



COMMENTS AND SUGGESTIONS ON

DRAFT MEDIATION BILL 2021

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25 NOVEMBER 2021

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CHAPTER I

INTRODUCTION

Mediation is not just a process to resolve various disputes, but something necessary for survival of the legal system. Without mediation, the system is subject to so much overloaded that it is well-nigh impossible to have it function well.

Mediation has always been part of Indian cultures and values and is given constitutional recognition in the form of panchayats. We have witnesses implementation of mediation in court annexed mediation scheme running successfully. However there were some problems:

1. Artificial distinction between mediation and conciliation while conciliation was governed by Part III of the Arbitration and Conciliation Act. Leonard Riskin[1] was of the view that there is only a difference in degree of role of mediator, who has to tailor her role around the needs of the client.
2. There were different status of agreements arrived out of these processes.
3. There was no law governing private mediations.
4. Enforceability of mediated settlement agreement.

The Bill is a very good step of the Government in the right direction but it is just the beginning of the journey to legislate Mediation. This Bill achieves to not just address addresses all of these concerns but also provides for:

a. pre-litigation mediation;
b. community mediation;
c. online mediation;
d. International mediation;
e. recognizes Mediation Institutes and Mediation Service Providers – establishes mediation as an independent method of dispute resolution and also encourages people to opt their career option;
f. Accreditation and Regulation of practice of mediation;
g. Institutionalization of mediation through establishing a governing body i.e. MCI

[1] Leonard L. Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", 1 Harv. Negot. L. Rev. 7, 13 (1996)

We want to analyse the provisions of the Bill against the basic principles of Mediation:

- Voluntariness
- impartiality of mediators
- confidentiality
- party autonomy and control

CHAPTER II

PREPARATION OF THE COMMENTS/SUGGESTIONS ON THE DRAFT BILL

About the Centre for ADR

The Centre for ADR has a vision to promote the use of ADR methods among the legal and non-legal professionals, students and general public at large. The Centre envisions a society which values harmony, peaceful co-existence and diversity. The skills involved in ADR methods are not only for amicably resolving the disputes and disagreements but these are life skills which are needed for all of us. The Centre strive to contribute to the vision and mission of the National Law University Delhi of developing human beings who are technically sound, socially relevant and emotionally strong by imbibing the skills of ADR methods like active listening, understanding other's point of view, discussions, empathy, rational thinking and community interest. The Centre wishes to bring a positive change in the view of the society regarding disputes/disagreements not as something negative but as an opportunity.

National Consultation on the Draft Mediation Bill

The Centre of ADR at the National Law University Delhi organized a National Consultation on the Draft Mediation Bill 2021 on November 20, 2021. In the Consultation, HMJ M. L. Mehta (founding Chairman, DDRS, Delhi) who was the Chief Guest and a panelist and Mr. Sriram Panchu (Internationally acclaimed Mediator) was the Guest of Honour. The panel discussion was among Mr. Amarjit Singh Chandiok (Senior Advocate and Mediator Master Trainer), Ms. Chitra Narayan (Mediator Master Trainer), Ms. Uma Ramanathan (Mediator Master Trainer), Dr. Aman Hingorani (A.O.R and Mediator)and Dr. Ruhi Paul (Director, CADR, NLU Delhi). The rapporteurs for the proceedings were Ms. Livie Jain, III Year, B. A. LL.B. (Hons.) and Mr. Ishaan Bhatnagar, III Year, B. A. LL.B. (Hons.) NLU Delhi.

The purpose of organizing this Consultation was to discuss the provisions of the Bill with some of the experts in the field of mediation and submit the comments to the Department of Legal Affairs as the Government has invited comments/suggestions on the draft Bill as part of the democratic process of making any law in the country.

The Detailed comments are prepared by the Centre for ADR, NLU Delhi and it includes the views expressed by the panelist at the Consultation.

CHAPTER III

TOPIC WISE COMMENTS/SUGGESTIONS

Kenneth Cloke – "the range of what we think and do is limited by what we fail to notice"

I. EXCLUSIONS FROM THE BILL

1. Exclusion of court-annexed mediation; mediation under the Legal Service Authority Act, Commercial Court's Act, Consumer Protection Act; MSME, Ombudsman, etc does not serve the purpose of bringing a uniform law governing the practice of mediation. If we will have multiplicity of avenues available to the parties under different laws and different types of procedures than private mediation will not thrive.
2. Excluding court-annexed mediation would mean that mediation would continue to govern by different rules of different High Courts. For development of any system, there is a need of bringing uniformity. Also, the Rules of High Court governing mediation require serious reconsideration due to huge gap between the actual practice of mediation in Court-Annexed Mediation Centres and the provisions of the Rules[2].

II. COMPOSITION OF THE COUNCIL

1. There are no mediators in the council.
2. There should be Council on State, District and Taluk Level on the line with the Legal Services Authorities Act if we want to take mediation to the grass root level.

III. LIST OF EXCLUSIONS

1. Exclusions are very widely worded. There is a scope of litigation on the issue of exclusions which is not the purpose of the Bill. For promoting use of mediation, the exclusions should be less and clearly stated. Of course in a mediation you cannot decide validity of copyright or patent- but because of exclusions, people in the dispute will not talk sit together and find mediated innovative solutions. This Bill puts too many thresholds, barriers in the beginning itself.

[2] Ruhi Paul, "**NEED TO RE−LOOK INTO THE RULES GOVERNING MEDIATION,** M.D. U, Volume XIX, July 2017, ISSN: 2230-746X

2. We need to look into international practice as IP disputes, Anti-trust disputes, etc are all made available for various ADR methods.

IV. INTERNATIONAL COMMERCIAL MEDIATION (ICM)

1. It has placed ICM under the chapter on domestic mediation, giving mediation agreement status of domestic decree of court. Singapore Convention on the other hand, gives worldwide recognition – thus, there is a considerable fear that international business persons will say- if we are going to mediate in India there is confusion on enforceability so we might as well mediate outside- there go our chances to make India a robust hub.
2. **Definition of the word "commercial" is different from the Singapore Convention**. Recently, few High Courts have passed some very contradictory judgments on the meaning of "commercial" (Investment disputes are not considered to be commercial disputes)[3].
3. **List of exclusions**: Singapore Convention provides for both International Mediation and International Commercial Mediation but Part III of the Bill only provides for International Commercial Mediation. Online dispute resolution has worked wonderfully with consumer disputes. All of these disputes are excluded currently under the Bill whereas these kinds of international disputes - including personal disputes, disputes relation to employment, succession, marriage and custody - often settled easily.
4. The Bill doesn't provide for the situation when one party to agreement files a civil suit in India on the lines of Section 45 of the Arbitration & Conciliation Act. It only provides for enforcement of settlement agreements under Section 51 & 52 of the Bill. There is a need to add provision for this.
5. Part III does not talk about the status of the International Mediation settlement agreement like section 36 and 49 of the Arbitration & Conciliation Act. Part III doesn't provide that the settlement will be at par with the decree of a civil court after challenge under section 52 of the Bill.
6. There is a duality of provisions in respect of ICM: like under Part I, the status of International settlement agreement is at par with decree of civil court under section 28 but the same is missing under Part III of the Bill. The grounds under section 29 and section

[3] *UOI v. Vodafone group PLC,* CS (OS) 383/2017 DHC

52 are completely different from each other. Section 29 grounds are not compatible with the grounds under the Singapore Convention.

V. GROUNDS OF CHALLENGE UNDER PART I

1. No need of grounds of challenging the settlement agreement like Section 96 CPC provides no right of appeal against a consent decree. Agreement entered under section 89 will be final but agreement entered under Mediation Act can be challenged.
2. We need to clearly define accountability/duties of parties, how mediator has to conduct the process, Mediator's privilege, etc to avoid challenges in the court, else there will be lot of scope of judicial interpretation which will dilute the purpose of mediation as an alternative to courts and give rise to satellite litigation.
3. Grounds of challenge under section 29 are very vague and not clearly defined. For example impropriety, impersonation, etc.
4. Time limit for challenging the settlement agreement under Section 29 (3) is completely unreasonable as for example in case of fraud there should be no time period. Even under section 17 of Limitation Act, in respect of fraud and mistake, the time beings to run after the date of knowledge of fraud/mistake. There is no need of time limit for setting aside the mediated settlement agreement. **Section 29 (3) may be deleted.**
5. Fraud as a ground has been a ground of litigation in arbitration matters also[4]. Internationally, fraud cannot vitiate the arbitration agreement unless it is very specific and serious. So, we need to clarify what types of fraud would be a ground for challenge of settlement agreements.
6. There is no purpose of putting a time line like section 8 of the Arbitration & Conciliation Act in Section 9 of the Bill. Parties should be free to request for referral to mediation at any stage of the proceedings even at appellate stage or post decree stage.

VI. PRE-LITIGATION MEDIATION

[4] *A. Ayyasamy v. A. Paramasivam and Ors. (2016), Avitel Post Studioz Limited and Ors. v. HSBC PI Holdings (Mauritius) Limited and Ors. (2020), Ameet Lalchand Shah v. Rishabh Enterprises (2018), Vidya Drolia v. Durga Trading Corporation (2021), etc.*

1. Making pre-litigation mediation mandatory in all cases though a good initiative but in the absence of infrastructure can also act as barrier to constitutional right of access to justice. The availability of mediator at the level of panchayats, taluks, etc is something which requires attention. Hence, we should have council at Panchayat and Taluk levels also and not just at the Centre.
2. If the purpose of mandatory pre-litigation mediation in all cases is to popularize the use of mediation, than it can be achieved by creating more awareness about mediation through different modes like introducing course on mediation in school and college curriculum, training people in mediation, and advertisement through electronic and print media.
3. In Kerala, the Court Fees Act had an interesting provision where only some money paid at the outset, rest to be paid after issues are framed and if parties want to move out of the court for mediation/ADR, there was no need to pay the remaining fees. Such procedural innovations can be brought in.
4. **Interim Relief** - In case of an application for interim relief under Section 8 of the Bill, if mediation process has not started and party has approached Court/ Tribunal for interim relief, no time period is mentioned within which the Mediation process should resume. In the Arbitration & Conciliation under Section 9, a period of 90 days is provided.
5. In compulsory mediation, people will go to med, but simultaneously they will go to court for seeking interim reliefs/protection also. Here if you're simultaneously pursuing remedies in court and mediating - **there would be no good faith participation, people will avoid sharing vulnerable thoughts etc if there is a remedy waiting against them. Even under the Commercial Court's Act, if there is a requirement of interim relief than the parties may skip the pre-litigation mediation process.**

VII. CONFIDENTIALITY

1. Confidentiality should be extended to the settlement agreement except where its disclosure is necessary for purposes of implementation and enforcement like Section 75 of the Arbitration & Conciliation Act.
2. There should be added provision on the line of Section 80 of the Arbitration & Conciliation Act in this Bill providing that except with the consent of the parties,

mediator cannot act as an arbitrator or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the mediation proceedings.

3. The act has given **tacit permission to video/audio recording under section 22 (3) of the Bill**. **This section should be deleted.**
4. In case of arbitral awards for the purpose of precedents and fairness, there is a need felt, internationally, for transparency and publication of awards. There also publication is with the consent of parties and in certain cases publication of awards is without the details of the parties to keep up with the requirement of confidentiality. However, in case of settlement agreement, there is no such requirement of precedent so the need of publication is not there.
5. **Registration and Depository of Mediated Settlement Agreement** – The purpose of dual requirement of compulsory registration and depository is not clear and it violates the principle of confidentiality of settlement agreement especially when India does not have a strong Data Protection Law. Registration of agreement is sufficient for the future purposes and in this case also the settlement agreement should only be available to the parties to the agreement and their predecessor in interest Just like Wills under Section 44 of the Registration Act.

VIII. COMMUNITY MEDIATION

Most of the cases are within a family, neighborhood, partnership, siblings, schools – If we don't handle it properly, they ultimately go to courts or to the Police and bring disharmony in the society. Large number of cases can be handled at community level.

But for its encouragement, proper systems need to be designed- we need people from community also who are well versed with culture, environment, socio-economic backgrounds- this model is already in use in the **Delhi Dispute Resolution Society**.

1. Under Section 47 (2), the power to notify the mediator is given to District Magistrates or the SDMs. This can be done by the Mediation Council at the District level instead.
2. Under Section 47 (3), certain members of the public are mentioned who can be included in the panel of mediator but there is no requirement of training of mediation for these people. Mediation training is essential for anyone to act as a mediator.

3. Another option is to impart a basic training (may be of one or two day capsule course) and these members of public may act as co-mediators with the trained mediators.

IX. ONLINE MEDIATION

1. Issues of appropriateness of online mediation in different types of cases – Online mediation may not be appropriate for certain types of disputes like inter personal relational disputes and it may be appropriate for commercial disputes.
2. Confidentiality and Data Protection should be ensured in online mediation. No provision to deal specifically is there in the Bill.
3. Issue of Jurisdiction – Which court/tribunal will exercise jurisdiction under Part I and Part III for enforcement purposes and other purposes is not clear.
4. The Bill doesn't deal in detail about the way online mediation will be conducted and leaves it to the Council.

X. MISCELLANEOUS

1. There is a lot of repetition in the Bill.
2. Lot of issues are not covered in the Bill but are left for Council to deliberate upon.

Submitted by Centre for ADR



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