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**MEDIATION BILL, 2021: AN ANALYSIS OF THE PARADIGM FOR  
ALTERNATIVE DISPUTE RESOLUTION IN INDIA**

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**ABSTRACT**

As we know, there had been no standalone law for mediation in India until 2021 which was the flagship initiative of the Government of India to bring in law regulating mediation. This was done to make mediation a more effective tool in shouldering the judiciary in faster and effective disposal of cases. This paper is an attempt to make a commentary on the Mediation Bill, 2021. It has touched upon various important aspects surrounding the bill which includes the need of bringing in Mediation Bill, 2021, its essential features, pros and cons of the Bill, international conventions on mediation and finally recommendations of the author to the Mediation Bill, 2021. During the course of our research, we found out that the most questioned aspect of the Bill was the mandate of pre-litigation mediation. This idea gives us a mixed opinion about its acceptability to the people at large to first necessarily resort to mediation inspite of the fact that ADR mechanisms such as mediation are employed voluntarily by the parties and is not mandated. Therefore, an analysis of the international jurisdictions who have adopted this feature of pre-litigation mediation has been done to get a better understanding of its effectiveness. Mediation Bill, 2021, being the first of its kind for Indian Jurisdiction, does come with certain grey areas, loopholes and unaddressed aspects. All these deficiencies have been pointed out in the paper which is necessary for the provisions to look more clear, concrete and precise in the best interest of justice and to avoid any misuse of the provisions of the law.

**KEYWORDS –**

Alternative Dispute Resolution, Mediation, Mediation Bill, Singapore Convention, 2021.

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“Discourage litigation. Persuade your neighbour to compromise whenever you can. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

- Abraham Lincoln

## **INTRODUCTION** –

Alternative Dispute Resolution (ADR) refers to means by which disputes are settled outside the traditional court system. ADR mechanisms comprise of resolution through arbitrations, negotiations, mediation as well as Lok Adalats. The resort to these alternate means is voluntary and requires the consent of either of the parties. Mediation as well is voluntary process in which parties settle the disputes by bringing in the assistance of independent and neutral third party called the mediator. A mediator would not impose a solution on the parties but creates a conducive environment in which they can resolve the disputes between the parties can be resolved.

The ADR mechanisms are flexible with the procedures and the manner in which it is done and does not strictly comply with the rules of Civil Procedure. Hence this flexible nature of mediation makes it easier to dispose of cases quickly and at the same time ensuring effectiveness of the resolution process. Also, one of the worth highlighting feature of mediation process is the confidentiality of its resolution process among the parties, which protects the reputation of the parties and safeguards them of the undesirable consequences of the media trials. To sum up mediation, in a row of several words, they are voluntary, non-adversarial, flexible, confidential, speedy, cost effective and consensual in nature. Besides these mechanisms, mediation is highly beneficial in lowering the burden of the cases on the judiciary. There are various ways we can use to resort ourselves to the mediation procedure. The various ways are as enumerated below:

A mediation process can be initiated through the following means:

1. Court referred mediation which can be directed under Code of Civil Procedure, 1908.
2. Private mediation, when the contract contains a mediation clause.
3. As provided under the specific statute under the Commercial Courts Act, 2015, The Consumer Protection Act, 2019, Companies Act, 2013.

“As per the information provided by the National Legal Services Authority for the year 2021-2022, India has 464 ADR Centres (397 functional), 570 Mediation Centres, 16,565 mediators

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and nearly 53,000 cases were settled through mediation<sup>2</sup>.

Various Countries have brought in standalone laws on mediation and the need to bring in laws on mediation through judgments of the Supreme Court as well as High Courts. A Committee which was formed by Supreme Court in 2020 had recommended and prepared a draft legislation which shall give sanctity to dispute resolution through mediation.<sup>3</sup> Therefore the major purpose of Mediation Bill, 2021 is to promote mediation, especially institutional mediation and also bring about legislations which would aid in enforcing the mediated settled agreements

Types of Mediation:

Mediation can be largely bifurcated into two types: <sup>4</sup>

1. **The Court annexed mediation** – As per the 1999 amendment to the Code of Civil Procedure, Section 89 was introduced which empowered the courts to refer certain matters for settling through mediation first and then resorting to litigation. Accordingly, many cases, especially relating to divorce and matrimonial cases are referred to court annexed mediation, to lessen the burden on courts and faster resolution.
2. **Private Mediation**– In this type of mediation, a private mediator is appointed with the consent of each of the parties. This type of dispute resolution is adopted voluntarily by the parties.

### **THE NEED TO INTRODUCE A MEDIATION BILL IN INDIA**–

In a country like India, with over 4.5 crore pending cases,<sup>5</sup> to say that Mediation as a form of dispute resolution hasn't lived up to its potential would not be an understatement. The reasons for this are many - but the lack of a legislation and structure surrounding the process would be the primary. To that, “the Ministry of Law and Justice, on 5th November, 2021 had released the Draft Mediation Bill, 2021 in the public” domain. The bill was necessary to address the inconsistencies between the existing pieces of Code of Civil Procedure, 1908, the Industrial Disputes Act, 1947 and the Commercial Courts Act, 2015. Further the need of a legislation was

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<sup>2</sup>Settlement through Mediation Report April 2021 to March 2022, NATIONAL LEGAL SERVICES AUTHORITY, <https://nalsa.gov.in/statistics/settlement-through-mediation-report/settlement-through-mediation-report-april-2021-to-march-2022>.

<sup>3</sup>The NITI Aayog Expert Committee on ADR, *Designing the Future of Dispute Resolution*, NITIAAYOG, (NOV. 29, 2021), <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>.

<sup>4</sup> Civil Procedure Code, 1908, S. 89, Acts of Imperial Council, (1908) India.

<sup>5</sup>PRSINDIA, <https://prsindia.org/policy/vital-stats/pendency-and-vacancies-in-the-judiciary> (last visited June 19, 2022).

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also to address the issue of domestic and international mediation, as India is a signatory to the Singapore Convention on Mediation.

In July 2021, the Chief Justice of India, Justice N.V. Ramana, while delivering a speech at the India – “Singapore Mediation Summit” noted that, “Prescribing mediation as a mandatory first step for resolution of every allowable dispute will go a long way in promoting mediation.

Perhaps, an omnibus law in this regard is needed to fill the vacuum.”<sup>6</sup> This speech was made in context of the huge pendency of cases in India.

Among many reasons, the need to bring in mediation was to popularize the meditation as a dispute redressal mechanism as it was faster and cheaper mode of dispute resolution.

Hon’ble Chief Justice N. V. Ramana also during the conclave of International Arbitration and Mediation Centre at the International Convention Centre, Hyderabad said that “The Court Should be the Last Resort for Dispute Resolution. Therefore, one should look for the choices of Alternative Dispute Resolution.”

The Tamil Nadu Mediation and Conciliation Centre, which is an initiative of the Madras High Court, is said to be the first court-annexed mediation centre in every district.<sup>7</sup> It was inaugurated in 2005 and has significantly reduced the pendency of referred cases.<sup>8</sup>

### **IMPORTANT FEATURES OF THE BILL –**

The major aim behind introducing Mediation Bill, 2021 was to promote the process of mediation,(offline as well as online)and also provide for a legislation which seeks the enforcement of Settlement Agreements, arrived through mediation. The main agenda of the Bill includes resolving the disputes of civil or commercial nature by mediation before moving to the court or tribunal. The Mediation process has been referred in various Acts which include. The Code of Civil Procedure,1908, The Arbitration and Conciliation Act, 1996, The Companies Act,2013, The Commercial Courts Act,2015 as well as Consumer Protection Act,2019.

#### 1. Mediation and Conciliation

Section 4 of the Bill defines what mediation is and considers conciliation to be synonymous to it. The mention of the word “conciliation” in this definition is significant in light of there being

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<sup>6</sup>Honourable Mr. Justice N. V. Ramana, *Mediation for Everyone: Realising Mediation’s Potential in India*, LIVELAW, [https://www.livelaw.in/pdf\\_upload/cji-speech-at-mediation-summit-396853.pdf](https://www.livelaw.in/pdf_upload/cji-speech-at-mediation-summit-396853.pdf)

<sup>7</sup>TAMIL NADU MEDIATION & CONCILIATION CENTRE, <https://tnmcc.tn.gov.in/about-tnmcc/about-us/> (last visited June 30, 2022).

<sup>8</sup>Tamil Nadu Mediation & Conciliation Centre, MADRAS HIGH COURT, (April 9, 2019), <http://www.hcmadras.tn.nic.in/Mediation%2014th%20Anniversary%20Celebrations.pdf>

a stand-alone law on conciliation, namely, the Arbitration and Conciliation Act, 1996. This Act's conciliation-related provisions are proposed to be modified with those of the Draft Bill in the Fourth Schedule. If this act emerging from the Mediation Bill is intended to replace the "conciliators" provisions of the Arbitration & Conciliation Act, 1996, and bring it in line with the Singapore Convention, which does not distinguish between a conciliator and a mediator, we must inherently eliminate the distinction between a mediator and a conciliator. This should be done so that the parties and the mediator may decide for themselves what strategy to use during the mediation session. The terms "mediation" and "conciliation" shall be used interchangeably by the parties as per the international practices as both of them do not have much of a difference and can be used interchangeably, which was also reaffirmed in the 238th Law Commission Report.<sup>9</sup> To that end, the Bill provides for amending of the "Section 89 of the Code of Civil Procedure, 1908 to state "conciliation or mediation" as a model for settling off of the" disputes.

## 2. Mediation followed by litigation

The Civil or Commercial matters should be first referred to mediation and then following that matter should be open for litigation. However, the pre-litigation mediation in matters of Commercial disputes of Specified value shall be taken as per the provisions of the Section 12A of the Commercial Courts Act, 2015, and the rules made there under. The Bill suggests that the courts or tribunals may at any stage of litigation refer the matter to mediation, in cases where the matters have not gone through the mediation process. It is also essential that the Mediator shall be registered with the Council, or empanelled by the Court-Annexed Mediation Centre, or any authority constituted under the legal Services Authorities Act, 1987 or a Mediation Service Provider recognized under this Act.

## 3. Disputes which cannot be mediated

As provided under Section 7 of the Bill, read with the First Schedule, the Bill has listed down certain disputes which cannot be mediated. They include: disputes about the claim of a minor or persons of unsound mind, disputes involving criminal prosecution, disputes which affect the rights of the third parties, disputes involving an allegation of serious and specific fraud, fabrication of documents, forgery, impersonation and coercion. However, this list is open to the

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<sup>9</sup>Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions, LAW COMMISSION OF INDIA, (Dec. 2011), <https://lawcommissionofindia.nic.in/reports/report238.pdf>

Central government to be amended, as and when required.

#### 4. Application of the Bill

Section 2 of the Bill provides that the Bill shall be applicable to mediations conducted in India (any or both the parties who habitually reside in or are incorporated in or have their place of business in India) in each of the following cases:

- a. Both the parties involved are domestic parties,
- b. Where one of the parties is a foreigner (international mediation),
- c. Where the agreement explicitly mentions that the mediation shall be as per this bill.

Also, when the Central Government or State Government, or agencies, public bodies, corporations, and local bodies, which include the entities, owned and controlled by such Government, the provisions of Sub Section 1 shall not apply except when the dispute pertains to some commercial dispute or it is explicitly notified by them.

#### 5. Mediation process

The mediation proceedings shall be confidential and completed within 180 days. However, this process shall be extended by 180 days by the parties. After completion of 2 sessions, a party may withdraw from mediation. If the mediation process is annexed by the Court, then the mediation must be executed as per rules framed by Supreme Courts or High Courts.

#### 6. Appointment of the Mediators

Mediators might be appointed by i) parties by way of agreement, ii) an institution administering mediation. iii) If there exists any conflict of interest, the same shall be raised, which shall raise doubts on their independence. In such instances the parties may choose to replace their mediators.

#### 7. Mediation Council of India

A Mediation Council shall be established by the Central Government and the composition of the Council shall be such that it consists of

1. A Chairperson
2. Two Full Time members who have the experience of ADR or mediation.
3. Three ex- officio members who includes the Law Secretary and the Expenditure Secretary and a part time member from an industry body. This Council shall execute the following functions: 1. Registration of Mediators, Recognizing the institutions which

provide mediation facilities as well as mediation institutes which shall train, certify and educate mediators.

#### 8. Mediated Settlement Agreement

Agreements which result from mediation (except for community mediation) will be final, binding as well as enforceable as the court judgements. The Agreement should be in writing, signed by the parties and verified by the mediator. The non-enforceability of the agreements which result from mediation shall be done on grounds of i) fraudii) corruption iii) impersonation or when the mediated disputes were not fit for mediation.

#### 9. Community Mediation

This technique is used to resolve disputes which are likely to affect the peace and harmony amongst the residents of a locality. The application for such mediation shall be put forth by any of the parties before the concerned authority under the Legal Service Authorities Act, 1987, or District Magistrate or Sub Divisional Magistrate, as the case maybe. It shall be conducted by a panel of three mediators (this panel shall include persons having a stand in the community as well as representative of resident welfare associations.) However, the settlements arrived in such manner shall not be enforceable as a judgement or decree of a civil court.

#### 10. Additional Provisions

Under this code, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 has been kept out of scope because as an internal or local complaint committee shall be formulated and the case can be resolved through conciliation without the involvement of third party. Similarly, the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 has been kept out of its scope as the offences mentioned are cognizable in nature.

### **PROS AND CONS OF THE BILL –**

#### **A. POSITIVE ELEMENTS :**

##### 1. Recognition of Enforcement of Domestic and International Mediated Settlement Agreements

The Bill recognizes both domestic as well as international mediation which is given under Part 1 and Part 3 of the Bill respectively. It provides for a mediated settlement agreement in both of the cases which is to be enforced as per the Code of Civil Procedure, 1908, i.e. by

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filing an execution petition. This is unlike the provisions prior to the Draft Bill wherein the settlement agreement could be enforced only by its specific performance, as it was deemed to be contractual in nature, unless it was a case of court referred mediation.

## 2. Interim Reliefs

As pre-litigation mediation is an essential feature of the bill, the bill, under Section 8 has empowered the parties to approach a court or tribunal of competent jurisdiction for seeking an interim relief during the course of proceedings so that there are no unwarranted injuries caused to the parties and their interest be adequately secured.

## 3. Matters which shall not be subjected to mediation

The Bill mentions that the jurisprudence of arbitrability which shall be essential in determining matters which shall be fit for mediation. There are certain tests laid down by the apex court for determining arbitrability in the case of *Vidya Drolia vs Durga Trading Corporation*.<sup>10</sup> The Law Department seems to have not followed the finer nuances of the Apex Court's judgment in *Vidya Drolia* judgment. The jurisprudence around arbitrability will apply with an equal force to selection of matters which can be subject to mediation, except certain instances. There should also remain a balance between the rights in rem and rights in personam, as laid down in the judgment of *Booz-Allen & Hamilton Inc. vs SBI Home Finance Ltd.*<sup>11</sup>

## 4. The Principle of Neutrality

"As per Section 12 of the Bill, it is the obligation of the mediator to disclose in writing to the parties about any circumstances or potential circumstances, personal, professional or financial, that may constitute conflict of interest or that is likely to give rise to justifiable doubts as to such mediator's independence or impartiality in the conduct of the mediation process. Further, as per Section 13, the mediator in a case can be terminated in case there is a doubt on his impartiality and neutrality".

## 5. Time Limit for Completion of Mediation Proceedings –

As given out in the Section 20, the mediation process shall be completed in 90 days and shall be further extended for a further period of 90 days.

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<sup>10</sup>*Vidya Drolia vs Durga Trading Corporation*, (2021) 2 SCC 1.

<sup>11</sup>*Booz-Allen & Hamilton Inc. vs SBI Home Finance Ltd.*, (2011) 5 SCC 532.

## 6. Grounds for Challenging a Mediated Settlement

If it is a domestic mediated settlement, the grounds include: fraud, corruption, gross impropriety or impersonation. However, in case of international mediated settlement agreement, the grounds to challenge include subject matters which are not within the scope of settlement, agreement involved fraud or corruption, or it was in contravention to public policy in India.

## 7. Online Mediation

The Bill has provided due recognition to online mediation under Chapter 6 of the Bill. This mode has already gained great prominence post pandemic. And giving it due recognition makes the process easier and appealing.

## **B. CONTESTED ELEMENTS OF THE BILL.**

### 1. Establishment of the Mediation Council of India –

According to Sec. 36(1) (a) of the proposed Bill, the Mediation Council shall be responsible for registration of mediators, recognising mediation service providers and recognising mediation institutes (providing training, education and certification of mediators) etc. It suggests that a person with exceptional expertise and experience in the conduct or administration of mediation is to be appointed by the Central Government as Chairperson, who has been a judge of the Supreme Court, the Chief Justice of a High Court, a judge of a High Court, or an eminent person. This is erroneous as for the position of chairperson, the term "eminent person" is too ambiguous and subjective. To provide some level of executive responsibility to the judiciary, the chairperson should also be chosen by the Central Government after consulting with the Chief Justice of India. As a whole, this provision needs to be reconsidered, as it is wide of the mark from what it tries to purport and not even a single professional mediator is appointed to regulate it.

### 2. Gross Impropriety

The bill provides gross impropriety as one of the grounds over which domestic mediated settlement shall be challenged; however there have been no endeavors to define or specify its contours. This provides for a huge leeway to the parties to resist the enforcement of settlement agreement by bringing any and all challenges under the ground of gross impropriety.

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### 3. Layers of Confidentiality

The Bill has failed to recognize the layers attached to confidentiality in mediation, and has thereby omitted to include some of the important points mentioned with respect to confidentiality under the Civil Procedure Mediation Rules. For example, Rule 20(2) of the Civil Procedure Mediation Rules inter-alia stipulates that “when a party gives information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose that information to the other party”.<sup>12</sup> The said principle does not find any mention under the Bill. Instead, a more generalized principle has been included in the Bill, which lacks sufficient” nuance.

### 4. Unspecified Jurisdiction for International Mediation

“The Bill does not specify what provisions would govern an international mediation that takes place in India but relates to non-commercial disputes that have arisen under a foreign law, such mediation not being covered by either Part I or Part III of the Draft” Bill. The Bill omits to state under what circumstances an international mediation involving a non-commercial dispute arising under a foreign law would take place in India.<sup>13</sup> Owing to the lack of jurisdiction, the mediated settlement would be contested in a nexus of lawsuits.

### 5. Vagueness in Community Mediation

With regard to the kind of conflicts for which community mediation may be used, i.e., any disagreement likely to impair peace, harmony, and tranquilly among the people or families of any region or location, the Bill lays a specific emphasis on community mediation under Section 44. It outlines the types of people that the relevant authorities may include on the mediation panel, including people of standing and integrity who are regarded in the neighbourhood, representatives of local/resident welfare groups, etc. It is facilitated by the words “any area or locality” which is vague in itself, and needs to be further defined. Additionally, Section 45 of the Bill outlines the community mediation process.

### 6. Mandatory Pre-Litigation Mediation

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<sup>12</sup>CIVIL PROCEDURE ALTERNATIVE DISPUTE RESOLUTION AND MEDIATION RULES, 2003, STATE LEGAL SERVICES AUTHORITY, [http://chdsla.gov.in/right\\_menu/rules\\_regulationslsa/pdf\\_files/cpadrm-rules-2003.pdf](http://chdsla.gov.in/right_menu/rules_regulationslsa/pdf_files/cpadrm-rules-2003.pdf).

<sup>13</sup> Neil Hildreth, *Relook the draft Mediation Bill: Some provisions will need clear definitions*, FINANCIAL EXPRESS (March 17, 2022, 1:15 AM), <https://www.financialexpress.com/opinion/relook-the-draft-mediation-bill-some-provisions-will-need-clear-definitions/2463151/>.

Section 6 of the Bill provides for mandatory pre-litigation mediation even if parties do not agree to mediate. This read with Section 20 and Section 25 of the Bill which forces the parties to stay in mediation for at least two mediation sessions, restricts parties who are unwilling to settle a dispute from approaching the court. Such an approach not only imposes the process of mediation on unwilling parties having no intention to settle, but also burdens them with the added cost of mediation, as Section 30 provides that costs of mediation shall be borne by the parties. At the same time, Section 8(1) of the Bill provides that “if exceptional circumstances exist, a party may, before the commencement of, or during the continuation of, mediation proceedings under this Act, file suit or appropriate proceedings before a court or tribunal having competent jurisdiction for seeking urgent interim relief,”<sup>14</sup> thereby self-defeating the purpose of the act as well as the core principle of this dispute Resolution mechanism: voluntary settlement.

#### 7. Time Limit for Completion of Mediation Agreement

Sec. 20(1) provides a 90 + 90 days outer limit for completion of mediation proceedings. On the one hand, this seems to be a good initiative towards faster dispute resolution, but it would be better to specify certain circumstances or type of mediation where completing the process within 90 days is required. An umbrella time period should not be enforced and in order to ensure that the parties won't be prohibited from going to court as a result of the time spent on mediation, it should be made clear in the Bill that any such period would be interrupted or terminated while the parties engage in mediation.<sup>15</sup>

#### 8. Time limit to challenge an agreement

Section 21 shortens the window of opportunity for contesting an agreement as fraudulently introduced. According to Article 59 of the Limitation Act, the statute of limitations for cancelling or setting aside an instrument or decree is three years from the date on which the plaintiff first learns the facts that entitle him or her to have the instrument or decree cancelled or set aside, or the contract revoked. The Draft Bill changes the timeline from which this limitation period is to be determined in addition to reducing it to three months with a 30-day extension. According to the Draft Bill, no challenge to a mediated settlement agreement may be filed more than three months after the party filing the challenge obtained a copy of the mediated settlement agreement. In contrast, the Hon'ble Delhi High Court in

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<sup>14</sup>The Mediation Bill, 2021, Bill No. 43 of 2021, §8(1) (December 20, 2021) (India).

<sup>15</sup>Dr. Justice Dhananjaya Y. Chandrachud, *Mediation-Realizing the Potential and Designing Implementation Strategies*, LAW COMMISSION OF INDIA, [https://lawcommissionofindia.nic.in/adr\\_conf/chandrachud3.pdf](https://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf).

the case of *Amita Rani Mangla v. Bhagwat Dayal and Ors.*<sup>16</sup> relied on the decisions of the Hon'ble Supreme Court in *Prem Singh and Ors. v. Birbal and Ors.*<sup>17</sup> and *Mohd. NoorulHoda v. Bibi Raifunnisa and Ors.*<sup>18</sup> to reaffirm that the primary point of limitation for cancellation of voidable documents is from the date of knowledge of alleged fraud of the plaintiff, who is seeking the cancellation of the documents, in order to determine the limitation period for cancellation of a document vitiated by fraud.<sup>19</sup> Interestingly, the imposition of such limitations/ restrictions is not recommended under the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.<sup>20</sup>

#### 9. Provides for Institutional Mediation

As per Sections 43 and 44 of the Draft Bill, Mediation Service Providers shall be graded by the Mediation Council of India and shall be required to maintain a panel of mediators, provide infrastructure and facilities for the efficient conduct of mediations, register and file Settlement Agreements, amongst other functions. However, there is no provision in case Mediation Service Provider is in violation of the council's regulations. It also does not provide whether a Mediation Service Provider can be a company.

#### 10. Vagueness in Online Mediation

The Bill states that this is to be carried out by the Mediation Council in accordance with the provisions of the Information Technology Act, 2000. Section 32(4) of the draft provides that "all provisions of this Act shall apply to online mediation procedures." However, there is uncertainty on how Section 15 of the Bill, which deals with the geographical jurisdiction of courts, should be applied. The draft fails to connect the location of conducting mediation with the territorial jurisdiction of the Court or Tribunal as intended by Section 15 in light of the fact that online mediation may be used as a tool to resolve cross-border disputes and

<sup>16</sup>*Amita Rani Mangla v. Bhagwat Dayal and Ors.*, 2018 SCC OnLine Del 11868.

<sup>17</sup>*Prem Singh and Ors. v. Birbal and Ors.*, (2006) 5 SCC 353.

<sup>18</sup>*Mohd. NoorulHoda v. Bibi Raifunnisa and Ors.*, (1996) 7 SCC 767.

<sup>19</sup> Jeevan Ballav Panda, Meher Tandon, Draft Mediation Bill, 2021- A Critical Analysis, 2 GNLUSRDCADR MAGAZINE 10, 11-12, 2021.

<sup>20</sup>*UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex\\_ii.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf).

ensure efficient dispute resolution in circumstances where both parties are not present at the same venue.<sup>21</sup>

In all, the mediation Bill 2021 appears to be a compromise between the demand for new and efficient methods of dispute resolution, the government's attempt to frame a transformative legislation to reinvent dispute redressal mechanism in order to strike balance between individualism and structuralism.

### **INTERNATIONAL CONVENTIONS:**

The United Nations Commission on International Trade Law (UNCITRAL) adopted the Singapore Convention on Mediation in 2018. However it came force in September, 2020<sup>22</sup>. This was after Six countries had already ratified the convention. Before the introduction of Singapore Convention on Mediation, the only instruments for resolving international commercial disputes were the various instruments on international litigation under the Hague Convention for Private International Law and New York Convention. Singapore Convention on Mediation is signed by 55<sup>23</sup> Countries as of 27<sup>th</sup> June 2022, which includes the United States, China, India as well as South Korea. As India is a signatory to the Singapore Convention, international mediation agreements were settled till now as per such International conventions and models. The Singapore Convention on Mediation is consistent with the UNICITRAL Model Law on International Commercial Mediation and International Settlement Agreement resulting from mediation. Accordingly, the states are free to abide by either of the protocols in resolving their disputes relating to international mediation as far as it do not violate its basic framework. Part 3 of the Mediation Bill, 2021 recognises International Commercial Agreements has incorporated provisions which are at tandem with the Singapore Convention on Mediation. As has been noted UNICITRAL, mediation has been greatly been used to settle international disputes, According to them it has surpassed the modes of arbitration and litigation as well. The

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<sup>21</sup> Aman Hingorani, Draft Mediation Bill, 2021: *How Not to Draft a Mediation Law*, THE SUNDAY GUARDIAN LIVE (Nov. 13, 2021, 8:29 PM), <https://www.sundayguardianlive.com/legally-speaking/draft-mediation-bill-2021-not-draft-mediation-law>.

<sup>22</sup>Deewakar Yadav, *United Nations: UN Convention on International Settlement Agreements Resulting from Mediation Enters into Force*, via mediation and arbitration centre, <https://viamediationcentre.org/readnews/MTIzMg==/United-Nations-UN-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Enters-into-Force#:~:text=Before%20the%20entry%20into%20force%20of%20the%20Singapore,Convention%2C%20which%20provided%20for%20arbitration%20on%20such%20disputes.>

<sup>23</sup>SINGAPORE CONVENTION ON MEDIATION, <https://www.singaporeconvention.org/convention/about> (last visited June 30, 2022).

prominence emerges from its key characteristics which include faster dispute resolution with minimal costs and creating a more favorable settlement to both the parties as compared to arbitration or litigation. Besides other key features such as flexibility of procedures and confidentiality of the agreements have greatly benefitted the parties in resolving the commercial disputes.

### **UNCITRAL'S FRAMEWORK ON MEDIATION:**

In the year 2021, UNCITRAL had revised its basic framework on mediation, which was based on the Singapore Convention<sup>24</sup>. The text was provided in order to harmonize the laws, procedural rules and enforcement mechanisms for international mediation. These updated provisions aimed at taking into account the recent mediation trends and developments which also included court ordered mediation. However, there have been certain important elements in this framework which are worth incorporating in the India's Mediation Bill, 2021. This would modify the bill parallel to the international standards.

1. It needs to be specified that mediation commence when the disputants agree to engage in mediation.
2. There should be explicit disclosure of circumstances regarding impartiality or independence.
3. The information shared by the parties with the mediator should be confidential unless it has been expressed by the parties otherwise. Deliberate breach of Confidentiality should attract consequences to the mediator and compensation to the parties
4. There should be a explicit provision which spells out the liability of the mediator and circumstances where they shall be protected.
5. In order to assure fairness in the mediation process, the recruitment in the mediation institution should be done taking into account principle of gender neutrality wherein there is balanced representation of each of the genders, Religion and Community neutrality to keep it a secular institution and representation from various geographical locations based on merit.
6. There should be uniformity in assessing mediation costs which should be agreeable by the parties as well as the mediator and in case of community mediation, the cost should be shared on pro rata basis.

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<sup>24</sup>Mylene Chan, *UNCITRAL Completes a New Mediation Framework , Based on the Singapore Convention*, *MEDIATE* (July 30,2021), <https://www.mediate.com/uncitral-completes-a-new-mediation-framework-based-on-the-singapore-convention/>.

**PRE-LITIGATION MEDIATION- EFFECTIVENESS IN FOREIGN JURISDICTIONS.**

One of the greatest critics to the bill was the mandate of the pre-litigation mediation. They say that this feature has altogether violated the fundamental feature of mediation of being voluntary in nature and should be adopted at the discretion of the parties. The basic idea behind this feature was that for people to resort to mediation over litigation and get the taste of its effectiveness would not be possible any time until it has been fairly tried in the matters which could be resolved through mediation and after two sessions the parties could anyways withdraw from mediation as the doors of the court were always open to litigate them. Given below is an analysis of the foreign jurisdictions which have adopted this feature and what has been the effect of adopting it.

**Mediation in the UK:**

Section 6(1) of the Mediation Bill 2021 makes pre-litigation mediation mandatory, and the same is prevalent in countries such as the UK. Sir Geoffrey Vos, the Master of Rolls of England and Wales, explored the idea of mandatory mediation in England and the Civil Justice Council headed by him, also considered whether it may be preferable for ADR to be made mandatory.<sup>25</sup> He gave a speech on 26<sup>th</sup> March, 2021 in a lecture at Hull University and in his speech, Sir Vos also emphasised a number of instances where ADR has been effective, including the early conciliation notices to the Advisory, Conciliation and Arbitration Service (ACAS) in employment claims and the Online Mediation Information and Assessment Meetings and Financial Dispute Resolution appointments in family claims.

One of the often-claimed defences against mandatory ADR is that it prevents people from going to court, which limits access to the legal justice system. Recent rulings by the English courts seem to indicate that the legal system is likewise warming up to the idea of mandatory mediation. In *Halsey v. Milton Keynes General NHS Trust*,<sup>26</sup> the court decided that while it may strongly encourage parties to use ADR (by, for example, imposing costs fines for unjustifiable refusals to mediate disputes), it lacks the authority to compel parties who are reluctant to do so.

In *Halsey*, the Court of Appeal of England and Wales made it abundantly apparent that a party may incur additional costs as a result of an unreasonable reluctance to mediate. In *PGF II SA v.*

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<sup>25</sup>Sir Geoffrey Vos, *Speech by Sir Geoffrey Vos, Master of the Rolls: Speech to Hull University*, COURTS AND TRIBUNALS JUDICIARY, (Mar. 26, 2021), <https://www.judiciary.uk/announcements/speech-by-sir-geoffrey-voss-master-of-the-rolls-speech-to-hull-university/>

<sup>26</sup>*Halsey v. Milton Keynes General NHS Trust*, (2004) 1 WLR 3002.

OMFS Co. 1 Ltd.,<sup>27</sup> the Court of Appeal of England and Wales expanded on this idea by holding that silence in response to a request for mediation might be viewed as an unjustified refusal that would therefore have negative costs implications.

Since the Lomax v. Lomax judgment of 2019,<sup>28</sup> courts have started to move toward having parties to participate in ADR on a mandatory basis. In this case, one side requested an Early Neutral Evaluation (ENE), while the other party objected. In an ENE, the neutral, who is usually a judge, retired judge, or Queen's Counsel, listens to each party's arguments before expressing his opinion on the likely result of the trial. That point of view is neutral and non-obligatory. The Court, in this case, decided that regardless of whether the parties consent, it is nonetheless within its authority to order an ENE hearing under the Civil Procedure Rules.

In England, the Civil Justice Council (CJC) published a study titled "Compulsory ADR"<sup>29</sup> in June 2021. CJC addressed two significant inquiries in this report. The first question being, can the parties to a legal dispute be forced to take part in an ADR process? Second, if parties can be required to use alternative dispute resolution (ADR), under what conditions, and at what point should that requirement be enforced. According to the CJC findings, any type of ADR that is not unduly burdensome and does not prevent the parties from effectively accessing the court would be consistent with the parties' right to access courts. The CJC study also noted that other countries, including Italy, Ontario, Australia, and Greece, have implemented various types of mandatory ADR. England recorded a whopping 93% of settlements out of 16500 mediations carried out.<sup>30</sup>

#### Mediation in Italy:

Mediation in Italy is regulated by Legislative Decree No. 28/2010<sup>31</sup> and amended by the Legislative Decree No. 69/2013.<sup>32</sup> This legislative act provides, inter alia, for (i) an obligation on parties to pursue mediation before filing a claim with any national court where the dispute relates to certain legal rights of a civil or commercial nature; and (ii) a non-mandatory mediation procedure that can be initiated in relation to any civil and commercial litigation relating to matters other than the "mandatory" ones under item (i). The Decree provides for a

<sup>27</sup>PGF II SA v. OMFS Co. 1 Ltd., (2014) 1 WLR 1386.

<sup>28</sup>Lomax v. Lomax, (2019) 1 WLR 6527

<sup>29</sup> Civil Justice Council, *Compulsory ADR*, JUDICIARY.UK, (June 2021), <https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf>.

<sup>30</sup>*The Ninth Mediation Audit*, CENTRE FOR EFFECTIVE DISPUTE RESOLUTION, (2021), [https://www.cedr.com/wp-content/uploads/2021/05/CEDR\\_Audit-2021-Ir.pdf](https://www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-Ir.pdf)

<sup>31</sup>Legislative Decree 4 March 2010, No. 28, The President of the Republic, 2010 (Italy).

<sup>32</sup>Legislative Decree 28 December 2013, No. 154, The President of the Republic, 2013 (Italy).

statutory obligation to mediate for any disputes in relation to insurance, banking and financial agreements as well as other matters such as rights in rem, division of assets, inheritance, medical liability or certain kinds of defamation/libel. Further, the duration of the mediation procedure has been reduced from the original four months to three months, with the understanding that efficiency won't be impacted due to faster mediation. Additionally, a new paragraph that was added to Article 5 of the 2013 law states that a court case is admissible once the first mediation session has ended in failure, which makes access to justice simpler than it was under the previous version.<sup>33</sup>The number of mediations in Italy is rising exponentially following the enactment of the new Mediation Law of 2013.<sup>34</sup> In implementing the 2008 European Directive on cross-border mediation,<sup>35</sup> Italian lawmakers decided to go beyond voluntary mediation and introduced mandatory pre-trial mediation in a variety of civil and commercial” cases.

#### **RECOMMENDATIONS TO THE BILL:**

1. In order to regulate the institution of mediation and its authenticity, no mediator shall be allowed to practice as a mediator without being member of the mediation council.
2. Mediation council should have sufficient autonomy and hence the requirement of approval of central government, every time a new regulation is released has the potential of hampering its autonomy and could question the independence of this arm of judiciary. Hence Mediation Council should not be made a puppet of the hands of the executive.
3. Whenever a client falls into legal trouble, he would first approach an advocate for his legal advice. Hence the advocates should be well educated about the mediation process and should encourage their clients to take up mediation over litigation and should instill confidence in them to believe in the effectiveness of mediation as a dispute resolution mechanism.
4. Government has been bestowed with the authority to regulate the list of the matters suitable for mediation. Considering the fact that there are more than 470 crore pending cases in courts and the rise of counts continues each day, the government should wisely modify the list of

<sup>33</sup>Giuseppe Conte, The Italian Way of Mediation, 6 INTL. ARBITR. LAW. REV. 180, 191-200 (2014).

<sup>34</sup> Francois Staechele, *Mediation and Judiciary in Italy in 2019*, GEMME-MEDIATION, (Oct. 22, 2019), <https://www.gemme-mediation.eu/2019/10/22/mediation-and-judiciary-in-italy-2019/#:~:text=year%202018%20%E2%80%93%2015%2C923%20mediation%20proceedings,rate%20in%202018%20was%2045%25>.

<sup>35</sup>DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, OFFICIAL JOURNAL OF THE EUROPEAN UNION, (May 24, 2008), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>.

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matters capable to be resolved through mediation and lighten the pressure on the overburdened Indian Courts.

5. A good infrastructure should be brought in place to take the advantage of mediation sessions conducted on a online mode. This has been an highly effective tool especially in the post pandemic world, giving due regards to their health and flexibility of location to the parties.

### **CONCLUSION:**

This initiative of the government to bring in a standalone law on mediation has indeed been a positive development and would be really aid in lessening the backlog of cases before the Indian Judiciary. However to makes this mechanism efficient and effective, there should be clarity on which entities should be recognised by the council as service providers and also base upon adequate minimum qualification to qualify as a mediator. The biggest challenge of the bill is the mandate of the pre litigation mediation which many critics have opposed to. The paper has at length discussed about the benefit of the pre mediation litigation in other countries where this provision is included in their respective mediation laws. However, how well is this feature accepted in India would be ascertained with passage of time. Many of the critics stand by the suggestion that pre mediation litigation should be mandated in certain types of disputes and rest should be left on the choice of the parties to adopt the dispute resolution method they deem fit.

### **REFERENCES:**

- <https://www.sundayguardianlive.com/legally-speaking/mediation-bill-2021-still-not-draft-mediation-law>
- <http://centre4mediation.com/united-nations-convention-on-international-settlement-agreements-resulting-from-mediation/>
- <https://hsalegal.com/wp-content/uploads/2021/12/HSA-Dispute-Resolution-Draft-Mediation-Bill-2021.pdf>
- <https://www.financialexpress.com/opinion/relook-the-draft-mediation-bill-some-provisions-will-need-clear-definitions/2463151/>
- <http://www.lawstreetindia.com/experts/column?sid=655>

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