

Dispute Resolution Hotline

September 04, 2023

DECODING THE MEDIATION ACT, 2023

- The Mediation Act 2023 ("**Mediation Act**") recognizes pre-litigation mediation, online and community mediation and encompasses the term "conciliation" to align with international practice.
- Provisions for enforcing domestic mediated settlement agreements introduced;
- Fails to recognize and enforce mediated settlement agreements which did not take place in India.
- Establishes the Mediation Council of India to regulate mediators and mediation institutions.
- Sets time limits for mediation proceedings, maintains confidentiality, and introduces guidelines for mediator appointments.
- Introduces amendments to existing statutes, like the Indian Contract Act, to align them with the new mediation framework.

INTRODUCTION

Mediation in India is not new. Historical use of mediation through Panchayats for community conflict resolution is well-known and still preferred. The practice of mediation lost ground during British rule, leading to increased disputes and delays in the adversarial legal system¹.

Section 89(1) of the Code of Civil Procedure, 1908 permits courts to suggest arbitration, conciliation, judicial settlement, or mediation for dispute resolution. This is well accepted and implemented by the courts. Mediation centers have been set up across India. Despite this, private mediation lacked structure and legal recognition, discouraging participation. To address this, the Mediation Bill 2021 was proposed to enhance the effectiveness of mediation and provide a comprehensive legal framework for it².

Although India became a signatory to the Singapore Convention on Mediation ("**Singapore Convention**") on 7 August 2019, it is yet to be ratified³. Therefore, the Mediation Act does not adopt the Singapore Convention on Mediation, akin to the adoption of the 'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' ("**New York Convention**"), under the Arbitration and Conciliation Act, 1996 ("**A&C Act**"). The Singapore Convention contemplates and provides a framework for cross-border enforcement of settlement agreements resulting from international mediation.

The Mediation Bill, 2021 was tabled in the Rajya Sabha on 20 December 2021 and was referred to the Standing Committee on Personnel, Public Grievances, Law & Justice for review on 21 December 2021 ("**Standing Committee**").

The Standing Committee issued its 117th Report on the Mediation Bill ("**Report**") making certain recommendations to the provisions on 13 July 2022. The Union Cabinet approved some of these recommendations and the Mediation Bill 2023 ("**Mediation Bill**") was passed by the Rajya Sabha on 02 August 2023 and by the Lok Sabha on 07 August 2023. The Mediation Bill received presidential assent on 15 September 2023, to be known as the "Mediation Act 2023" ("**Mediation Act**").

THE MEDIATION ACT: KEY PROVISIONS

In essence, the Mediation Act aims "*to promote and facilitate mediation*" with a special focus on institutional mediation, online mediation, and community mediation, in order to facilitate resolution of disputes in a time bound manner. The Mediation Act also provides for enforcement of mediated settlement agreements and establishment of a regulatory body for registration of mediators and institutions.

Our analysis of some of the key provisions of the Mediation Act is as under:

1. "Mediation" as defined under the Mediation Act

The Mediation Act 2023 aims to expand the scope and statutorily recognize pre-litigation mediation, online mediation, community mediation, conciliation under the definition of 'mediation'.⁴ This would have the effect of dispensing with the concept of conciliation, in line with the international practice of using the terms 'mediation' and 'conciliation' interchangeably as done previously by the Supreme Court of India and as documented in the Singapore Convention⁵. Part III of the A&C Act is thus rendered otiose and consequently, the Mediation Act seeks to remove the provisions on conciliation from the A&C Act.⁶

2. Applicability of the Mediation Act

On being notified, the Mediation Act shall apply to mediations conducted in India. It would *inter alia* apply to

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mediations where:

- 1) all parties habitually reside or incorporated in or have their place of business in India, or
- 2) the mediation agreement imports the applicability of the Mediation Act, or
- 3) there is an international mediation in relation to a commercial dispute⁷ provided one of the parties is an individual who is a national or habitually resides in a country other than India, or a body corporate/association/body of individuals having place of business outside India⁸, or
- 4) Further, where one of the parties is the Central/State Government or any entity/body controlled or owned by such Government, the Mediation Act will be applicable only in case of a) commercial disputes, or b) any other disputes as notified.⁹

Though the Singapore Convention provides a framework for cross-border enforcement of settlement agreements resulting from international mediation, the Mediation Act applies only to international mediations where the mediation is conducted in India but not applicable to mediations conducted outside India. More specifically, the Mediation Act does not contemplate enforcement of mediated settlement agreements resulting from mediation conducted outside India.¹⁰ This would, inevitably exclude enforcement of such mediated settlement agreements in India under the Mediation Act.

3. Matters not fit to be resolved by mediation

The Mediation Act provides an illustrative list of disputes or matters not fit for mediation which *inter alia*. include, a) disputes against minors or persons with intellectual disability, b) prosecution of criminal offences, c) any dispute relating to levy, collection, penalties, direct/indirect tax refunds, d) any investigation, inquiry or proceeding before the Telecom Regulatory Authority of India, Telecom Disputes Settlement and Appellate Tribunal and under the Competition Act, 2002, etc.¹¹ The Mediation Act is also intended to apply beyond civil and commercial disputes, i.e., disputes relating to compoundable offences including the matrimonial offences which are compoundable and pending between the parties may also be referred to mediation.¹²

This may prove to be an effective guidance in case of any ambiguity in the nature of disputes which can be settled through mediation. The Mediation Act thus goes a step ahead of the A&C Act, which has left issues related to non-arbitrability of disputes to judicial precedents.

4. Mediation Agreement

A mediation agreement may be in the form of a clause in an agreement or separate agreement as long as it is in writing.¹³ The Mediation Act explains 'in writing' to mean either (a) any document signed by the parties, or (b) an exchange of communications or letters including through electronic form as provided under the Information Technology Act, 2000, or 3) any pleadings or any other proceedings in which existence of mediation agreement is alleged by one party and not denied by the other¹⁴. Further, parties can submit a dispute to mediation even subsequent to the dispute arising between them.¹⁵

5. Pre-Litigation Mediation and the Power of Courts to Refer the Parties to Mediation

The 2021 version of the Mediation Bill mandated pre-litigation mediation, irrespective of the existence of a mediation agreement before filing any suit or proceeding of civil or commercial nature in any court. The Report recommended that this be amended to voluntary mediation before commencing litigation, on the premise that compulsory or mandatory mediation amounts to denial to justice where the parties are unwilling to mediate.¹⁶ Further, that the object of mediation is voluntary resolution and therefore parties cannot be compelled for mediation involuntarily.

Section 5(1) of the Mediation Act provides that irrespective of any mediation agreement, the parties may voluntarily, and with mutual consent, refer the dispute for settlement by mediation before filing any case of civil or commercial nature in any court.¹⁷ This excludes commercial disputes of specified value¹⁸ that are subject to compulsory pre-litigation mediation under the Commercial Courts Act, 2015.¹⁹ Further, any court/tribunal may at any stage of a proceeding, refer the parties to undertake mediation, irrespective of whether there is a mediation agreement or not.²⁰

6. Interim orders for protection

The court or tribunal may pass suitable interim order(s) in such court referred mediations to protect the interest of any party if it deems appropriate.²¹ However, the Mediation Act does not specify the nature and extent of such interim orders (unlike Section 9 of the A&C Act).

7. Appointment of Mediators

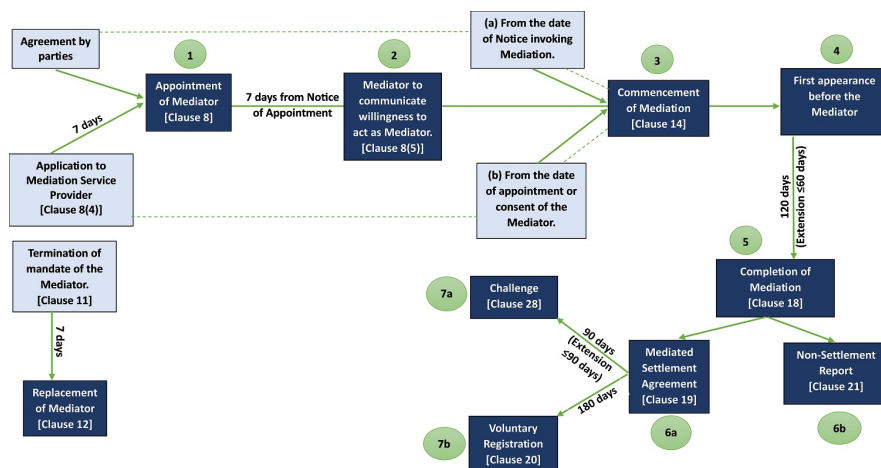
A person of any nationality may be appointed as a mediator according to a process agreeable by the parties.²² However, the party autonomy is curtailed by the proviso to Section 8(1) which provides that in case of a foreign mediator, he/she shall possess such qualification, experience and accreditation "as may be prescribed". Failing agreement, the parties may make an application to the Mediation Service Provider (*see below*) for appointment of a mediator from the panel of mediators maintained by it, which must take into consideration the preference of the parties and suitability of the mediator in resolving the dispute.²³

The mediator proposed to be appointed is required to disclose, in writing, any circumstances (personal, professional, financial or otherwise) that may give rise to any conflict of interest or give rise to justifiable doubts as to his independence or impartiality²⁴, in line with the standard of disclosure adopted under UNCITRAL Model Laws²⁵ and the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration.²⁶ This is a continuing obligation, and the mediator is required to intimate if any such circumstances arise during the course of the proceedings²⁷, which conflict may be waived by the parties expressly in writing²⁸. Further, a mediator so appointed cannot act as an arbitrator or a counsel/representative of a party in any arbitral or judicial proceeding which is subject

matter of the mediation proceedings or be presented as witness in any proceeding.²⁹

While for the appointment of an arbitrator, the grounds are elaborately set out in the Fifth Schedule of the A&C Act which “shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator”³⁰ based on the IBA **Guidelines on Conflicts of Interest in International Arbitration**, the Mediation Act provides no such guiding principles. We can expect similar guiding factors to be set out in the rules to be framed by the Mediation Council of India³¹ (*defined herein below*).

8. Mediation Proceedings: An Overview



- Place of mediation:** The mediation shall take place within the territorial jurisdiction of the court or tribunal of competent jurisdiction to decide the subject matter of the dispute, or at any other place by mutual consent of the parties.³² Parties may also conduct the mediation proceedings (including pre-litigation mediation) online, provided the parties agree to do so by written consent.³³
- Process:** Mediation is deemed to have commenced from the date a party receives notice invoking mediation under a mediation agreement. In case there is no such agreement, from the date of appointment or consent of the mediator to be appointed, whichever the case may be. The mediator is required to assist the parties in an independent, neutral and impartial manner guided by principles of objectivity and fairness. The mediator may meet the parties separately or jointly, as frequently as required. The mediator shall not be bound by the principles of Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.³⁴ This would ensure more flexibility from procedural requirements and party autonomy in arriving at an amicable settlement.
- Role of the mediator:** The mediator's role is limited to facilitating voluntary resolution of the dispute by assisting the parties in identifying the issue, advance better understanding, clarify priorities, explore areas of settlement, generate options and lay emphasis on the ultimate responsibility of the parties to take a decision regarding their claims - whilst ensuring that the mediator does not impose a settlement on the parties or give an assurance that the mediation may result in a settlement³⁵.
- Time-limit:** The mediation proceeding is required to be completed within a period of 120 days from the date fixed for the first appearance of the mediator. This may be extended by a further period mutually agreed upon by the parties, not exceeding 60 days³⁶. A corresponding amendment has also been proposed to the Commercial Courts Act 2015 in case of pre-institution mediation which currently requires the process of mediation to be completed within a period of three months from the date of application made by the plaintiff extendable for a further period of two months with the consent of the parties.³⁷

Mediation, as a voluntary process, cannot be coercively imposed on disputing parties. This is reflected in the Mediation Act. While honoring party autonomy, the Mediation Act seeks to adopt a balanced approach by introducing well-defined timelines to prevent the process from devolving into an indefinite and unproductive endeavor. It acknowledges the voluntary nature of mediation while also recognizing the need for structure to safeguard against unnecessary delays.

- Confidentiality:** Parties and participants involved in mediation are obligated to keep confidential several aspects, including statements, proposals, documents, and any other communication exchanged during the mediation.³⁸ 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.³⁹ This extends the protection under “without prejudice privilege” to parties to encourage them to engage in candid discussions towards an amicable settlement.⁴⁰

This section clarifies that confidentiality does not apply to mediated settlement agreements (*defined below*)

needed for registration, enforcement, or challenge.⁴¹ Additionally, mediators, participants, experts, and administrators involved in the mediation process are prohibited from disclosing mediation communications or contents in court or adjudicatory proceedings. However, this privilege does not shield information related to threats of criminal activity, domestic violence, child abuse, or statements posing significant threats to public health or safety and claims of professional misconduct or malpractice during mediation.⁴²

9. Mediated Settlement Agreements: Form, Registration, Enforcement and Challenge

- Form:** The agreement is required to be (a) in writing, (b) may be between some or all parties in the mediation, (c) settling some or all disputes between such parties, (d) authenticated by the mediator and signed by all the parties

voluntarily, failing which it would be void.⁴³ Further, the terms of the mediated settlement agreement may extend beyond the scope of matters that have been referred to mediation, unlike under Section 16 of the A&C Act where the scope of the award is required to be restricted to the scope of disputes referred to arbitration under the arbitration agreement. Therefore, unlike the A&C Act, where the award is confined strictly to the issues directly referred to arbitration, this approach acknowledges that disputes can be multi-faceted and interconnected. It may facilitate a more holistic and comprehensive resolution, as parties can negotiate on various aspects of their relationship or dispute, leading to a more comprehensive and lasting solution.

2. **Registration:** Parties have the 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 said act or as may be specified, within 180 days (subject to extension) of receiving the authenticated copy of the Agreement. Registration is not, however, compulsory.⁴⁴ The Mediation Act does not specify the implications of non-registration of the same⁴⁵.
3. **Non-settlement Report:** Where no agreement is arrived at between the parties within the time prescribed, or where the mediator is of the opinion that no settlement is possible, a signed non-settlement report is required to be submitted by the mediator to the parties in case of an ad hoc mediation and to the Mediation Service Provider (*defined below*) in case of an institutional mediation.⁴⁶ In furtherance of the interests of the parties, the non-settlement report would also be subject to confidentiality and the mediator shall not disclose reasons for non-settlement or any information related to the conduct of the parties during the mediation⁴⁷.
4. **Finality and Enforcement:** A mediated settlement agreement is final and binding on the parties.⁴⁸ Further, it shall be enforceable as a decree or judgement of a court.⁴⁹
5. **Challenge:** The grounds for challenging a mediated settlement agreement are four-fold, i.e., existence of fraud, corruption, impersonation and where the subject matter of dispute was not subject to mediation under Section 6 of the Mediation Act.⁵⁰ An application for challenging the settlement agreement may be filed within 90 days from receipt of the copy of mediated settlement agreement, subject to an extension of time as per the court's discretion in case of sufficient cause. While the Mediation Act is well-intended by restricting the grounds of challenge, they may be subjected to abuse by recalcitrant parties, defeating the purpose of the Mediation Act. Therefore, the interpretation by way of judicial precedents may provide some guidance in this respect.

10. Institutional Mediation under the Mediation Act

1. Mediation Service Providers

Section 40 provides that mediation proceedings may be conducted by a Mediation Service Provider which includes a body or an organization, or b) an authority constituted under the Legal Services Act, 1987, c) a court annexed mediation center, or d) any other body as notified, provided any of these are recognized by the MCI (*defined below*) for conduct of mediation proceedings under the Mediation Act.⁵¹ The Mediation Service Providers are tasked with the duty to *inter alia* accredit mediators and maintain a panel of mediators, provide all facilities such as secretarial assistance and infrastructure for the conduct of mediation proceedings, facilitate registration of mediated settlement agreements.

2. Mediation Council of India

The Mediation Act refers to establishment of a Mediation Council of India ("**MCI**")⁵², in the form of a corporate body, tasked with duties to *inter alia* develop India to be a robust center for domestic and international mediation. The MCI is also expected to provide for the manner to conduct mediation proceedings, recognize, renew, cancel or suspend Mediation Service Providers, maintain an electronic depository of mediated settlement agreements, submit annual report on implementation of the provisions of the Mediation Act to the Central Government⁵³. The MCI would also have the power to frame rules and regulations consistent with the provisions of the Mediation Act.⁵⁴ The provisions pertaining to the establishment of MCI have recently been notified.⁵⁵

11. Amendments to Existing Statutes

The Mediation Act also provides for corresponding amendments to be brought about in existing statutes, including the Indian Contract Act, 1872⁵⁶, the Code of Civil Procedure, 1908⁵⁷, the Legal Services Authorities Act, 1987⁵⁸, the Arbitration and Conciliation Act, 1996⁵⁹, the Micro, Small and Medium Enterprises Development Act, 2006⁶⁰, the Companies Act, 2015⁶¹, the Commercial Courts Act 2015⁶² and the Consumer Protection Act, 2019.⁶³

CONCLUDING REMARKS

While the concept of mediation remains completely voluntary and optional, the recognition and formalization of the process and method into a statute demonstrates its growth as an effective form of alternative dispute resolution. COVID 19 and the economic duress seen globally has ensured that speedier and cost-effective justice, even if non-adjudicatory, is critical.

The Mediation Act represents a significant step towards fostering a culture of alternative dispute resolution in India. Introduced with the primary objective of promoting and facilitating mediation, the Mediation Act emphasizes institutional, online, and community mediation as an effective means of resolving disputes in a timely manner. Its applicability spans a broad spectrum of cases, encompassing parties residing or doing business in India, as well as international commercial disputes involving foreign entities.

The journey of the Mediation Act through the legislative process, including the recommendations from the Standing Committee, demonstrates a conscientious effort to strike a balance between voluntary participation and judicial intervention – while protecting confidentiality and privileged communications of parties intending to settle disputes amicably. The establishment of MCI, the provisions for mediated settlement agreements, and the role of mediation service providers collectively lay the groundwork for a comprehensive mediation framework.

Having said that, there are clear misses like absence of statutory enforcement of mediated settlement agreements passed in mediations conducted outside India – in sync with the Singapore Convention. In a world where mediation is fast becoming an effective and preferred dispute resolution mechanism, the Mediation Act has, perhaps, lost an opportunity to provide for an all-encompassing law where mediated settlements entered into by parties anywhere in the world can be enforced in India. Thus, there is a pressing need for ratification and adoption of the Singapore Convention by India⁶⁴. This is likely to affect uptake of mediation in resolution of cross border commercial disputes significantly.

Further, while the A&C Act offers some guidance on the types of interim orders that can be issued, the Mediation Act lacks this level of specificity, leaving room for interpretation and potential variance in practice. The Mediation Act also lacks analogous guiding principles and does not furnish equivalent clarity for appointment of a mediator as provided by the Fifth Schedule of the A&C Act for the appointment of an arbitrator. It is hoped that the rules to be framed under Section 52⁶⁵ of the Mediation Act will bridge this gap.

The Mediation Act is a welcome step towards transforming the landscape of dispute resolution by offering parties an effective and efficient avenue to resolve conflicts voluntarily and without any form of adjudication.

– Soumya Gulati, Shweta Sahu & Sahil Kanuga

You can direct your queries or comments to the authors.

¹Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, “One Hundred Seventeenth Report on The Mediation Bill, 2021”, https://prsindia.org/files/bills_acts/bills_parliament/2021/SC%20Report_Mediation%20bill.pdf (13th July, 2022) (“Report”), Para 1.4, Page 3, Volume I

²Report, Para 1.7, Page 4, Volume I

³Report, Para 1.13, Page 6, Volume I

⁴The Mediation Act, 2023, Section 3 (h)

⁵Report, Para 1.14, Page 6, Volume I

⁶The Mediation Act, 2023, Section 61, The Sixth Schedule

⁷The Commercial Courts Act 2015, s 2(1)(c)

⁸The Mediation Act, 2023, Section 2, (i) – (iii)

⁹The Mediation Act, 2023, Section 2, (iv) and (v)

¹⁰Report, Para 3.29, Page 18, Volume I

¹¹The Mediation Act, 2023, Section 6 read with the First Schedule

¹²The Mediation Act, 2023, Proviso to Section 6(1)

¹³The Mediation Act, 2023, Section 4(1)

¹⁴The Mediation Act, 2023, Section 4(3)

¹⁵The Mediation Act, Section 4(5)

¹⁶Report, Page 83, Volume I

¹⁷The Mediation Act, 2023, Section 5(1).

¹⁸Commercial Courts Act, 2015, s 2(1)(i).

¹⁹Commercial Courts Act, 2015, s 12A; The Mediation Act, 2023, the Nineth Schedule.

²⁰The Mediation Act, 2023, Section 7(1)

²¹The Mediation Act, 2023, Section 7(2).

²²The Mediation Act, 2023, Section 8(1) and 8(2)

²³The Mediation Act, 2023, Section 9

²⁴The Mediation Act, 2023, Section 10(1)

²⁵UNCITRAL, *Model Law on International Commercial Arbitration* (1985), Article 12(1).

²⁶International Bar Association, IBA Guidelines on Conflict of Interest in International Arbitration. (2014), Part I (2) Conflict of Interest.

²⁷The Mediation Act, 2023, Section 10(2)

²⁸The Mediation Act, 2023, Section 10(3)

²⁹The Mediation Act, 2023, Section 17

- ³⁰The Arbitration and Conciliation Act, Explanation 1 to s.12 read with Fifth Schedule.
- ³²The Mediation Act, Section 38(f) and 52(2)(c)
- ³³The Mediation Act, 2023, Section 13
- ³⁴The Mediation Act, 2023, Section 30
- ³⁵The Mediation Act, 2023, Section 15
- ³⁶The Mediation Act, 2023, Section 16
- ³⁷The Mediation Act, 2023, Section 18
- ³⁸The Commercial Courts Act 2015, s 12A
- ³⁹The Mediation Act, 2023, Section 22
- ⁴⁰The Mediation Act, 2023, Sections 22(3), 23
- ⁴¹Privilege and Waiver: Without Prejudice Privilege, January 2021,
https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Privilege-and-Waiver-Part-II.PDF
- ⁴²The Mediation Act, Explanation to Section 22
- ⁴³The Mediation Act, Section 23
- ⁴⁴The Mediation Act, 2023, Section 19
- ⁴⁵The Mediation Act, 2023, Section 20
- ⁴⁶Report, Para 3.149, Page 46, Volume I
- ⁴⁷The Mediation Act, 2023, Section 21
- ⁴⁸The Mediation Act, 2023, Proviso to Section 21
- ⁴⁹The Mediation Act, 2023, Section 27(1)
- ⁵⁰The Mediation Act 2023, Section 27(2)
- ⁵¹The Mediation Act, 2023, Section 28
- ⁵²The Mediation Act, 2023, Section 40
- ⁵³The Mediation Act, 2023, Section 31
- ⁵⁴The Mediation Act, 2023, Section 38
- ⁵⁵The Mediation Act, 2023, Section 52
- ⁵⁶Notification S.O 4384 (E) [F.No. A-60011/45/2023-ADR] dated 09 October 2023
- ⁵⁷The Mediation Act, 2023, Section 58 read with the Third Schedule
- ⁵⁸The Mediation Act, 2023, Section 59 read with the Fourth Schedule
- ⁵⁹The Mediation Act, 2023, Section 60 read with the Fifth Schedule
- ⁶⁰The Mediation Act, 2023, Section 61 read with the Sixth Schedule
- ⁶¹The Mediation Act, 2023, Section 62 read with the Seventh Schedule
- ⁶²The Mediation Act, 2023, Section 63 read with the Eighth Schedule
- ⁶³The Mediation Act, 2023, Section 64 read with the Ninth Schedule
- ⁶⁴The Mediation Act, 2023, Section 65 read with the Tenth Schedule.
- ⁶⁵The Singapore Convention was ratified and adopted by most of these jurisdictions in their domestic legislation- Belarus, Ecuador, Fiji, Georgia, Honduras, Kazakhstan, Qatar, Saudi Arabia, Singapore, Turkey and Uruguay-
<https://www.singaporeconvention.org/jurisdictions>
- ⁶⁶Notified; Ibid at 55

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