

Resolving The Unresolved: A Transformative Approach Inviting India's Focus To Mediation - Draft Mediation Bill 2021

written by Smita Paliwal | December 13, 2021



"An ounce of mediation is worth a pound of arbitration and a ton of litigation!" – Joseph Grynbaum

The Ministry of Law and Justice on November 5th 2021 released the Draft Mediation Bill 2021[1] ("Bill") and invited public comments and consultation. The Draft Mediation Bill lays down several objectives including promotion, encouragement and facilitation of mediation – especially institutional mediation – for resolution of disputes. It also aims to provide a body for the registration of mediators and to encourage community mediation; and remarkably, works towards making online mediation an acceptable and cost-effective process facilitating the enforcement of domestic and international mediation settlement agreements.

Strong and standalone legislation on mediation is the need of the hour and the same has been advocated for by many experts in the field of Alternative Dispute Resolution ('ADR'). Unlike "Arbitration" and "Conciliation" which are governed under the provisions of the Arbitration and Conciliation Act, 1996, there is no umbrella legislation that governs mediation in India.

The General Assembly of the United Nations in its seventy-third session on December 20th 2018 adopted a resolution 73/198 on the United Nations Convention on International Settlement Agreements Resulting from Mediation[2], which paved the way for India to become one of the first signatories on August 7th 2019 to the document which is also known as "the Singapore Convention".

Blurring Boundaries Between Mediation And Conciliation (Draft Mediation Bill 2021):

In India, the terms "mediation" and "conciliation" are not used interchangeably. The Hon'ble Supreme Court of India in the case of *Salem Advocate Bar Association v. Union of India*[3] considered the report submitted by the committee for enabling the better implementation of Section 89 of the Code of Civil Procedure, 1908 ("CPC"). The committee constituted by the Apex Court drafted the Model Rules, 2003 which served and still serves as the standard for various High Courts in framing their own mediation rules. In yet another landmark case of *Afcons Infrastructure Ltd. and others v. Cherian Varkey Constructions Co. (P) Ltd.*[4], the Supreme Court of India settled several procedural aspects of a reference under the aforesaid Section 89 of

CPC.

However, a paradigm shift is evident from the definition of "Mediation" provided under Section 4 of the Bill. It took away the difference between the terms and aimed to set up a practice of the usage of the terms "mediation" and "conciliation" interchangeably within the scope and for the purposes of this Bill. It blurs out the difference between the terms and defines the term "mediation" as hereunder:

"Mediation means a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of the dispute"

Classification And Significant Provisions Of The Draft Mediation Bill 2021

The Bill has been divided into four parts as follows:

1. Part-I – Domestic Mediation;
2. Part-II – Community Mediation;
3. Part-III – Enforcement of International Commercial Settlement Agreements resulting from Mediation;
4. Part-IV – Miscellaneous

Several salient features and significant provisions of the Mediation Bill from a commercial outlook that are more likely to affect commercial transactions and businesses are listed out for a better understanding.

1. Mediation Agreement:

Section 5 of the Bill provides for the existence of an agreement in writing by or between parties to submit to all or certain disputes in respect of any relationship whether contractual or otherwise. With a striking similarity between the already recognized practice of entering into an "arbitration agreement" pursuant to Section 7 of the Arbitration and Conciliation Act, 1996, the present Bill aims to make the practice of entering into a "mediation agreement" a contractual mandate and necessity.

• Pre-litigation Mediation:

Back in the year 2018, an amendment to the Commercial Courts Act, 2015 (CAA) was promulgated with an attempt to insert Section 12A titled 'Pre-Institution Mediation and Settlement'. The said provision mandated the plaintiff seeking to institute a suit for adjudication of any commercial dispute under the CAA, to first initiate a pre-institution mediation for the same dispute. The only exception under CAA is if there is an urgent requirement of any relief from the Court. However, despite the introduction of this provision, effective implementation of the same could not be reached till this date due to several non-starter reports/failure reports in the matters.

Now, the Mediation Bill seeks to mandate a similar process through Section 6 in the Bill which is parallel to the existing Section 12A of the CAA; a section that provides and mandates the settling of disputes by pre-litigation mediation through a registered mediator with the Mediation Council of India or a Court Annexed Mediation Centre or a Mediation Service Provider recognized under the provisions of this Act authorized to conduct pre-litigation mediation.

• Interim relief(s):

With a striking similarity, the Bill further provides for another standalone provision under Section 8, similar to Section 9 of the Arbitration and Conciliation Act, 1996, which grants power to parties to approach a competent

jurisdictional Court in exceptional circumstances, seeking urgent interim measures before the commencement of or during the continuation of mediation proceedings.

- The time-bound Mediation process:

As mandated under Section 20 of the Mediation Bill, it makes an ineffectual effort, with the introduction of a time-limit, for completion of the mediation process within 90 (ninety) days from the date of commencement of mediation with a further extension of ninety days with the consent of parties.

- Recognition, authentication and registration of 'Mediated Settlement Agreement':

In an attempt to recognize and enforce the Mediated Settlement Agreement including the final and interim agreements between the parties to mediation, Section 21 of the Mediation Bill further provides for the recognition of such agreements resulting from mediation, settling some or all of the dispute between mediating parties which further needs to be authenticated by the mediator. Furthermore, sub-clause 6 of Section 21 further recognized electronically signed and authenticated mediated settlement agreements resulting from online mediation.

In addition to the same, the provision under sub-clause 7 and 8 of Section 21 in the Bill also mandates registration of such Mediated Settlement Agreement with authorities constituted under the Legal Services Authorities Act, 1987 and further mandates issuance of a unique registration number to such settlements, within ninety (90) days from the date of receipt of the copy of such Mediated Settlement Agreement.

- Provision to safeguard confidentiality:

The loosely worded confidentiality clause under Section 22 of the Bill attempts to afford confidentiality to the acknowledgements, opinions, suggestions, promises, proposals, apologies, admissions made during the mediation, acceptance, or willingness to accept proposals, and documents prepared solely for purpose of mediation. The provision further ensures the maintenance of confidentiality to all mediation proceedings except mediated settlement agreements which gives an impression of being prima facie contradictory. In addition to the same, stretching the scope and ambit of the same provision, the sub-clause (3) to Section 22 provides that any audio or video recording of the mediation proceedings shall be kept confidential by the parties and the participants including the mediator.

Furthermore, the sub-clause (4) – in an attempt to restrict and safeguard the confidentiality of the communications and information during the mediation – introduces a restrictive covenant regarding the inadmissibility of such communications and information before a Court or Tribunal.

- Online Mediation:

Given due respect to the technological advancement in the field of online dispute resolution and in an effort to keep up with the need of the hour, the present Bill under Section 32 recognizes Online Mediation conducted by the use of applications and computer networks. Furthermore, the said provision mandates online mediation to be conducted in adherence to the Regulations which are to be specified by the Mediation Council, in the light of provisions of Information Technology Act, 2000. In addition to the same, notably, Section 33 of the Bill further provides that Online Mediation can be resorted to at any stage of the mediation process with the written consent of

the parties.

- Incorporation and establishment of Mediation Council of India:

The present Bill under Section 35 aims to establish a Mediation Council of India to perform duties and discharge functions as laid down in the Bill. It is to be noted that a relatively similar amendment to the Arbitration and Conciliation Act, 1996 was brought in the 2019 Amendment Act, for establishing an Arbitration Council of India as an independent body and promoting Alternative Dispute Resolution in India. Comments on various Rules framed under the Section 84 of the Arbitration and Conciliation, 1996 were invited by the Ministry of Law & Justice, from all stakeholders.

The present Bill also mandates the incorporation and establishment of the Mediation Council of India as a body corporate with various duties, powers and functions as laid down under Section 42 of the Draft Mediation Bill 2021.

- Recognized Mediation Service Provider and Mediation Institutes:

The Mediation Service Providers and Mediation Institutes are a relatively new concept that the present Bill seeks to introduce under Section 43 of the Draft Mediation Bill 2021. The Mediation Service Provider and the Mediation Institute, as per the provisions under the Draft Mediation Bill 2021, shall be recognized and accredited by the Mediation Council under the Regulations to be made thereon.

1. Recognition and Enforcement of International Mediation Settlement Agreement:

The International Mediation Settlement Agreement has been defined and recognized under the provisions of Part-III of the Mediation Bill following hot on the heels of India ratifying the United Nations Convention on International Settlement Agreements resulting from Mediation. As per Section 50 of the Bill, International Mediation Settlement Agreements shall be treated as binding for all purposes and shall be enforceable under Part-III of the Mediation Bill in any legal proceedings in India.

Key Challenges:

1. The unruly horse still let loose on the track:

The infamous unruly horse of the “public policy” has been completely left untouched in the Bill. The drafting committee ought to have taken assistance from numerous precedents of the Apex Court on “public policy” to clearly lay out grounds for challenge to the enforcement of the Settlement Agreement. The issue of it being in contravention with the public policy of India has been kept open-ended as similarly erred in the Arbitration and the Conciliation Act, 1996. This could lead to multiple disputes and litigations at the time of enforcement of any such Settlement Agreement.

- Contradictions in confidentiality provisions:

The confidentiality provision under Section 22 of the Bill is loosely worded and does not cover it on all four corners. Furthermore, Section 22(3) mentioned in the Bill, is in direct contravention with Rule 20(5) of the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003. The same could result in a prospective challenge to the constitutional validity of the provision in so far as it provides and permits any audio or video recording of the mediation proceedings by the parties, which are specifically discouraged under Rule 20(5) of the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003.

- Non-starter/Failure reports:

Numerous non-starter reports/failure reports issued by jurisdictional Legal Services Authority (‘LSA’) threaten to sabotage the entire process of

encouraging mediation before instituting a suit. In the recent past, similar chaos has arisen in proceedings mandated under Section 12A of the Arbitration and Conciliation Act, 1996 wherein the inability or refusal of parties to come forward for mediation leaves the LSA with no other alternative but to issue a non-starter/mediation failure report. The present Mediation Bill does not address the issue regarding the failure of mediation.

- Overlapping and proposed amendments to various legislations:

The Bill aims and proposes various amendments to overlapping legislations to streamline the mediation process in India. It proposes to amend Exception I to the Section 28 of the Contract Act, 1872[5]; Part III of the Arbitration and Conciliation Act, 1996 containing Section 61-81[6]; Section 89 of the Code of Civil Procedure[7]; Section 12A of the Commercial Courts Act, 2015[8]; Section 4(f), Section 7(2)(c), Section 10(2)(b) of the Legal Services Authorities Act, 1987[9]. The legal intricacies of these proposed amendments after the passing of the Mediation Bill may lead to inordinate delay since these overlapping legislations have to be accordingly amended after the passing of the Bill.

Comments

The absence of a strong legal framework for mediation has always been disruptive to the process of ADR in India. The existing ADR mechanism for mediation having overlaps with various legislations has proven to be inefficient. As per the recent data of the National Judicial Data Grid ('NJDG'), as of 06.12.2021, 1,07,59,149 total Civil Cases are pending across the country.[10] For reducing this humungous number of pending cases, the Indian government (along with the judiciary) have time and again introduced and encouraged various modes of ADR. However, the execution and implementation of these mechanisms have always posed an imminent challenge to the entire scheme of ADR.

From an effective reading of the present Mediation Bill in line with existing legislations in India, it is accurate to state that the Bill positively addresses and aims to bridge that very gap in the Indian legislations between the modes of ADR with a special focus on Mediation. It also ensures a more efficient and faster resolution mechanism to settle disputes commercial and otherwise, which may arise between the parties.

The number of pending cases in India could be reduced to a great extent if the provisions of the Mediation Bill along with other enactments for ADR are strictly adhered to, without diluting their essence. The Mediation Bill 2021 is an excellent move that could prove to be a milestone development because it provides a much-awaited boost to the process of resolution in the field of ADR and ought to seriously encourage dispute resolution via well-tempered mediation.

In the present scenario, where the world is still struggling with numerous challenges due to the outbreak of the Coronavirus (COVID-19), due regard given to the process of online mediation in the Mediation Bill is highly commendable. The same should prove to be cost-efficient and will assuredly result in the prevention of health risks associated with the physical appearances of parties in cases and disputes.

Having said that, the operative issues of the entire mediation process highlighted above – along with the setting-up of the online mediation facilities across courts, forums and appropriate authorities, etc – might pose the biggest challenge to the effective implementation of the provisions

of the Mediation Bill; and the same needs to be tackled efficiently and effectively.

- [1] <https://legallaffairs.gov.in/sites/default/files/DRAFT-MEDIATION-BILL-2021.pdf>
- [2] AIR 2005 (SC) 3353
- [3] MANU/SC/0525/2010
- [4] Schedule-III of the Draft Mediation Bill
- [5] Schedule-IV of the Draft Mediation Bill
- [6] Schedule-V of the Draft Mediation Bill
- [7] Schedule-VI of the Draft Mediation Bill
- [8] Schedule-VII of the Draft Mediation Bill
- [9] https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard

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