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## THE MEDIATION BILL, 2021

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### INTRODUCTION

The Mediation Bill, 2021 seeks to promote mediation, particularly institutional mediation, and provide a mechanism for enforcing mediated settlement agreements. The Bill has been referred to the Standing Committee on Personnel, Public Grievances, Law and Justice. The judicial system in India is marred by delay in processing mainly due to the number of pending cases in India and the time taken to dispose of such cases. In order to facilitate the quick disposal of disputes, outside of traditional court systems, the need for a standalone Law on Mediation has been highly sought after. The Mediation Bill, 2021 ("Bill") was introduced in the Rajya Sabha on December 20, 2021, but it was referred to the Committee on Law and Justice for additional scrutiny due to strong opposition. Mediation is a type of alternative conflict resolution in which parties try to resolve their disagreements outside of court with the help of a neutral third party called a mediator. The Bill's goal is to make mediation easier and more popular in India, particularly institutional mediation for dispute resolution. It also intends to promote community mediation and make online mediation a viable and affordable option. It suggests that a codified legislation on mediation be enacted, as well as provisions for the enforcement of settlement agreements reached through mediation. This essay aims to highlight the most important points. The Mediation Bill 2021 aims to promote mediation (including online mediation) and ensure that settlement agreements reached through mediation are enforced. In most Civil and Commercial Disputes, one must first attempt to resolve the matter through mediation before proceeding to the Court or Tribunal.

### SALIENT FEATURES OF THE MEDIATION BILL, 2021

- Section 6 of the Bill proposes that parties to a civil or commercial dispute must take steps to settle their dispute through pre-litigation mediation before approaching a court of law.<sup>1</sup> Additionally, courts and tribunals are proposed to be

given powers to refer parties to mediation and pass suitable interim reliefs to protect the interests of the parties to a court case pending completion of mediation proceedings.

- Potential mediator appointments will be required to disclose any conflicts of interest that could call their independence and impartiality into question. The bill grants parties the power

<sup>1</sup> <https://www.lawinsider.in/wp-admin/post.php?post=29041&action=edit#post-29041-post-29041-endnote-ref-4>

to fire any mediator who has provided misleading or erroneous conflict of interest information.

- As a result of mediation-related conflicts, Section 22 of the Bill seeks to introduce a "Mediated Settlement Agreement" (the "Agreement")<sup>2</sup>. Once the parties have signed and the mediator has certified the agreement, it will be final and binding. Under the terms of the Civil Procedure Code, this Agreement will be enforced as a judgment or decree.
- Section 29(2) of the Bill allows an aggrieved party to challenge the Agreement in a court or tribunal of competent jurisdiction in the event of fraud, corruption, gross impropriety, or impersonation.
- The bill proposes creating a Mediation Council of India (the "Council") as a separate legal entity to promote and govern domestic and international mediation in India. Supreme Court or High Court judges, eminent personalities and academicians in the field of mediation, and senior government officials are proposed as members of the Council.
- Section 23(1)(iii) of the Bill makes mediation an effective tool to maintain the confidentiality of a dispute, as documents produced during mediation will not be admissible as evidence in any court or tribunal. However, this can be somewhat problematic if one party decides to sue the counterparty following a failed mediation and is prevented from introducing key documents into evidence in court simply because they were a part of the mediation proceedings.
- To sign an Agreement to which the government is a party, prior written authorization of the appropriate government body will be required. Furthermore, measures made in good faith by the federal or state governments, their officers,

Council members, mediation institutes, or mediation service providers cannot be contested and are exempt from legal action.

- The Bill has not been divided into four (4) parts as was the case with the earlier draft and does not address the enforcement of international commercial settlement agreements.

### **SCOPE OF THE BILL**

- Conflicts connected to criminal prosecution, disputes involving an allegation of significant and specific Fraud, Fabrication of Documents, Forgery, Impersonation, and Coercion are not fit for Mediation, according to Section 7[2] of the Bill. Certain provisions of the Bill,<sup>3</sup> on the other hand,

<sup>2</sup> <https://www.lawinsider.in/wp-admin/post.php?post=29041&action=edit#post-29041-post-29041-endnote-ref-7><sup>3</sup> 'Mediation', Mediation and Conciliation Project Committee, Supreme Court of India.

may aid in the improvement of law and order in a community or encourage the compounding of criminal acts.

- The bill mandates that any dispute between residents of any area or municipality that is likely to contravene law and order be addressed through community mediation. Any settlements reached in this manner, however, will not be enforceable as a civil court judgment or decree.
- It further specifies that the Act's provisions do not supersede the Maintenance and Welfare of Parents and Senior Citizens Act of 2007 or the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act of 2013, among other statutes. It means that if a civil or business disagreement is resolved through mediation, a criminal violation stemming from that civil or commercial dispute may be compounded. Similarly, any local conflict might devolve into a law and order crisis, leading to the filing of a criminal prosecution. Community mediation could help to settle these issues.
- Many big crimes are the result of little concerns that are not dealt with effectively or

ignored. As a result, while the proposed Bill's primary goal is to resolve civil and commercial disputes through mediation, it also has the potential to relieve some of the load on law enforcement.

- The law to prevent the Sexual harassment of women at the workplace has probably been kept out of its scope so that an internal or local compliant committee can take up conciliation and close the case locally without involving a third party in the detailed procedure. The law on the maintenance and the welfare of parents and senior citizens has also been kept out of its scope as offenses under it are cognizable offenses.
- The Code of Criminal Procedure's Section 320 allows for the compounding of certain criminal offenses, which has the result of the accused being acquitted. There are around 43 criminal offenses that can be compounded by the victim, ranging from bodily harm to property crimes, and approximately 13 offenses of considerably greater intensity that can be compounded with the court's authorization.

#### Mediation Council of India

The Bill provides that the central government will establish the Mediation Council of India. Functions of the Council include: (i) registering mediators, (ii) recognising mediation service providers (institutions administering mediation) and mediation institutes (providing training, education, and certification of mediators), (iii) grading mediation service providers, and (iv) laying down standards for professional conduct of mediators, mediation service providers, and mediation institutes. We discuss two issues with the Council.

Section 2 of the Mediation Bill defines '*domestic mediation*' as one conducted in India, where:

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

'*International mediation*' as per Section 3(f) of the Bill is defined as 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:

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

**Mandatory pre-litigation mediation and settlement:** Section 6 (1) of the Bill requires parties to take steps to resolve disputes through pre-litigation mediation in accordance with the Bill's provisions before filing any suit or proceeding in any Court or Tribunal, and this may be done regardless of the existence of any Mediation Agreement. As a result of this clause, pre-litigation mediation is now required.

**Disputes not suitable for mediation:** According to Section 7 of the Bill, mediation under this Bill will not be conducted for the resolution of any dispute or item listed in the First Schedule's suggestive list. The First Schedule contains conflicts involving claims against children or persons of unsound mind, (ii) disputes involving criminal prosecution, (iii) disputes affecting third-party rights, (iv) issues relating to the assessment or collection of taxes, and so on. The First Schedule further states that the central government has the authority to change the list of issues not suitable for mediation.

**Process of mediation and deadline for completion:** Mediation proceedings shall be kept confidential. After the first two mediation sessions, a party may withdraw from the process. Section 21 of the Mediation Bill stipulates that mediation must be completed within 180 days after its start date, with the option of an extra

180-day extension with the approval of the parties. Section 26 of the Bill requires that court-annexed mediation (i.e., mediation performed at a mediation center established by a court or tribunal) be conducted in accordance with directions or norms framed by the Supreme Court or High Courts.

Recognition and enforcement of domestic and international Mediation Settlement Agreements: Under Section 22, a "Mediated Settlement Agreement" is defined as "an agreement or interim agreement in writing between some or all parties resulting from mediation that settles some or all of the parties' disputes and is authenticated by the mediator."

The Bill has incorporated Section 28 to recognize domestic mediation as final and binding between the parties and the person claiming thereunder. The Bill provides that a Mediated Settlement Agreement can be enforced in accordance with the provisions of the Code of Civil Procedure, 1908.

Challenges to a Mediated Settlement Agreement: The Bill establishes a number of grounds for challenging a Mediated Settlement Agreement. The Bill's section 29(2) lays forth four grounds for challenging a domestic Mediated Settlement Agreement:

a) Fraud, b) Corruption, c) Impersonation, and d) Disputes that are not suitable for settlement.

Recognition of institutional mediation: Section 3(1) of the Draft Bill defines a 'Mediation Service Provider' as a body or organization that provides for the conduct of mediation and has in place procedures and rules to govern the conduct of the mediation in conformity with the Bill. Lok Adalats constituted under the National Legal Services Authorities Act, 1987 and mediation centers annexed to courts are also included in the term 'Mediation Service Provider'.

Mediation Service Providers will be graded by the Mediation Council of India and will be required to maintain a panel of mediators, provide infrastructure and facilities for the efficient conduct of mediations, register and file Settlement Agreements, and perform other duties as outlined in Sections 41 and 42 of the Bill.

Online mediation: Chapter VII of the Bill recognises pre-litigation mediation performed through the use of applications and computer networks, which can be used in whole or in part at any stage of the mediation process with the parties' written approval. All such online mediations must be conducted in accordance with the procedures that may be provided.

Establishment of the Mediation Council of India: Chapter VIII of the Mediation Bill outlines

the Central Government's role in establishing and incorporating the Mediation Council of India, as well as its extensive responsibilities, powers, and activities.

Community mediation: Chapter X of the Mediation Bill specifies the kind of issues for which community mediation may be used, namely, any dispute that threatens peace, harmony, or calm among the residents or families of any area or neighborhood. It also specifies the kind of people who may be included in the mediation panel by the relevant authorities, such as people of standing and integrity who are well-liked in the community, representatives from neighborhood/resident welfare organizations, and so on. The mechanism for community mediation is also spelled out in Section 45 of the Bill.

### **The Bill does not require representation of practicing mediators on the Council**

The Mediation Council's main responsibilities include certifying, assessing, and registering mediators, as well as establishing standards for their professional and ethical conduct. The Council will be made up of seven members, including two full-time members with mediation or alternative dispute resolution experience, as well as ex-officio members like the Law and Expenditure Secretaries. A professional mediator is not required to be a member of the Council under the Bill. It's also unclear why the Expenditure Secretary was elevated to a Council member.

In general, statutory bodies that regulate professions (such as lawyers, chartered accountants, and doctors) must include people who have extensive experience or are currently practicing in the subject.<sup>4</sup> While full-time members of the Council must have knowledge or experience with mediation or alternative dispute resolution legislation and methods, they are not required to be practicing mediators with extensive experience.<sup>5</sup> For example, the Bill would allow an arbitrator to be nominated to the Council as a full-time member.<sup>6</sup> It's possible that an arbitrator isn't the appropriate person to set rules for mediators' professional conduct. It's worth noting that the law governing arbitration in India was changed in 2019 to allow for the establishment

of the Arbitration Council of India, whose responsibilities include rating arbitral institutions and accrediting arbitrators.<sup>7</sup> This clause has yet to take effect. The 2019 amendment mandates that the Arbitration Council have a full-time member who is a prominent arbitrator with extensive experience in institutional arbitration.

<sup>4</sup> The Advocates Act, 1961.

<sup>5</sup> The Chartered Accountants Act, 1949.

<sup>6</sup> The National Medical Commission Act, 2019.

<sup>7</sup> Section 10, The Arbitration and Conciliation (Amendment) Act, 2019.

### **Requiring central government approval before issuing regulations may not be appropriate**

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**No provision for enforcing certain international mediated settlements**

If commercial disputes are mediated in India, the Bill extends to international mediations (where at least one party is a foreign party). However, there may be cases where the mediation is undertaken outside of India involving an Indian party. The execution of settlement agreements in India becomes a challenge in such situations. Mediation settlement agreements will be enforceable in the same manner that a court decision or decree will be. This excludes settlement agreements reached outside of India as a result of international mediation. It's worth noting that the Singapore Convention on Mediation establishes a framework for the enforcement of international mediation settlement agreements across borders. India signed the Convention on August 7, 2019, however it has yet to be ratified.

<sup>8</sup>The Company Secretaries Act, 1980.

**CONCLUSION**

Prior today, there was no specific legislation in India designed solely for the purpose of mediation. As a result, the attempt to have codified legislation on mediation is a positive move because it will have a significant impact on lowering the backlog of cases in the Indian legal system while also providing prompt justice to the people. However, several aspects of the Bill may require clarification. To begin with, the Bill is unclear as to which businesses will be recognised by the Council as mediation service providers, necessitating clarification. Second, the Bill contains no information about the qualifications or capabilities of a qualified mediator. Third, requiring a mandated pre-litigation mediation mechanism could be difficult and contradict the purpose of mediation if the parties are unwilling to negotiate and choose to litigate instead. To avoid this, the Bill may provide a choice about the parties' consent to participate in pre-litigation mediation. Finally, the provision in Section 18 of the Bill that the mediator disclose "each party's opinion to the other to the extent agreed upon by them" could create a potential conflict of interest, in addition to interfering with the confidentiality requirement of the mediation process. The government's attempt to have a standalone mediation law is positive because of the beneficial effect it will have in reducing the backlog of cases in the Indian judicial

system. However, clarity needs to be provided on which entities will be recognized by the Council as mediation service providers. In addition, the applicability of pre-litigation mediation will be a challenge for disputants who may prefer to litigate. Therefore, the Bill should give a choice in this regard and specify that only certain types of disputes should be directed for pre-litigation mediation.