

# Kluwer Mediation Blog

## A Critical Analysis of the Indian Mediation Bill 2021

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The quest for India's comprehensive legislation on commercial mediation has culminated in the formulation of the Draft Mediation Bill 2021 ("**Bill**"). The Bill was tabled by the Union Law Minister in the Indian Parliament in December 2021, after which it was referred to the Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice ("**Committee**") for deliberations. In essence, the Bill aims to promote, strengthen, and consolidate the law on commercial mediation within the Indian legal framework to alter the mediation landscape in India.

The Bill contains several laudable features, such as the recognition of a mediated settlement agreement under the Indian Civil Procedure Code 1908 ("**CPC**"), right of parties to seek urgent interim relief in courts before the commencement of, or during the continuation of mediation proceedings, provisions in relation to timely completion of mediation proceedings, community mediation and the establishment of a Mediation Council of India to institutionalize mediation. Despite the above, the author argues that there are several gaps in some of the key provisions of the Bill that makes the Bill a work in progress. This piece is aimed at critically analysing those provisions and suggesting suitable amendments to the Bill to make it a water-tight piece of legislation.

### The Unwarranted Juxtaposition of Mediation and Conciliation

Under Section 4 of the Bill, the definition of Mediation includes conciliation within its ambit. This is problematic for two reasons. Firstly, conciliation and mediation are two distinct concepts in law. In conciliation, the conciliator plays a far more proactive role and is empowered to propose settlement terms (See Section 67(4) of the Indian Arbitration and Conciliation Act 1996 ("**Arbitration Act**"). On the contrary, the Bill does not contemplate any such powers for a mediator. In fact, Section 18 specifies that the role of a mediator is that of a facilitator and nothing beyond. Secondly, section 61 read with the Sixth Schedule seeks to do away with the provisions on conciliation under the Arbitration Act while the Bill itself does not have separate provisions for conciliation. This would have the effect of dispensing with the concept of conciliation under Indian law altogether and lead to anomalous results where parties will no longer have effective recourse to conciliation under the Arbitration Act. It is therefore, suggested that conciliation be excluded from the ambit of Mediation under the Bill since the law on conciliation already stands codified in the Arbitration Act.

## Mandating Pre-Litigation Mediation: A Blessing in Disguise?

One of the distinguishing features of the Bill is the introduction of a mandatory pre-litigation mediation. According to section 6(1), the parties to a dispute *shall* attempt to first settle their disputes through mediation before filing any suit or proceeding in courts. Interestingly, this section makes this provision applicable regardless of the existence of a mediation agreement between parties. In other words, parties would be required to mandatorily explore mediation before litigation even if no agreement to mediate exists between them. Furthermore, this pre-litigation mediation process is also supplemented by an opt-out mechanism. Under section 19(1) read with section 25 (d), a party may withdraw from mediation at any time after the first two mediation sessions by communicating its intention to do so to the mediator and the other party. The proceedings would stand terminated as on the date of such communication having been made.

From a policy perspective, enforcing mandatory recourse to mediation prior to litigation can lead to expeditious settlement of disputes by nipping them in the bud. It will reduce costs that parties would otherwise incur in litigation, which is traditionally understood to be expensive in India. It will also reduce the judiciary's burgeoning pendency of caseload. The issue that however needs to be addressed is whether mandatory mediation as a pre-litigation tool, in the manner it is sought to be introduced in the Bill, can help achieve the objectives of the Bill.

In this regard, the author argues that the language of section 6(1) does more harm than good. Firstly, the import of the words "*Subject to other provisions of this Act*" is not clear and to a certain extent unnecessary. If the provision is intended to be mandatory, then subjecting it to other sections in the Bill is inconsistent. Secondly, the provision does not indicate what kind of "*steps*" would constitute adequate compliance with the section. Furthermore, the option of opting out from the process after attending two sessions is likely to incentivize unwilling parties to exploit these conditions to first submit their disputes to mediation and then eventually resort to courts/arbitration anyway, thus relegating the entire process to an empty procedural formality. If the intent of the lawmakers is to ensure that every dispute ought to be mediated before it reaches the courts (except the ones held to be outside the purview of mediation under the Bill), then there is no reason for the Bill to give an option to parties to circumvent the process. Thirdly, and perhaps most importantly, mandating mediation prior to litigation could be construed as invasive of party autonomy. Coercing unwilling parties to mediate their disputes against their will can be counterproductive. One needs to keep in mind that mediation is a voluntary process where parties willingly share sensitive information with a neutral third party.

Pursuant to a recent decision of the Hon'ble Supreme Court of India where pre-litigation mediation has been held to be mandatory under the Commercial Courts Act 2015 ("**Act of 2015**"),<sup>[1]</sup> it is possible that the legislature may be implored to retain section 6(1) as it stands today to bring parity with both sets of laws. However, circumspection ought to be exercised while mandating mediation across the board. In this context, it is relevant to note that as of July 2022, the Committee has submitted a report to the Lok Sabha (Lower House of Parliament) Speaker and the Rajya Sabha (Upper House of Parliament) Chairman making extensive recommendations to the Bill and in particular, cautioning against making pre-litigation mediation compulsory on the ground that such a tool may be used by truant litigants to delay the disposal of cases. To strike a balance between the individual interest and policy considerations, it is suggested that section 6(1) of the Bill be reconsidered, and pre-litigation mediation be made optional, at least at the inception stage. The

other alternative to make it mandatory in only those cases where no interim relief is contemplated by the parties akin to Section 12(A) of the Act of 2015. It may perhaps also be more prudent to gauge the performance of an optional provision first and then consider making the same mandatory basis such performance.

### **The Shaky Ground That Interim Relief Stands On**

Section 8(1) of the Bill permits parties to approach courts for urgent interim relief only if “*exceptional circumstances exist*”. In the author’s view, the expression ‘exceptional circumstances’ is ambiguous and open to subjective interpretation. It also carries the risk of courts adopting unreasonable and/or non-uniform standards to decline interim relief in a purported attempt to preserve the sanctity of the mediation process. Therefore, to harmonize the interests of parties and the interest of the Bill vis-a-vis mediation, the expression “*exceptional circumstances exist*” should either be deleted, or its contours should be laid down in the Bill by way of an Explanation, indicatively if not exhaustively. This will also aid in streamlining the jurisprudence on this subject.

### **Restricting Party Autonomy in Choosing Mediators**

The proviso to Section 10(1) of the Bill provides that “*mediator of any foreign nationality shall possess such qualifications, experience and accreditation as may be specified*”. As it stands, this proviso is directly opposed to the cardinal principle of party autonomy. Parties to a collaborative ADR process such as mediation should be able to choose any mediator of a foreign nationality as they deem fit without being unduly fettered by any criteria prescribed by the Mediation Council of India in this regard [See Section 53(2)(b) of the Bill]. It is relevant to note here that a similar law prescribing qualifications for arbitrators was introduced in the Arbitration Act in 2019 by way of an amendment. The provision was however, heavily criticized for being too restrictive, so much so, that it was eventually deleted in 2021. Accordingly, the proviso to Section 10(1) of the Bill also warrants similar consideration.

### **Other areas that need a re-look**

Apart from the above, the Bill lacks nuances in several places. Under Section 15, the Bill has tied the jurisdiction of a mediation proceeding to that of courts. In other words, a mediation is mandated to take place where the court has jurisdiction to try the dispute. This is unnecessary. In an ADR system, parties are free to choose the place of mediation as well as the jurisdiction of courts if such decision is in parity with the CPC and conflict of laws. The consequences of non-registration/non-stamping of a mediated settlement agreement have also not been discussed under the Bill.

There is no doubt that the roll out of this Bill is a positive development. If enacted into law, India will be one of the few jurisdictions in the world to have its own statute on commercial mediation, like Singapore, Hongkong, Brazil and the US. This is also relevant because the new law (when enacted) will provide the much needed domestic legal framework to enforce international mediated settlement agreements under the Singapore Convention on Mediation, to which India is a

signatory. It will go a long way in boosting investor confidence in India as well. The Bill in its present form, however, is, by no means complete. There is an urgent need to address the inconsistencies in the Bill to make it a robust piece of legislation.

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References[+]

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