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**INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH**

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**MEDIATION BILL 2023: A NEW DAWN FOR MEDIATION IN INDIA**- Shirin Gupta<sup>1</sup>**ABSTRACT**

The Indian Courts are overburdened with a lot of pending cases. According to the National Data Grid, there are over 6,00,000 pending cases in various High Courts<sup>2</sup> of India and over 40,00,000 pending cases in various District Courts in India<sup>3</sup>. It became necessary to have an alternate dispute resolution mechanism to solve issues that can be resolved without the required intervention of the court system. The Mediation Bill 2023 encourages the parties to take mandatory steps to settle the dispute outside the Court. This Bill<sup>4</sup> aims to promote mediation as an alternate dispute resolution mechanism. Thereby giving legal enforceability to the mediation as a method of dispute resolution<sup>5</sup>. The bill seeks to facilitate the mediation.<sup>6</sup> The researcher in this article would like to analyze various aspects of the Mediation Bill of 2023. The researcher also explores the critical issues recognized under the Mediation Bill 2023.

**KEYWORDS**–Mediation, Alternate Dispute Resolution mechanism, Mediation Bill, 2023

**INTRODUCTION**

On December 20, 2021, the Mediation Bill 2021 (“**Bill**”) was introduced in the Rajya Sabha. This Bill was referred to the Parliamentary Standing Committee, which submitted its report on July 13, 2022.<sup>7</sup> The Committee recommended substantial changes to the bill, such as institutional mediation, establishing the Mediation Council of India, and making pre-litigation mediation voluntary instead of compulsory in the 2021 bill. The Mediation Bill was

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<sup>2</sup> National Judicial Data Grid <https://njdg.ecourts.gov.in/hcnjdgnew/>

<sup>3</sup> National Judicial Data Grid [https://njdg.ecourts.gov.in/njdgnew/?p=main/pend\\_dashboard](https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard)

<sup>4</sup> The Mediation Bill, 2023, Bill No. XLIII of 2021, Acts of Parliament 2023(India)

<sup>5</sup> Preamble of the bill

<sup>6</sup> Preamble of the bill

<sup>7</sup> <https://sansad.in/rs/committees/18?departmentally-related-standing-committees>

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subsequently introduced in Parliament. Later, on August 01, 2023, the bill was passed in Rajya Sabha and Lok Sabha on August 07, 2023. The bill's main aim is to “*promote and encourage mediation, especially institutional mediation for the resolution of disputes, commercial or otherwise.*”<sup>8</sup> This Bill also provides for the establishment of a Mediation Council, which is enshrined with various functions such as the appointment of experts, the constitution of committees, etc

Mediation as an Alternate Dispute Resolution (“**ADR**”) mechanism has been defined under the bill to include pre-litigation mediation, online mediation, community mediation, and conciliation.<sup>9</sup> One of the salient features of the account is that the mediation settlement agreement resulting from the mediation will be final, binding, and will have the same effect as if it were a decree or a judgment passed by a court.<sup>10</sup>

### **NEED FOR THE MEDIATION BILL, 2023**

Before dwelling on the various aspects of the Bill, it is necessary to understand the jurisprudential concept of the Mediation Bill. Due to the lengthy, time-consuming, and procedural compliances of the Court system in India, the issue of the reluctance of foreign companies to enter India was identified. To resolve this issue, the Arbitration and Conciliation Act of 1996<sup>11</sup> came into existence; this act comprehensively covers disputes relating to international and commercial matters and comes to a resolution through arbitration and conciliation. Arbitration is a process in which a dispute is submitted to an impartial third party (arbitrator or arbitral tribunal), who makes a binding decision after hearing the evidence and arguments from both sides. This method is often used to resolve complex technical disputes requiring specialized knowledge. Perhaps mediation as a speedy and cost-effective dispute resolution hasn't been dealt with within the Arbitration and Conciliation Act 1996.

It is also imperative to note that no specific law dealt with mediation separately. Mediation as a method of dispute resolution was limited to traces found in particular statutes such as the Code of Civil Procedure, 1908 and the Digital Personal Data Protection Bill, 2023; the Companies Act, 2013,<sup>12</sup> etc. Only after passing the Mediation Bill 2023 has mediation as an alternate dispute resolution mechanism been dealt with exhaustively by forming a

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<sup>8</sup> <https://legalaffairs.gov.in/actsrulespolicies/mediation-bill-2021>

<sup>9</sup> Clause 4(1), the Bill

<sup>10</sup> Clause 28, the Bill

<sup>11</sup> The Arbitration and Conciliation Act, No. 26 OF 1996, Acts of Parliament 1996(India)

<sup>12</sup> The Companies Act, 2013, NO. 18 OF 2013, Acts of Parliament 2013(India)

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statute. Therefore, it felt necessary to redefine the statutory framework on mediation by bringing comprehensive legislation on the subject.

India is a signatory to the Singapore Convention on Mediation<sup>13</sup> (formally the United Nations Convention on International Settlement Agreements Resulting from Mediation). The United Nations, mainly through the United Nations Commission on International Trade Law (UNCITRAL), has also shown significant support for mediation. Therefore, enacting a law governing domestic and international mediation is appropriate.

## KEY FEATURES OF THE BILL

### 1.1 APPLICABILITY

This Bill will be applicable when the mediation is conducted in India, provided that all the parties reside in India or have a place of business in India.<sup>14</sup> It applies to all the mediation agreements which stipulate that the dispute shall be resolved by the provisions of the Act and international mediation as well.<sup>15</sup> In case of disputes other than commercial disputes, in which one of the parties is the Central Government or state government or instrumentalities of them, it is voluntarily on the part of the central or state government, as the case may be, to refer the disputes to be resolved by mediation. It can do so by the issuance of a notification.<sup>16</sup>

### 1.2 MEDIATION

Mediation means an informal approach to resolving civil, commercial, or otherwise disputes arising between the parties. Under mediation, the parties request a third person, known as a mediator, to assist them in settling.<sup>17</sup> Specific matters that cannot be resolved by mediation are provided under the First Schedule of the bill, which includes concerns about fraud, claims against minors or persons with disabilities, disputes involving criminal offenses, etc.<sup>18</sup> The parties can only approach the Court or tribunal for urgent interim relief if exceptional circumstances exist.<sup>19</sup>

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<sup>13</sup> <https://sso.agc.gov.sg/Act/SCMA2020>

<sup>14</sup> Section 2(1)(i), the Bill

<sup>15</sup> Section 2(1)(ii), the Bill

<sup>16</sup> Section 2(2), the Bill

<sup>17</sup> Section 4, the Bill

<sup>18</sup> Section 7(1), the Bill

<sup>19</sup> Section 8(1), the Bill

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**Online Mediation** –Online mediation may be conducted at any stage with the parties’ written consent. This form of mediation is performed using electronic documents such as secure chat rooms, video calls, audio calls, etc. The process shall be in such a manner as may be specified by the Council.<sup>20</sup>

**Court annexed mediation:** This is a form of mediation conducted by mediation centers that courts or tribunals establish.<sup>21</sup>

### 1.3 MEDIATION AGREEMENT

Section 5 of the Bill provides that a mediation agreement between the parties to the dispute shall be in writing. It is pertinent to note that the dispute can be a present dispute, i.e., a dispute which has arisen and a dispute which may arise in the future. It shall be a separate clause in a contract or a separate agreement.<sup>22</sup>In case of international mediation in matters of commercial dispute, there shall be an agreement for resolution.<sup>23</sup>

### 1.4 PRE-LITIGATION MEDIATION

The Bill makes it mandatory to take steps to settle a dispute of a civil or commercial nature by pre-litigation mediation before filing any suit or proceeding in any Court or Tribunal.<sup>24</sup>It is voluntary on the part of parties to settle disputes by mediation. The provisions of Section 12A of the Commercial Courts Act 2015 shall undertake the pre-litigation in case of commercial disputes. The parties can choose their mediator in case of pre-litigation mediation.<sup>25</sup>

### 1.5 MEDIATORS

Chapter IV of the Bill deals with the appointment of the mediators, termination of the mediator’s mandate, replacement of a mediator, etc. The parties to the dispute are free to agree upon the mediator’s name and the procedure for appointing a mediator.<sup>26</sup> In case the parties fail to reach an agreement, the mediator is to be set by a mediation service provider within seven days of receipt of an application made by the parties to the

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<sup>20</sup> Section 32, the Bill

<sup>21</sup> Section 3(d), the Bill

<sup>22</sup>Section 5(2), the Bill

<sup>23</sup>Section 5(6), the Bill

<sup>24</sup>Section 6(1), the Bill

<sup>25</sup>Section 6(3), the Bill

<sup>26</sup>Section 10(2), the Bill

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dispute.<sup>27</sup>A mediator is bound to disclose in writing any conflict of interest before or during the mediation.<sup>28</sup>Such a mediator can be replaced upon disclosure at the parties' discretion.<sup>29</sup>It is essential to note that, in case of conflicting interest or withdrawal from mediation, he is liable to be terminated.<sup>30</sup>Every mediator shall assist the parties in an independent, neutral, and impartial manner.<sup>31</sup> Further, the mediator is not bound by the Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872.<sup>32</sup>

## 1.6 MEDIATION PROCEEDINGS

Every mediation proceeding shall be undertaken within the territorial jurisdiction of the Court or Tribunal except when there is mutual consent by the parties stating otherwise<sup>33</sup>. There is a fixed period for the completion of the mediation proceeding, i.e., 180 days from the date set for the first appearance.<sup>34</sup>This mandatory period can be extended to 180 days if the parties agree by mutual consent. The mediation proceedings can be terminated when the dispute has been resolved, both parties have signed the mediation settlement agreement, or when the mediator declares in writing that the proceedings are no longer justified.<sup>35</sup>

## 1.7 MEDIATION SETTLEMENT AGREEMENT AND ITS ENFORCEMENT

A mediation settlement agreement is an agreement or interim agreement in writing between some or all parties resulting from mediation, settling some or all of the disputes between such parties and authenticated by the mediator.<sup>36</sup>This section also provides that a mediation agreement that is void under the Indian Contract Act of 1872 shall not be deemed to be a lawful settlement agreement. Such understanding is binding and enforceable as if it were a judgment or a decree of a Court or Tribunal.<sup>37</sup>A mediation settlement agreement can be challenged for fraud, corruption, impersonation, or any

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<sup>27</sup>Section 10(3), the Bill

<sup>28</sup>Section 12(1), the Bill

<sup>29</sup>Section 12(4), the Bill

<sup>30</sup>Section 13, the Bill

<sup>31</sup>Section 17(1), the Bill

<sup>32</sup>Section 17(4), the Bill

<sup>33</sup>Section 15(1), the Bill

<sup>34</sup>Section 21, the Bill

<sup>35</sup>Section 25(a) and Section 25(b), the Bill

<sup>36</sup>Section 22, the Bill

<sup>37</sup>Section 28(2), the Bill

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matter unsuitable for mediation.<sup>38</sup> An application for challenging the mediation settlement agreement can be made within 90 days of receiving the settlement agreement. In case of delay, the Court or the Tribunal has the power to admit such application even after the expiry of 90 days if the Court or Tribunal is satisfied that the applicant had sufficient reasons for not making an application within the stipulated period of 90 days.<sup>39</sup>

### 1.8 MEDIATION COUNCIL OF INDIA

This Bill lays down that the Central Government shall establish a Mediation Council.<sup>40</sup> Section 34 of the Bill provides for the composition of the Council, which shall consist of a Chairperson, two full-time members, three ex-officio members, and a part-time member from an industry body.<sup>41</sup> The primary duties of this council are to promote domestic and international mediation in India, to provide the manner of registration of mediators, to lay down standards for the professional and ethical conduct of mediators, etc.<sup>42</sup>

### 1.9 COMMUNITY MEDIATION

Any dispute that affects the peace, tranquillity, and harmony among the residents of any area or locality can be settled through community mediation with the mutual consent of the parties. The concerned Authority conducts this form of mediation under the Legal Services Authorities Act, 1987, or the District Magistrate or Sub-Divisional Magistrate.<sup>43</sup> Such authority shall include a panel of three mediators.

### KEY ISSUES RECOGNISED UNDER THE MEDIATION BILL, 2023

- This Bill allows agreements to be enforced as court judgments. This could be abused for quick enforcement, potentially undermining fairness. Parties with less power might be able to take advantage if agreements are enforced without proper safeguards. To address exploitation, enforcing agreements as court judgments could be limited to mediation by registered mediators. Challenges must be within 180 days of receiving the mediation settlement agreement. If fraud is a reason, it's suggested to calculate challenge time from when fraud is discovered, aligning with the Limitation Act.

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<sup>38</sup>Section 29(2), the Bill

<sup>39</sup>Section 29(3), the Bill

<sup>40</sup>Section 33(1), the Bill

<sup>41</sup>Section 34, the Bill

<sup>42</sup>Section 40, the Bill

<sup>43</sup>Section 44, the Bill

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- The concept of international mediation has not been dealt with in the Bill. The bill pertains to international mediations involving commercial disputes arising out of a legal relationship, contractual or otherwise, under any law for the time being in force in India.<sup>44</sup> However, a challenge occurs when an Indian party engages in mediation abroad, leading to concerns about enforcing settlement agreements in India. It is sad that though the Bill is to be applied to international mediation, there is no specific provision and procedure to deal with the issues and disputes that arise under international mediation. Despite India being a signatory to the Singapore Convention on Mediation, it's worth noting that it provides a mechanism for enforcing such cross-border settlement agreements resulting from international mediation.<sup>45</sup>
- The limitation of the government's involvement in mediation only to "commercial disputes" contradicts the legislative goal. The Standing Committee suggested that the government is the largest litigant within the country, and excluding non-commercial government-related disputes from the bill's scope would make the bill ineffective. Therefore, government-related disputes should also be covered by the Bill government, perhaps with some exclusions, as this will inspire confidence among the citizens.
- Another issue recognized by the Standing Committee was that Section 12A of the Commercial Courts Act, 2015 limits the parties' choice of a mediator. Parties can choose their mediator for disputes below the Specified Value or civil disputes. However, in the case of commercial disputes meeting the Specified Value, parties must use mediators assigned by the Legal Services Authority or Mediation Service Provider authorized by the Central Government. This means that their choice of mediator is restricted in commercial disputes of a specific value. The Committee believes these facts should be indicated in the definition of 'Commercial Dispute' in clause 3 (a) of the Mediation Bill to avoid any dispute.
- The Mediation Bill 2021 expressly provided that it is necessary on the part of the disputed parties to go for pre-litigation mediation if the dispute is civil or commercial in nature. Such a provision is progressive as certain disputes ought to be easily solved between parties instead of going to court. Over this, the pre-litigation mediation would have helped reduce the burden of cases on courts. Perhaps the Bill has deviated

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<sup>44</sup> Section 3(f), the Bill

<sup>45</sup><https://sso.agc.gov.sg/Act/SCMA2020>

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from the earlier position and has instead made the pre-litigation mediation voluntary on the part of disputed parties.

## CONCLUSION

No dedicated statute dealt exhaustively with mediation as an alternate dispute resolution mechanism. The bill needs to be more active about how the international mediation will be conducted. There are various other loopholes in the bill, which the author has dealt with. One of the most unique features of the account is Confidentiality. The statement stipulates that the mediators, parties, and participants cannot disclose information such as opinions, proposals, documents related to mediation, etc. No party is allowed to make an audio or video recording of the mediation proceedings. The court or tribunal cannot compel the parties to disclose any material or documents related to the mediation proceedings.<sup>46</sup>The bill's efforts to recognize online and community mediation is another progressive step. On a larger scale, the account is a welcome move and will lower the burden of the courts and solve disputes in a time-bound manner.

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<sup>46</sup> Section 23(2), the Bill

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