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Mandatory Pre-Institution Commercial Mediation In India: Premature Step In The Right Direction?

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The Indian parliament passed the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 ("Bill") on 10 August, 2018. In a potentially significant development, section 12A of the Bill stipulates mandatory pre-institution mediation i.e. the plaintiff is mandatorily required to exhaust the remedy of mediation prior to filing a suit in accordance with the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 ("Rules"), unless the suit contemplates any urgent interim relief under the parent Commercial Courts Act, 2015 ("Act")

Why is this Bill potentially significant?

Mediation has long been considered the poorer cousin to litigation and arbitration in India. In particular, commercial disputes constitute only a fraction of mediations conducted by existing institutions, which largely mediate family, matrimonial and property disputes. Given that commercial disputes constitute a significant proportion of disputes involving Indian parties, urgent legislative, institutional and attitudinal reforms are required to promote commercial mediation. In light of this, the introduction of mandatory pre-institution mediation could provide much-needed impetus to promote commercial mediation, enhance the acceptance of mediation as a viable and preferred dispute resolution mechanism in India and further larger objectives of improving India's Ease of Doing Business ranking (currently 100) and facilitating quicker resolution of commercial disputes.

Key features

The Bill envisages the opt-out model of mediation, which has enjoyed considerable success in countries like Italy and Turkey in the recent past. In this model, parties are required to attend an initial information session with a mediator. The session provides them an opportunity to learn more about mediation and make an informed decision about whether to attempt it or initiate litigation. Voluntariness of the process is protected as parties are not obligated to participate in an actual mediation session. Any mediated settlement assumes the status of a deemed arbitral award under section 30(4) of the Arbitration and Conciliation Act, 1996 and can accordingly be enforced as an arbitral award.

The Rules appear to prescribe the facilitative model of mediation as they expressly refer to the principles of self-determination and voluntariness. Further, confidentiality of the mediation as well

as the principal ethics to be abided by the mediator are also prescribed. The mediation is required to be completed within three months from the date of the plaintiff's application to initiate mediation, which can be extended by two months upon both parties' consent.

Premature step?

Although a step in the right direction, there is no denying that the implementation and success of the envisaged mechanism remain highly questionable. Perhaps the biggest hindrance could prove to be the authorisation of the State Authorities and District Authorities (constituted under the Legal Services Authorities Act, 1987) as the relevant authorities to conduct the pre-institution mediation.

The object of the Legal Services Authorities Act is to "provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities". To this end, State Authorities and District Authorities ("LSA Authorities") provide legal services to eligible persons and periodically conduct Lok Adalats ("people's courts"), among other functions and services.

While an analysis of the Legal Services Authorities Act is beyond the scope of this post, it suffices to state that the LSA Authorities are already immensely overburdened. This problem only amplifies when you consider (1) the fact that the Bill lowers the required pecuniary threshold of a suit from one crore Indian rupees (approximately USD 142,000) to three lakh Indian rupees (approximately USD 4,285); and (2) the broad definition of "commercial dispute" under section 2(1)(c) of the Act. While a lower pecuniary threshold is an arguably well-intentioned amendment to allow more people to access commercial courts and facilitate resolution of more commercial disputes, it is likely to adversely impact the pre-institution mediation. A broad definition of "commercial dispute" combined with a lower pecuniary threshold is more likely than not to result in more suits filed under the Act, which in turn means more pre-institution mediations – the LSA Authorities are simply not equipped with the appropriate capacity currently to effectively deal with this, especially without compromising on the justice administered to the weaker sections of society, which is of course an undesirable outcome.

Moreover, it is likely that the LSA Authorities lack adequate and relevant experience and expertise to mediate commercial disputes as the disputes they typically address pertain to labour, family and insurance matters. Experience and training in commercial mediation is always preferable as the issues involved can be fairly technical and a skilled mediator in this regard can ensure effective dialogue and a workable settlement. Even if one were to legitimately reason that facilitative mediation does not necessarily require a mediator to be trained in the area of dispute, there is no guarantee that the officers and members of the LSA Authorities have any experience at all in any sort of facilitative mediation, let alone any training. Efficient, useful and effective mediation of commercial disputes requires, at the very least, some basic minimum training in and exposure to mediation. This is all the more essential in a country like India where awareness of mediation is minimal and, therefore, parties rely on the mediator to effectively guide the process. In my opinion, in this respect, the Bill reflects a widely-held perception in India that anyone can mediate and that mediation is not a distinct discipline which requires its own skills-set.

Ideally, the successful implementation of any reform, such as pre-institution mediation in this case, requires adequate infrastructure and resources to be established and available prior to its introduction. Italy and Turkey invested in resource-building prior to their respective pre-institution mediation reforms, which have played a pivotal role in the success of the reforms. India's

mediation machinery is minimal – there is no pool of certified accredited mediators, no central statute governing mediation and opportunities to be trained are limited. The legislature should have taken into account these constraints and designated external institutions and centres dedicated to ADR and mediation as well as mediation centres attached to courts as the responsible authorities. Such institutions and centres have empanelled mediators who are certified and have undergone certain minimum training. In addition, they are likely to have more experience and skills in commercial mediation than the LSA Authorities.

Further, section 12A creates a carve-out from mandatory mediation for "urgent interim relief" – neither the Act nor the Bill clarifies what constitutes an "urgent" interim relief. This could potentially be misused by parties and/or counsel to wriggle out of participating in mediation or delaying the same, which in turn would defeat the overall objective of the statute. In addition, it is not clear if pursuit of the urgent interim relief temporarily delays the mediation or eliminates the mandatory requirement to mediate altogether.

Lastly, in my opinion, there are two important questions to consider – (1) should there be any monetary sanction if either party does not appear for mediation or participate in the mediation seriously?; and (2) is the three-month time period (extendable by two months) for completion of the mediation too long? Mediators and practitioners in India agree that these are relevant issues, however these are complex issues to which there are no easy/straight-forward answers and merit detailed analysis. This is all the more so in India where mediation is nascent, and resources and awareness limited. For instance, who would determine whether or not a party participated seriously and on what basis? And would a penalty actually guarantee serious participation or only encourage parties to pretend to be participating seriously? Likewise, would a shorter time period actually be feasible given the capacity crunch highlighted above and instead have an adverse impact on the quality of mediation? While a detailed analysis of these issues is beyond the scope of the post, they are definitely worth deliberating and examining in the context of the Bill.

Concluding thoughts

While urgent reforms are required to promote mediation in India, and in particular commercial mediation, any such reform requires an enabling environment to succeed, which India currently lacks. Allocation of the responsibility to the LSA Authorities reflects short-sightedness and lack of careful thought on the part of the legislature. Now that only the President's assent is required to make the Bill into law (which will almost certainly be given), it remains to be seen how this reform will work in practice. A silver lining, perhaps, is that this Bill may hopefully generate discussion and awareness about commercial mediation, which could lead to more sensible initiatives and reforms in the future.

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