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A CLEAR MESSAGE TO INDUSTRY ON DISPUTE RESOLUTION

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‘The Act will effectively position mediation similar to commercial arbitration in India’ | Photo Credit: Getty Images/iStockphoto

Any conversation about the Indian litigation system eventually veers toward the term Alternative Dispute Resolution (ADR). ADR refers to a bouquet of mechanisms that enables disputing parties to resolve their differences amicably, without the intervention of courts. Given the delays in Indian court proceedings and increasing cost of litigation, the significance of ADR in India cannot be understated. Until recently, these discussions largely focussed on arbitration or conciliation of disputes under the Arbitration and Conciliation Act, 1996 (A&C Act). But mediation of disputes is finally getting its due.

In the recent monsoon session of Parliament, both Houses passed The Mediation Bill, 2023, and upon receiving the assent of the President of India, is referred to as the Mediation Act, 2023 (“the Act”). The Indian legal framework already encourages courts to refer the disputing parties to ADR procedures, including mediation, if there were elements of settlement which the parties may accept. The Act will take this encouragement a step forward. Irrespective of a prior mediation agreement, it will obligate each party to take steps to settle their dispute through pre-litigation mediation before approaching an Indian court. To facilitate this process, the Act will also require courts and relevant institutions to maintain a panel of mediators.

The potential benefits are several. This requirement is expected to reduce the filing of frivolous claims before Indian courts. Owing to the confidentiality of a mediation, it may also mitigate the risk of deterioration of the parties’ relationship due to a publicly fought dispute. Yet, at the same time, concerns are raised about the feasibility of a mediation conducted under the sword of an obligation as opposed to a sincere desire to arrive at an amicable resolution. In the latter scenario, this may empower a recalcitrant defendant to delay a genuine claim. Fortunately, the Act will provide some safeguards against these concerns. On the one hand, it will require the mediation to ordinarily be conducted by an empanelled mediator, who must always be neutral and have uncompromising expertise.

Subject to an extension by the parties, they must also complete the mediation within 180 days from the parties’ first appearance. On the other hand, the Act will not remove the refuge of Indian courts entirely. A party may, in exceptional circumstances, seek urgent interim reliefs

from a court before the commencement or during the continuation of a mediation. These provisions prioritise expertise and efficiency, while ensuring that the obligation of pre-litigation mediation is not weaponised. The aim is to create a balanced framework which encourages the parties to focus more on their commercial dealings and less on their disputes.

In these discussions, however, one aspect has gone unnoticed. The Act will effectively position mediation similar to commercial arbitration in India. The similarities between their respective supporting pieces of legislation are obvious. Both pieces of legislation impose stringent timelines for the conduct of proceedings, mandate confidentiality, obligate Indian courts to refer the parties to mediation or arbitration, provide a default mechanism for the appointment of a mediator or arbitrator, and prescribe the procedure for the termination of their mandate. Likewise, both ensure the enforceability of a mediated settlement agreement and an arbitral award, respectively. The establishment of a Mediation Council of India equally mirrors the proposal in 2019 to establish an Arbitration Council of India (that is yet to be implemented). Mediation and commercial arbitration are thus made allies, albeit at different stages of the same journey.

Parliament's message to Indian industry is clear — in commercial matters, courts must no longer be the default venue for dispute resolution. Parties are expected to resolve their dispute amicably through mediation, and, alternatively, through commercial arbitration. While the doors of Indian courts are open if required, this access must be perceived as a matter of last resort. To this extent, the Act will foster camaraderie between the mediation and arbitration of commercial disputes, and reduce the burden on Indian courts.

In this context, a final key parallel emerges. Similar to how the recent amendments to the A&C Act prioritised institutional arbitration of disputes, the Act also places emphasis on institutional mediation in India. It envisages "mediation service providers" to provide not only the services of a mediator but also all the facilities, secretarial assistance, and infrastructure for the efficient conduct of mediation. A mediation service provider is synonymous with arbitration institutions. India is already home to experienced arbitration institutions, some of which provide mediation services that are on a par with global best practices. These institutions are, therefore, expected to play a meaningful role in India's mediation journey. Only then would India become a global hub not only for arbitration but also for all aspects of commercial dispute resolution.

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