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MEDIATION OF COMMERCIAL DISPUTES IN INDIA

Sahil Kanuga & Shraddha Bhosale#*

ABSTRACT

Resolving commercial disputes in India can often be harder than one may imagine. While it is not difficult to file a civil proceeding in India, it is a well-known fact that courts in India are clogged with a burgeoning number of cases. It is not unusual to see cases linger unresolved for even decades at a time. Though the reasons for such delays is a subject beyond the purport of this paper, such delays do not work for commercial disputes where time is often equivalent to money. This led to an increased adoption of alternative dispute resolution methods, particularly arbitration. Arbitration provided an attractive alternative to the courts, where once adopted was binding on the parties and the award of the arbitral tribunal was equivalent to a decree of the court. However, over time, arbitration has become expensive, complex, and time-consuming. While it is still considered a better option than traditional court litigation, a void was felt for effective dispute resolution for commercial disputes, where the point in issue was often short and simple.

* The author is the Co-Head for the International Dispute Resolution practice at Nishith Desai Associates, Mumbai and may be contacted at [sahilkanuga\[at\]therate\[dot\]gmail\[dot\]com](mailto:sahilkanuga[at]therate[dot]gmail[dot]com).

The author is the General Counsel for the Weikfield Group, Pune and co-founder of Squarely Legal and may be contacted at [shraddha\[underscore\]bhosale\[at\]therate\[dot\]weikfield\[dot\]com](mailto:shraddha[underscore]bhosale[at]therate[dot]weikfield[dot]com).

While mediation is certainly not a new method to resolve disputes, of late, it often finds its way into legal chatter for such matters. This could probably be attributed to two reasons, first, the United Nations Convention on International Settlement Agreements resulting from Mediation to which India is a signatory, and second, the lockdown imposed to control the spread of COVID-19.

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I. INTRODUCTION TO THE SINGAPORE CONVENTION

The United Nations Convention on International Settlement Agreements resulting from Mediation (“Singapore Convention”)¹ provides the framework for enforceability of international settlement agreements, resulting from mediation, to conclude commercial disputes. The Singapore Convention aims to facilitate international trade, and has been signed by 53 countries to date, including India.² It entered into force on 12 September 2020. This level of cross border recognition and enforcement of mediated settlements accorded through the Singapore Convention had made mediation an attractive option for commercial disputes, albeit it remains a non-binding method of dispute resolution and consequently, depends on the volition of the parties involved. Several recent deliberations have revolved around the issue of whether and when will India have its own mediation-specific legislation in pursuance of the Singapore Convention.³ The provisions of such legislation will definitely play a crucial role in deciding the attractiveness of mediation as an effective option to resolve commercial disputes.

¹ ‘United Nations Convention on International Settlement Agreements Resulting from Mediation’ United Nations (29 April 2019) <<https://treaties.un.org/doc/Treaties/2019/05/20190501%2004-11%20PM/Ch-XXII-4.pdf>> accessed 24 February 2021.

² *ibid.*

³ Ajmer Singh, ‘Supreme Court Forms Committee to Draft Mediation Law, Will Send to Government’ (2020) *The Economic Times* (19 January 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms?from=mdr>> accessed 24 February 2021.

II. IMPACT OF COVID-19

Performance of various contracts was adversely affected because of several factors such as the nationwide lockdown to curb the spread of COVID-19, followed by several state-imposed lockdowns in the country. Even globally, the repercussions of similar lockdowns hit the ability of parties to adhere to the terms of their agreements. Delays and breaches of contract were the order of the day resulting in innumerable disputes and claims. While this may have come within the ambit of a *force majeure* clause in some contracts, the defaults were too large and widespread to consider traditional litigation; the sheer number of disputes would have meant a complete breakdown of the global dispute resolution system. A more practical approach was necessary considering that a pandemic was beyond either party's control. Several parties considered mediation as a better suited dispute resolution mechanism in such cases.

Considering the growing popularity of mediation, it is worthwhile to explore the current status of commercial mediation in India. Through this paper, the authors intend to draw the readers' attention to existing legal provisions pertaining to mediation in the Code of Civil Procedure 1908 ("CPC") and the Arbitration and Conciliation Act 1996 ("ACA"). Further, the authors present a holistic picture including mediation related provisions in multiple distinct legislations, such as the Commercial Courts Act 2015 and the Micro, Small, and Medium Enterprises Development Act 2006 ("MSMED Act").

In this paper, mediation and conciliation are to be understood as being synonymous,⁴ especially in the context of their reference in a statute unless stated otherwise. In practice, however, a differentiation between the two can certainly be made based on the nature of the role played by the neutral party in the proceedings, as is the case in most jurisdictions in the world. With the entry of a new legislation for mediation in the near future, one would expect the gap between mediation and conciliation to widen and both will find their own space within the four corners of the law.

III. MEDIATION UNDER THE CODE OF CIVIL PROCEDURE 1908 AND THE ARBITRATION AND CONCILIATION ACT 1996

The insertion of Section 89 in the CPC and enactment of the ACA marked the beginning of commercial mediation in India. The wording of Section 89 seemed to distinguish between mediation and conciliation as entirely separate mechanisms, until in the case of *Afcons Infrastructure Ltd v. Cherian Varkey Construction Co Pvt Ltd*,⁵ the Supreme Court of India (SC) settled, *inter alia*, several procedural aspects of a reference under the aforesaid Section 89.

Section 89 read with Rule 1A of Order 10 of the CPC empowers a court to refer a dispute before it of suitable category to arbitration, conciliation, mediation, Lok Adalat settlement or judicial settlement. The SC clarified that of these five modes of alternate dispute resolution, arbitration and conciliation are to be governed by the ACA; mediation and

⁴ *Afcons Infrastructure Ltd and Ors v Cherian Varkey Construction Co Pvt Ltd and Ors* [2010] 7 SCALE 293.

⁵ *ibid.*

Lok Adalat settlement are to be governed by the Legal Services Authority Act, 1987 and judicial settlement is governed by such procedure as may be prescribed in that regard.⁶

Reference to conciliation under Section 89 can be made by a court only if all parties to the dispute consent to it and agree to undergo assisted negotiation with the help of a neutral third party, either by an agreement or by the process of invitation. Acceptance has to be provided in accordance with Section 62 of the ACA, which is followed by the appointment of conciliator(s) under Section 64 of the ACA. If the parties reach a settlement, the concerned court, which made the reference, can scrutinize such settlement and make a decree in terms of such settlement thereby making it enforceable.

While there is no direct legislation dealing specifically with mediation yet, private commercial mediation in India is usually considered as being governed by Part III of the ACA, which deals with conciliation of disputes arising out of a legal relationship, whether contractual or not, and to all proceedings relating thereto. To initiate mediation under the ACA, a party is required to send a written invitation to that effect to the other party and on acceptance by the other party, the mediation can begin.⁷ If the other party declines or does not respond, the mediation will be a non-starter.⁸ The parties can agree to appoint a maximum of three mediators to act jointly.⁹ Such an appointment can be mutual or through the assistance of a

⁶ *ibid.*

⁷ Arbitration and Conciliation Act 1996, s 62.

⁸ *ibid.*

⁹ *ibid* s 63.

suitable institution.¹⁰ The mediator(s) will not be bound by the CPC or the Indian Evidence Act 1872.

The ACA provides the procedure to be followed for a settlement agreement when it appears to the conciliator that there exist elements of a settlement that may be acceptable to the parties. The *first* stage of the procedures entails formulation of the terms of a possible settlement by the conciliator. Then the conciliator is required to submit such terms to the parties for their observation, and further, the conciliator may reformulate the terms of a possible settlement in the light of such observations. *Second*, if the parties reach an agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up the settlement agreement. Upon signing the settlement agreement, it shall be final and binding on the parties and persons claiming under them. *Finally*, the conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.¹¹

The ACA accords same status and effect to the settlement agreement as if it were an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30 of the ACA.¹² The pre-condition is that all the essentials of the settlement agreement are met under Section 73.¹³

¹⁰ *ibid* s 64.

¹¹ *ibid* s 73.

¹² *ibid* s 74.

¹³ *Mysore Cements Ltd v Svedala Barmac Ltd* [2003] 10 SCC 375.

Further, the ACA safeguards confidentiality and requires the conciliator and the parties to keep all matters relating to the conciliation proceedings as well as the settlement agreement confidential, except where its disclosure is necessary for purposes of implementation and enforcement.¹⁴ In addition to confidentiality, Section 81 of the ACA makes the following inadmissible as evidence in any subsequent arbitral or judicial proceedings:

- views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- admissions made by the other party in the course of the conciliation proceedings;
- proposals made by the conciliator; and
- the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.¹⁵

Effectively, litigants before an Indian court for adjudication of a civil suit can initiate mediation at any time before framing of issues of such suit. Even after making a reference under Section 89 of the ACA, the matter does not go out of the Court's purview. If the parties settle during such mediation, the Court before which the suit was originally pending can decree the suit in terms of such settlement on scrutiny thereof. If parties do not settle, the Court can proceed with framing of issues in the suit. Moreover, even if the Court has begun with its trial and the recourse under Section 89 is no longer available, nothing prevents the parties from

¹⁴ Arbitration and Conciliation Act 1996, s 75.

¹⁵ *ibid* s 81.

engaging in mediation privately, and if they settle, they still have the ability to either withdraw the suit or have it decreed in terms of their settlement.

In case where a dispute has arisen but parties have not yet filed a suit, parties can agree to mediate either under the rules of an institution offering mediation services or in an *ad hoc* manner under the provisions of the ACA as stated above. The parties can mutually appoint a mediator of their choice and if they settle their dispute, having followed the applicable provisions of the ACA, it will result in settlement agreement having enforceability akin to an arbitral award/decreed.

IV. MEDIATION UNDER THE COMMERCIAL COURTS ACT 2015

The Commercial Courts Act 2015 (“CCA”) was enacted to constitute commercial courts for adjudicating commercial disputes.¹⁶ Section 2(1)(c)¹⁷ defines a ‘commercial dispute’ as:

“A dispute arising out of- i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents; ii) export or import of merchandise or services; iii) issues relating to admiralty and maritime law; iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same; v) carriage of goods; vi) construction and infrastructure contracts, including tenders; vii) agreements relating to immovable property used exclusively in trade or commerce; viii) franchising agreements; ix)

¹⁶ Commercial Courts Act 2015, preamble.

¹⁷ *ibid* s 2(1)(c).

distribution and licensing agreements; x) management and consultancy agreements; xi) joint venture agreements; xii) shareholders agreements; xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services; xiv) mercantile agency and mercantile usage; xv) partnership agreements; xvi) technology development agreements; xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits; xviii) agreements for sale of goods or provision of services; xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum; xx) insurance and re-insurance; xxii) contracts of agency relating to any of the above; and xxiii) such other commercial disputes as may be notified by the Central Government.

Explanation. - A commercial dispute shall not cease to be a commercial dispute merely because - (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property; (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions."

Evidently, the definition of 'commercial dispute' is quite broad and all-encompassing. Subsequently, a 2018 Amendment to the CCA was promulgated for, *inter alia*, the insertion of Section 12A titled 'Pre-institution mediation and settlement'.¹⁸ The said provision mandates that a

¹⁸ *ibid* s 12A.

plaintiff/applicant seeking to institute a suit for adjudication of a commercial dispute under the CCA shall first be required to initiate pre-institution mediation for the same dispute unless the plaintiff/applicant intends to seek urgent interim relief under the said Act. The Central Government has also notified the Commercial Courts (Pre-institution Mediation and Settlement) Rules 2018 that will govern such mediation proceedings under the CCA.

On making of an application to the concerned Authority (as notified by the Central Government) for initiation of pre-institution mediation, the said Authority will issue a notice to the opposite party to appear and give consent to participate in the mediation.¹⁹ In the absence of response or refusal to participate from such opposite party to the said notice, the Authority shall treat the mediation to be a non-starter and prepare a report to that effect.²⁰ Should the opposite party agree to participate in such mediation, then such Authority shall complete the process of mediation within three months from the date of application by the applicant to initiate mediation.²¹ However, with the parties' consent, the said period may be extended by two more months.²²

Any settlement between the parties shall be reduced to writing and shall be signed by the parties to the dispute and the mediator.²³ The settlement arrived at under Section 12A of the CCA shall have the same

¹⁹ *ibid* s 3(1).

²⁰ *ibid* s 3(4).

²¹ *ibid* s 3(8).

²² *ibid*.

²³ *ibid* s 7(vii).

status and effect as if it is an arbitral award on agreed terms under Section 30(4) of the ACA.²⁴ The provision further states that the period during which the parties remained occupied with the pre-institution mediation shall not be computed for the purpose of limitation under the Limitation Act 1963.²⁵

The parties, their authorized representatives or counsel, and the mediator are bound to maintain the confidentiality of the proceedings. Stenographic, audio or video recording of the mediation sessions is not permitted.

In effect, pre-institution mediation under the CCA continues to remain a voluntary process. Only initiation of the process of mediation is mandatory before institution of a suit, and the choice is left with the opposite party to decide whether to participate in such proceedings. The provision is a well-intended nudge and offers a quick, cost-effective dispute resolution mechanism to disputants. A potential pitfall of this provision is lack of the parties' ability to choose their mediator. It is well known that a mediation is only as good as the mediator. It is also possible that the opposite party may use pre-institution mediation as a tool to somewhat protract initiation of a suit by the applicant. However, largely, on balance, the advantages outweigh the disadvantages.

²⁴ *ibid* s 12A(5).

²⁵ *ibid* s 12A(3).

V. A PEEK INTO THE STATISTICS

It is fair to expect that the statistics would show this mechanism to be a tremendous success. As statistics on a national scale appear to be lacking, we have taken the data available for the states of Maharashtra and Karnataka as examples. Considering the numbers in Maharashtra, it appears that in the period between July 2018 and March 2019, 1,168 applications were received to initiate pre-institution mediation.²⁶ Out of these 1,168 applications, the opposite party refused to participate or never responded in 104 cases (“non-starter” cases); and 28 cases underwent the process of mediation of which only 2 cases were settled.²⁷

Subsequently, data available for the first quarter of 2020 in Maharashtra shows that 1,259 applications were received to initiate pre-institution mediation.²⁸ Out of these, 970 cases were “non-starter”; and 44 cases underwent the process of mediation of which only 4 cases were settled.²⁹ Lastly, data available for the second quarter of 2020 in Maharashtra shows that only 158 applications were received to initiate pre-institution mediation of which only 1 case underwent the process of mediation and does not appear to have been settled.³⁰ In all of the above data, there seems to be no information available of the outcome of the

²⁶ Maharashtra State Legal Services Authority, ‘Statistical Data’ (2020) MSLSA <<https://legalservices.maharashtra.gov.in/1122/Statistical-Data>> accessed 24 February 2021.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid.*

balance cases in respect of which applications to initiate mediation were filed.

However, this sudden decrease in applications can be attributed to the severe outbreak of COVID-19 in the state during this period. In another example, the data available for Karnataka for the period from January 2020 to March 2020 shows that 382 applications were received during this period. Data shows that 209 cases were ‘non-starters’, 16 cases were referred to mediation, and only 1 case was settled.³¹

The rather grim statistical data available is perhaps indicative of the fact that voluntary mediation has not taken off as desired, and measures need to be introduced to create awareness to assist parties in making informed decisions about choosing or rejecting mediation as a dispute resolution mechanism.

VI. MEDIATION UNDER THE MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT 2006

The MSMED Act was enacted with a view to facilitate the promotion, development, and competitiveness of enterprises classified as micro, small, and medium under the said Act.³²

As part of the measures framed for recovery of delayed payments to micro and small enterprises, the provisions under Chapter V of the MSMED Act allows for a reference to be made by either party to the ‘Micro

³¹ Karnataka State Legal Services Authority, ‘Statistical Data’ (2021) KSLSA <<https://kslsa.kar.nic.in/NLA.asp#>> accessed 24 February 2021.

³² Micro, Small, and Medium Enterprises Development Act 2006, preamble.

and Small Enterprises Facilitation Council' ("MSEFC") for resolution of a dispute between a buyer and a seller. On receipt of such a reference, the MSEFC either itself conducts conciliation or it can seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre for conducting conciliation.³³ Sections 65 to 81 of the ACA apply to such a dispute as if the conciliation were initiated under Part III of that Act.³⁴

This provision seems to open a window to access the benefits of settlement of disputes under Part III of the ACA. A potential drawback though is that in case settlement is not reached in a mediation conducted by the MSEFC, the MSEFC itself is empowered to adjudicate the same dispute by way of arbitration. This means that a 'Med-Arb' model is being followed by MSEFC which may be frowned upon by parties for reasons such as inability of the neutral to remain impartial as an arbitrator after having mediated the dispute.

That said, the intent to provide Micro and Small Enterprises with a speedy and cost-effective mechanism is met in this instance. The online portal of 'Delayed Payment Monitoring System' called 'MSME SAMADHAAN' indicates that the MSEFC successfully conciliates and settles roughly 35% of the cases admitted before it.

³³ *ibid* s 18(2).

³⁴ *ibid*.

VII. THE WAY FORWARD

In addition to the above statutes, mediation has also been introduced in other areas such as resolution of real estate disputes under the Real Estate (Regulation and Development) Act 2016, consumer disputes under the Consumer Protection Act 2019, as well as the Companies Act 2013. Initiation of mediation under these statutes remains mostly voluntary which is undoubtedly a core value of the process of mediation. However, this does not rule out the fact that parties opt not to mediate simply because they do not understand what mediation entails. So, the decision to not mediate may not always be an informed decision.

At the same time, if mediation is made mandatory, there is always a risk that parties may participate in it only as a step to finish in a tiered process which defeats the purpose of mediation. To bridge this gap between mandatory and voluntary mediation, India could consider following Italy's 'Required Initial Mediation Session' model introduced in limited civil and commercial cases in Italy.³⁵ As a backdrop, the Italian judiciary is just as backlogged as the Indian judiciary and hence, this may be an appropriate solution. Under the said model, the applicant/plaintiff is required to first file a mediation request before instituting a suit. Following such request, the parties are required to mandatorily attend an initial mediation session with the mediator where the process is explained to the parties and lawyers. Subsequently, if parties, after understanding the process

³⁵ Leonardo D'Urso, 'Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation' (2018) 36(4) *Alternatives to the High Cost of Litigation* 49.

and weighing its pros and cons, choose to mediate, such mediation is concluded within ninety days from initiation. But if, after such a mandatory introduction session, one or more parties choose not to move forward, then the requirement of the initial mediation session will stand fulfilled and the applicant/plaintiff can institute the suit. If one of the parties remains absent during such 'Required Initial Mediation Session' then the concerned judge will sanction that party in ensuing judicial proceedings. The model can be considered and replicated in the Indian context with necessary amends. Its implementation will also require uniformity in training of mediators and the process to be followed during such mandatory introduction session.

In conclusion, although India's existing legal framework for commercial mediation is fairly robust, some tweaks appear necessary. In addition to making some sessions of mediation mandatory for disputing parties prior to the institution of a suit before the courts, the creation of widespread awareness about the benefits of mediation as well as reputed mediation institutions should form part of the next few steps. This will likely be enhanced by introduction of mediation-specific legislation as is anticipated to happen, especially in case of commercial disputes. We must not lose sight of the fact that mediation is now slowly becoming mainstream and we are yet in its early days. The road ahead remains positive and hopeful for the success of mediation.