of mediation, including the fees of the mediator and the charges of the Mediation Service Provider are required to be borne equally by the parties.

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**CONCLUSION**

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The Mediation Act is a welcome move and an extremely significant milestone in the legal landscape as it provides a comprehensive framework to streamline, structure and institutionalise the mediation process. In India, alternate dispute resolution system such as 'mediation' holds immense importance due to its high potential to ease out the existing burden on the judiciary and offer a cost-effective and expeditious dispute resolution mechanism while preserving relationships and empowering the parties with customized solutions.