

MEDIATION BILL 2021

Shreya Shorewala*

This article reviews the mediation bill 2021. Initially, the article focuses on what Mediation is, what a mediation bill is, why it is needed, and its salient features. Subsequently, the author will comment on the Mediation bill's advantages and drawbacks.

"The spirit of the law, not its letter, is what gives life to justice." Lord Justice Earl Warren

Mediation comes from the Latin word "medicare", meaning to halve. In Chinese, it means to take a step between two conflicting parties and remedy it. Succinctly defined Mediation as third-party assistance to two or more interacting parties. A lawsuit is a "lis inter partes," i.e. Suit between two parties. The Indian legal system has developed an alternative to adversarial litigation known as the Alternate Dispute Resolution Mechanism. On December 4, 1993, the Chief Ministers and Chief Justices of the States adopted a Resolution. It read: "The heads of government and the highest judges agreed that the courts couldn't handle everything and that some conflicts were better suited to being settled through arbitration, Mediation, or negotiation. They stressed the value of parties to a disagreement using alternative dispute resolution, which can provide procedural flexibility, save time and money, and reduce the emotional and mental strain of going to trial."

Journal of Legal Research and Juridical Sciences

Due to the heavy workload on Indian courts and expensive trials, Alternate dispute resolutions have gained momentum over the years. It helps mitigate between two disagreeing parties to resolve their issue. This external dispute resolution allows parties to listen amicably to another party, decreasing their animosity towards each other while trying to keep the situation under control and improving their sense of fairness. This also helps them save time and money. There are at least five forms of alternative dispute resolution (ADR): Arbitration, Mediation, collaborative law, conciliation, and negotiation. Mediation is one of the most influential and popular alternative dispute resolution modes. Mediation is a settlement between two disputed parties in a private setting with the help of a third unbiased/neutral party making it faster, cost-effective, flexible, and efficient. It is used in various legal matters, such as civil disputes, family law matters, and commercial disputes. The mediation process is typically less formal than a

*LLB (HONS), FIRST YEAR, OP JINDAL GLOBAL UNIVERSITY, SONIPAT.

court proceeding and allows for more flexibility and creative solutions due to the voluntary role of the parties. The mediator's role is to facilitate communication and negotiation between the parties, but they do not make decisions or impose settlements; instead, the parties reach a mutually acceptable agreement with the mediator's guidance. The scope for ADR opened up in India due to Section 89 of the code of civil procedure in 2002. Most suitable cases for Mediation are "pertaining to recovery of money, rent, partition, matrimonial, labor, specific performance, damages, injunction, declaration, a dispute between landlord and tenant, cheque bounce cases, motor accident claim and many more. Suitable criminal cases include offenses covered under Section 320 Cr. P.C" Either the judge can refer the parties for Mediation if settlement elements exist in the parties or if both parties desire it. The mediation bill of 2021 was introduced in the Rajya Sabha on December 20, 2021, after the ministry of law and justice opened it for public comment and suggestion on November 5, 2021, and was reviewed by a parliamentary Standing Committee. The Committee submitted its report on July 13, 2022, and recommended significant changes to the Bill to establish the mediation Council of India. There was no particular legislation for Mediation in India, though there were multiple laws with mediation provisions, such as the Code of Civil Procedure, 1908; the Arbitration and Conciliation Act, 1996; the Companies Act, 2013; the Commercial Courts Act, 2015, and the Consumer Protection Act, 2019. Moreover, since India is a signatory to the Singapore Convention on Mediation, it is appropriate to have a law in place for both domestic and international Mediation. The Bill aims to promote, consolidate and facilitate Mediation in India, specifically institutional Mediation to resolve disputes and community mediation and make online Mediation a cost-effective option.

The Bill has several essential features, including the definition of Mediation as "domestic" or "international," (Section 2) mandatory pre-litigation mediation, a time limit (Section 20) for the completion of Mediation, and recognition and enforcement of domestic and international Mediation Settlement Agreements (Section 21). The Bill defines "domestic mediation" as one conducted in India where all or both parties habitually reside or do business in India and "international mediation" as one that relates to commercial disputes arising out of legal relationships under Indian law and where at least one party is a foreign national, body corporate, or foreign government. The Bill also requires parties to have a written agreement for Mediation and establishes the Mediation Council of India to promote and develop domestic and international Mediation in India. Additionally, the Bill recognizes institutional Mediation and allows for appointing foreign mediators with the necessary qualifications and accreditation.

The Bill has several objectives, including:

Establishing a uniform procedure for Mediation in the country and clearly defined legal terms

Encouraging people to use Mediation as a more efficient and cost-effective method of resolving disputes in order to reduce the number of pending court cases

Addressing pre-litigation Mediation and clarifying its role

Providing guidance on the powers and responsibilities of courts and tribunals in the mediation process

Ensuring that the principles of confidentiality, neutrality, impartiality, and participation of parties are upheld by creating an authority to oversee mediation proceedings and clarify the relevance of mediation proceedings.

The Bill contains several positive features, such as the recognition of a mediated settlement agreement under the Indian Civil Procedure Code 1908 ("CPC"), the right of parties to seek urgent interim relief in courts before or during mediation proceedings under exceptional circumstances, provisions for timely completion of mediation proceedings, community mediation, and the establishment of a Mediation Council of India to institutionalize Mediation. However, there are gaps in some of the critical provisions of the Bill that make it a work in progress. These gaps need to be critically analyzed and suitable amendments made to the Bill to make it a comprehensive and practical legislation.

The Bill defines Mediation to include conciliation(section 4) within its scope, which is problematic for several reasons. Firstly, conciliation and Mediation are distinct concepts in law. In conciliation, the conciliator plays a more proactive role and is empowered to propose settlement terms, unlike the mediator's role, which is that of a facilitator and nothing beyond that. This is a significant difference between the two concepts, which would be lost if they were grouped. Secondly, the Bill does not have separate provisions for conciliation. It seeks to do away with the provisions on conciliation under the Indian Arbitration and Conciliation Act 1996, which would lead to anomalous results where parties will no longer have effective recourse to conciliation under the Arbitration Act. Including conciliation within the definition of Mediation would lead to confusion and conflicts with existing laws on conciliation. To avoid these issues, it is suggested that conciliation be excluded from the scope of Mediation under

the Bill and that the law on conciliation remains codified in the Arbitration Act. This would ensure that the concept of conciliation remains intact and that parties have a clear and distinct recourse to conciliation under Indian law.

The Bill includes a provision for mandatory pre-litigation Mediation (section 6 (1)), which requires parties to attempt to settle their disputes through Mediation before filing any suit or proceeding in court. This provision applies regardless of whether a mediation agreement exists between the parties. The provision aims to reduce the burden on courts and encourage parties to try the mediation process to resolve their disputes. However, the provision has been criticized for being inconsistent, unclear, and potentially counterproductive. It could be seen as invasive of party autonomy and lead to unwilling parties exploiting the opt-out mechanism to circumvent the process. The provision needs to be reconsidered, and pre-litigation Mediation is made optional, at least at the initial stage. Alternatively, the provision could be made mandatory only for certain disputes. The Committee has also submitted a report suggesting caution against making pre-litigation Mediation compulsory on the ground that truant litigants may use it to delay the disposal of cases. Additionally, the provision on mandatory pre-litigation Mediation can be seen as problematic as it is contrary to the voluntary nature of Mediation and may lead to unwilling parties attending mediation sessions as a formality before withdrawing from the process.

The Bill allows parties to seek urgent interim relief from courts in exceptional circumstances. However, the phrase "exceptional circumstances" is open to subjective interpretation and may lead to inconsistent standards in courts' decisions. Also, Bill's requirement that foreign mediators possess specific qualifications (Section 10 (1)), experience, and accreditation is seen as restricting party autonomy in choosing mediators, which goes against the principle of party autonomy in collaborative ADR processes like Mediation. This provision should be reconsidered, or the criteria for qualifications, experience, and accreditation should be more clearly defined in the Bill to ensure clarity and consistent application.

The Parliamentary Standing Committee Report on Mediation Bill 2021 also highlighted several issues with the draft bill, including the mandatory and coercive nature of pre-litigation Mediation, the power given to the supreme court or the high court to make laws of pre-litigation, the non-applicability of the provisions of the Bill to disputes/matters of non-commercial nature involving the government and its agencies, and the qualifications and appointment of the chairperson and members of the proposed Mediation Council. They

recommended making pre-litigation Mediation optional and introducing it in a phased manner, establishing mediation councils in each state, having the Mediation Council of India issue each mediator with a unique registration number, reducing the time limit for Mediation from 180 days to 90 days, and reframing the definition of Mediation. They also suggested that the Mediation Council of India should be the nodal authority for the registration and accreditation of mediators. These recommendations should be taken seriously.

In conclusion, the Mediation and Conciliation Bill of 2021 has several positive features, such as recognition of mediated settlement agreements, the right to seek urgent interim relief, provisions for the timely completion of mediation proceedings, community mediation, and the establishment of a Mediation Council of India. However, several gaps in the Bill need to be addressed. The inclusion of conciliation within the definition of Mediation, the mandatory nature of pre-litigation Mediation, the restriction on party autonomy in choosing mediators, and the lack of nuances in several places are some of the issues that need to be addressed to make the Bill a comprehensive and practical piece of legislation. The Bill, if enacted, will provide a much-needed legal framework for commercial Mediation in India and boost investor confidence. However, it is essential to address Bill's inconsistencies to make it a robust legislation.

