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MEDIATION BILL, 2021: AN OLD WINE IN A NEW BOTTLE?

– Varun Chetan Chikhale¹

“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, expenses, and waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good man. There will still be business enough.” – Abraham Lincoln

ABSTRACT

This research aims to decode the draft mediation bill, 2021 introduced in the Rajya Sabha. In December 2021, the Union Law Minister tabled the draft Mediation Bill (the “Bill”) in parliament. Due to significant opposition, the Bill was sent to the Committee on Law and Justice for further scrutiny. This article also lists some salient features of the Bill. Further, this research paper aims to reveal the skeletons in this bag of mediation bill, it aims at making the flaws and a few erroneous mistakes which are res ipsa loquitur. The paper also aims to highlight the international impact and view of the bill and its co-relation with existing acts and regulations. The Draft Bill seeks to empower and promote mediation in India, namely institutional mediation for conflict resolution, as well as to encourage community mediation and make internet mediation a viable and cost-effective option. It suggests enacting separate mediation legislation and considers the international practice of using the terms 'conciliation' and 'mediation' alike because India is a party to the Singapore Convention on Mediation. The point of this study is to give a brief analysis of the Draft Bill, noting some of its key features as well as inadequacies in the legislation that deserve additional consideration. Resolving such points would enable the Mediation Act, when passed, provides precise and comprehensive provisions that would, in actuality, foster mediation as an alternative conflict resolution tool, this has been also considered while writing this paper. The bill states that the mediation settlement agreement will have the status of a judgment or decree of a court, which will be binding. This will go a long way in ensuring that agreements

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arrived at through mediation are recognised and enforced by law, such aspects of the bill have also been discussed by the author.

INTRODUCTION

“An ounce of mediation is worth a pound of arbitration and a ton of litigation!”- Joseph Grynbaum, this adage speaks nothing but the truth that litigation is becoming costly, time-consuming, complicated and often unsatisfactory day by day. Speaking of the situation in India, delayed justice has somewhat become the *mantra* of the courts in corporate and civil disputes. Even after getting a decree in favour, the implementation or execution of the same takes up a lot of time. The Chief Justice of India NV Ramana has earlier said that going to courts after a dispute should be the "last resort" and suggested exploring options like arbitration, mediation and conciliation. He emphasized making mediation and Alternate Dispute Resolution (ADR) as well as other out of court settlement mechanisms the first step toward resolving disputes. “Justice does not always require black gowns & elaborate arguments future belongs to mediation” this was the oracle provided by the CJI while addressing Virtual Mediation Summer School, 2021. Mediation is the process of settling conflicts with the assistance of an unbiased third party who aids the parties in reaching a mutually acceptable solution. The cornerstone of mediation is that the mediator does not try the facts or decide the issues. He only serves as a conduit. Mediation, unlike arbitration, is not organised or institutionalised in India. The newly proposed Draft Mediation Bill is a step toward establishing mediation as a technique of conflict resolution. This paper seeks to illustrate the current structure governing mediation, as well as its inadequacies. The draft bill was offered by the government to address flaws. However, the draught bill has aroused several issues that must be addressed immediately. If we talk about India then mediation can be dated back to the Code of Civil Procedure 1908 and the Arbitration and conciliation act, 1996. These existing legal frameworks talk about mediation in nuances and do not provide an in-depth look at the subject. A few notable cases which draw out the importance of mediation would be, firstly The Supreme Court emphasised various ambiguities or drafting flaws under Section 89 of the CPC in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*², such as a lack of clarity on the usage of terminology like 'judicial settlement' and 'mediation.' The clause does not specify the stage at which the dispute should be referred to mediation. Likewise, there are no common rules of procedure regulating mediation; hence,

²Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P)Ltd. <https://main.sci.gov.in/jonew/judis/36579.pdf>

sessions are conducted following the norms established by each High Court. All of these circumstances have made it difficult to harvest its full benefits. Secondly The Supreme Court, in the case of *MR Krishna Murthi v. New India Assurance Co. Ltd.*³, directed the government to investigate the viability of establishing an Indian Mediation Act to address different elements of mediation in general. The Court also urged the government to investigate the viability of establishing a Motor Accidents Mediation Authority (MAMA) by amending the Motor Vehicles Act. During the interregnum, NALSA was ordered to establish Motor Accident Mediation Cells, which can operate freely under NALSA's auspices or be handed over to MCPC.

CONSPICUOUS ASPECTS OF THE BILL⁴

DEFINITION OF MEDIATION:As per Section 2 of the Draft Bill, 'domestic mediation' has been defined as one conducted in India, where:

1. All or both parties habitually reside in or are incorporated in or have their business in India
2. The Mediation Agreement provides that the Mediation Act, 2021 would apply to the mediation
3. The mediation is an international mediation

As per Section 3(c) of the Draft Bill, 'international mediation' has been defined as a mediation that relates to commercial disputes arising out of legal relationships, contractual or otherwise, under the law in force in India and where at least one of the parties, at the time of conclusion of that agreement, is:

1. An individual who is a national of, or habitually resides in, any country other than India
2. Body corporate including limited liability partnership of any nature, with its place of business outside India
3. An association or body of individuals whose place of business is outside India
4. The government of a foreign country

MANDATORY PRE-LITIGATION MEDIATION AND SETTLEMENT:

³MR Krishna Murthi v. New India Assurance Co. Ltd <https://indiankanoon.org/doc/179274439/>

⁴The draft mediation bill, 2021 <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/Mediation-RS%20int-20%2012%2021-E.pdf>

Section 6(1) of the Draft Bill states that a party "shall" take steps to settle disputes through pre-litigation mediation following the provisions of the Bill before filing any suit or proceeding in any Court or Tribunal, and this can be done "regardless of the existence of any Mediation Agreement."

DUE RECOGNITION FOR ONLINE MEDIATION

Chapter 6 of the Draft Bill acknowledges online mediation established by utilising programmes and computer networks, which can be used entirely or partially at any stage of the mediation process, with the written approval of the parties. The provisions of the Information Technology Act of 2000 regulate the conduct of all such online mediations.

FOUNDATION OF THE MEDIATION COUNCIL OF INDIA: Chapter 7 of the Draft Bill embodies the establishment and incorporation of the Mediation Council of India, as well as the broad tasks, powers, and activities that it would perform.

COMMUNITY MEDIATION: Section 47 of the Draft Bill specifies the types of conflicts that may be resolved by community mediation, namely any disagreement that is likely to disrupt peace, harmony, and tranquillity among the inhabitants or families of any region or neighbourhood. It also specifies the kind of people who may be included on the mediation panel by the relevant authorities, such as people of standing and integrity who are regarded in the community, representatives of area/resident welfare organisations, and so on. Section 48 of the Draft Bill also outlines the method for community mediation.

PROVISIONS THAT NEED TO BE REVISITED

Few of the sections and terminologies in the draft bill have been left ambiguously and these are the crux of the bill. Hence following are the sections and parts of sections which need to be revisited and clarified before the bill reaches its final stage:

1. Section 2 of the proposal establishes requirements for the mediation centres' territorial jurisdiction. The rationale for Section 2(i)(iii) should be reconsidered since the phrase "place of business having the closest link to the mediation agreement" is not clearly defined. Such sloppy writing might lead to a variety of perspectives. As a result, the framers should characterize the phrase to avoid future disputes regarding court jurisdiction.
2. Section 7 specifies that mediation shall not be performed in connection with any of the issues outlined in the draft's Schedule II. It is worth noting, however, that Schedule II is labelled "disputes that may not be suitable for resolution through mediation." Varying connotations result from the use of two different terms (shall and

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may). As a result, making the terminology uniform under the aforementioned laws would simplify their interpretation.

3. The procedure of required pre-litigation mediation ("mandatory mediation") was incorporated in Section 6 of the draught law. It is perceptible that the provision's legislative goal is to promote a mediation culture in India. Nevertheless, the legislators neglected to note that India has sufficient infrastructure for forced mediation, such as a sufficient number of mediators and mediation facilities, among other things. Compelling hesitant parties to participate in mediation can also be detrimental. Reluctant parties may employ Section 26(1) of the proposed law, which states that parties may disengage from mediation proceedings after speaking with the mediator, provided they have attended one session, reducing mandated mediation to a procedural formality.
4. Section 29 of the proposed law provides that parties may dispute the mediated settlement agreement based on fraud, corruption, or other grounds within three months of obtaining the settlement agreement. The provision refutes the common norm that the limitation period runs from the date of revelation of the fraud, not the date of receipt of the alleged agreement. As an outcome, there is a need to address the problems raised by the limitation period under the aforesaid point.

STEPS TO BE TAKEN TO HELP MEDIATION REACH ITS MAXIMUM LEVEL IN INDIA

In India, there is an urgent need for a unified statute that only governs the mediation process. More than 18 additional nations, including Singapore, Malaysia, and Ireland, have mediation legislation (which plays a regulatory role). The Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC) have developed the SIAC-SIMC Arb-Med-Arb Protocol (AMA Protocol) to manage commercial contract disputes that include an "Arb-Med-Arb" provision.

1. Widespread public knowledge (especially among parties, attorneys, judges, and other players) with simple participation in Mediation.
2. To make parties feel at ease, Mediation Centres require strong infrastructure and a consistent structure.
3. A strategy for selecting mediators as well as effective training norms for mediators should be devised. Hence the need to safeguard standardised training programmes for prospective mediators, as well as information about the mediators' professional and

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educational origins, including prior mediations undertaken, areas encompassing the issues at stake in prior mediations, competence in another discipline (s), if any, and so on.

4. Multiple Mediation drives should be carried out by courts at diverse scales, whether at the district or national level. These activities may be quite effective, assisting in the clearance of vast caseloads pending before multiple courts. During the recently ended Family Courts Mediation Drive, the Delhi High Court successfully disposed of 2,171 cases out of the 2,884 cases submitted to mediation by the Family Courts, for a clearance rate of 75.27 percent. This implies that the legal system needs substantial advocacy of the mediation mechanism.

MORE GRAY AREAS OF THE DRAFT BILL

While the Draft Bill is a step in the right direction in terms of recognising and marketing mediation as an efficacious technique of dispute settlement, certain shortcomings and vulnerabilities in the legislation must be addressed:

1. The Draft Bill contains no information on the credentials of a qualified mediator, nor does it include the 'ability to mediate.'
2. The provision in Section 18 of the Draft Bill that the mediator transmits "the opinion of each party to the other to the extent agreed upon by them" might lead to a conflict of interest, in addition to undermining the mediation process's secrecy.
3. The Draft Bill does not address what laws would govern international mediation held in India but rather refers to non-commercial issues arising under foreign law.
4. The Draft Bill does not answer what laws would regulate an international mediation held in India but rather refers to non-commercial issues arising beneath foreign law, which are not covered by either Part I or Part III of the Draft Bill.
5. The Draft Bill makes no mention of whether a Mediation Service Provider can be a corporation.
6. The Draft Bill states that a household mediated settlement may well be appealed on the premise of 'gross impropriety,' despite attempting to explain or describe the term's parameters.
7. The repercussions of failing to register a Mediated Settlement Agreement are not addressed in the Draft Bill.
8. Resolving these concerns will guarantee that the Mediation Act, when it is passed, includes unambiguous provisions.

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CONCLUSION

The government's endeavour to pass a freestanding mediation law is a welcome step since it would help to reduce the caseloads in the Indian judicial system. Nevertheless, the Council has to be clear about which institutions will be recognised as mediation service providers. Furthermore, the application of pre-litigation mediation will be tricky for disputants who desire to litigate. As a result, the Bill should provide an option and stipulate that only specific sorts of conflicts must be assigned to pre-litigation mediation. Hopefully mediation bill, 2021 will not be old wine in a new bottle like SEBI's sudden shift from promoter to the person in control⁵. Finally, because it is the cheapest and simplest alternative attainable to the general public, mediation may be defined as a social justice instrument. Independent mediation legislation and guidelines will indisputably answer the majority of complaints about the mediation process and pave the way for mediation to become the first-stop conflict resolution option for domestic and cross-border issues. In addition to the differences mentioned previously, a significant shift in participant thinking, understanding of the process, and reframing our orientation to mediation is required for the survival and longevity of the mediation profession in India.

⁵ Promoter To Person-In-Control: SEBI's old wine in a new bottle, Jayant Thakur, August 11, 2021 / 11:56 Am IST <https://www.moneycontrol.com/news/opinion/promoter-to-person-in-control-sebis-old-wine-in-a-new-bottle-7313921.html>