

# Legislative Brief

## The Mediation Bill, 2021

The Mediation Bill, 2021 was introduced in Rajya Sabha on December 20, 2021.

Subsequently, it was referred to the Standing Committee on Personnel, Public Grievances, Law and Justice.

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### Highlights of the Bill

- ◆ The Bill requires persons to try to settle civil or commercial disputes through mediation before approaching any court or tribunal. A party may withdraw from mediation after two mediation sessions. The mediation process must be completed within 180 days, which may be extended by another 180 days by the parties.
- ◆ The Mediation Council of India will be set up. Its functions include registering mediators, and recognising mediation service providers and mediation institutes (which train and certify mediators).
- ◆ The Bill lists disputes that are not fit for mediation (such as those involving criminal prosecution, or affecting the rights of third parties). The central government may amend this list.
- ◆ If the parties agree, they may appoint any person as a mediator. If not, they may apply to a mediation service provider to appoint a person from its panel of mediators.
- ◆ Agreements resulting from mediation will be binding and enforceable in the same manner as court judgments.

### Key Issues and Analysis

- ◆ The Bill makes participation in pre-litigation mediation mandatory. Mediation is a voluntary dispute resolution process. The question is whether it is appropriate to mandate parties to attempt pre-litigation mediation. On one hand, this could lead to more out of court settlements and reduce the pendency in courts. On the other hand, mandating mediation goes against its voluntary nature.
- ◆ The Mediation Council, established to regulate the profession of mediators, may not have representation of practising mediators with adequate experience. This is unlike other professional regulators such as the Bar Council of India.
- ◆ The Mediation Council requires prior approval from the central government before issuing regulations related to its essential functions. It is not clear why such prior approval is required. This may also be questioned since the central government may be a party to mediations.
- ◆ The Bill applies to international mediations only if they are conducted in India. It does not provide for enforcement of settlement agreements resulting from international mediation conducted outside India.

## PART A: HIGHLIGHTS OF THE BILL

### Context

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Alternate dispute resolution (ADR) refers to means by which disputes are settled outside the traditional court system. In India, modes of ADR include arbitration, negotiation, mediation, and Lok Adalats. Mediation is a voluntary process in which parties try to settle disputes with the assistance of an independent third person (the mediator).<sup>1</sup> A mediator does not impose a solution on the parties but creates a conducive environment in which they can resolve their dispute. The mediation process depends on the choice of parties, and there are no strict or binding rules of procedure.<sup>1</sup> Benefits of mediation include its voluntary and non-adversarial nature, the flexibility and confidentiality of the process, its speed and cost effectiveness, and the finality of consensual settlements.<sup>2</sup> As a mode of ADR, mediation may also help reduce the case burden on courts.

At present, mediation in India may be: (i) court referred (courts may refer cases to mediation under the Code of Civil Procedure, 1908), (ii) private (for instance, under a contract having a mediation clause), or (iii) as provided under a specific statute (such as the Commercial Courts Act, 2015, the Consumer Protection Act, 2019, or the Companies Act, 2013).<sup>3,4,5,6</sup> Mediation services are provided by private ADR centres or mediation centres, as well as centres set up by courts or tribunals (known as court annexed mediation centres). As per data published by the National Legal Services Authority for the year 2021-22, India had 464 ADR centres (397 functional), 570 mediation centres, 16,565 mediators, and nearly 53,000 cases were settled through mediation.<sup>7</sup>

Various countries including Australia, Singapore, and Italy have standalone laws on mediation.<sup>8</sup> The suggestion to enact a separate legislation governing mediation in India has been made on a number of occasions, including by the Supreme Court (2019), and the High Level Committee to review the institutionalisation of arbitration mechanism in India (2017).<sup>8,9</sup> Further, a committee formed by the Supreme Court in 2020 had recommended and prepared a draft umbrella legislation to give sanctity to dispute settlement through mediation.<sup>10</sup> 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.

### Key Features

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- **Pre-litigation mediation:** Parties must attempt to settle civil or commercial disputes by mediation before approaching any court or certain tribunals. Even if they fail to reach a settlement through pre-litigation mediation, the court or tribunal may at any stage refer the parties to mediation if they request for the same.
- **Disputes not fit for mediation:** The Bill contains a list of disputes which are not fit for mediation. These include disputes: (i) relating to claims against minors or persons of unsound mind, (ii) involving criminal prosecution, and (iii) affecting the rights of third parties. The central government may amend this list.
- **Applicability:** The Bill will apply to mediations conducted in India: (i) involving only domestic parties, (ii) involving at least one foreign party and relating to a commercial dispute (i.e., international mediation), and (iii) if the mediation agreement states that mediation will be as per this Bill. If the central or state government is a party, the Bill will apply to: (a) commercial disputes, and (b) other disputes as notified.
- **Mediation process:** Mediation proceedings will be confidential, and must be completed within 180 days (may be extended by 180 days by the parties). A party may withdraw from mediation after two sessions. Court annexed mediation must be conducted as per the rules framed by the Supreme Court or High Courts.
- **Mediators:** Mediators may be appointed by: (i) the parties by agreement, or (ii) a mediation service provider (an institution administering mediation). They must disclose any conflict of interest that may raise doubts on their independence. Parties may then choose to replace the mediator.
- **Mediation Council of India:** The central government will establish the Mediation Council of India. The Council will consist of a chairperson, two full-time members (with experience in mediation or ADR), three ex-officio members (including the Law Secretary, and the Expenditure Secretary), and a part-time member from an industry body. Functions of the Council include: (i) registration of mediators, and (ii) recognising mediation service providers and mediation institutes (which train, educate, and certify mediators).
- **Mediated settlement agreement:** Agreements resulting from mediation (other than community mediation) will be final, binding, and enforceable in the same manner as court judgments. They may be challenged on grounds of: (i) fraud, (ii) corruption, (iii) impersonation, or (iv) relating to disputes not fit for mediation.
- **Community mediation:** Community mediation may be attempted to resolve disputes likely to affect the peace and harmony amongst residents of a locality. It will be conducted by a panel of three mediators (may include persons of standing in the community, and representatives of resident welfare associations).

## PART B: KEY ISSUES AND ANALYSIS

### Whether mandating pre-litigation mediation is appropriate

*Bill:* Clauses 6 and 20

Mediation is a voluntary dispute resolution process. Unlike litigation or arbitration, which involve adjudication of a dispute, mediation involves settlement with the consent of the parties. The Bill mandates pre-litigation mediation in civil and commercial disputes. The question is whether it is appropriate to require participation in a process which is essentially voluntary. Note that under the Code of Civil Procedure, 1908, courts may refer disputing parties to mediation without their consent.<sup>3</sup> There are divergent views on the potential benefits and drawbacks of mandating mediation. We discuss these below.

Mediation is a cost-effective dispute resolution process that also helps reduce the burden on courts by enabling out-of-court settlements. Mandating participation in pre-litigation mediation may help reduce pendency and the slow disposal rate in courts. One may also argue that the Bill is only compelling parties to participate in the process and not to settle. Parties may withdraw from the mediation process after two sessions. The NITI Aayog (2021) has observed that this model of compulsory mediation up to a few sessions has been successful in countries such as Italy, Brazil, and Turkey.<sup>10</sup> Other countries including Australia and England statutorily mandate mediation for certain disputes, or allow courts to order mediation.<sup>11</sup>

On the other hand, mandating participation in mediation is contrary to its voluntary nature. It may not translate to a greater uptake of mediation since unwilling parties may attend the initial mediation sessions as a mere formality before withdrawing from the process. This could further delay dispute resolution, and result in additional costs. Note that the Bill mandates parties to attend at least two mediation sessions, failing which costs may be imposed on them.

Further, mandating pre-litigation mediation would require availability of sufficient trained mediators. NITI Aayog (2021) noted that a framework for mandatory pre-litigation mediation in India must be planned keeping in mind the number of mediators available and the ecosystem's ability to provide a large number of mediators.<sup>10</sup> It recommended rolling out mandatory pre-litigation mediation in a phased manner, first for certain categories of disputes and then eventually to cover a wide range of disputes. It observed that the expansion in the classes of such disputes should see a corresponding increase in capacity in terms of mediators and ADR centres.

### Mediation Council of India

*Bill:* Clauses 33(1), 34(1) and 40

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 mediations) 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.

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

Key functions of the Mediation Council relate to certification, assessment and registration of mediators, and laying down standards for their professional and ethical conduct. The Council will consist of seven members, including two full-time members with experience in mediation or ADR, and ex-officio members such as the Law and the Expenditure Secretaries. The Bill does not require a practicing mediator to be a member of the Council. It is also not clear why the Expenditure Secretary has been made a member of the Council.

Generally, statutory bodies for regulating professionals (such as lawyers, chartered accountants, and doctors) necessarily comprise persons having considerable experience or practicing in the relevant field.<sup>12,13,14</sup> While the full-time members of the Council must possess knowledge or experience pertaining to mediation or ADR laws and mechanisms, they may not necessarily be practicing mediators with significant experience. For instance, the Bill would permit an arbitrator to be appointed as full-time member of the Council. An arbitrator may not be best suited to perform functions such as prescribing standards of professional conduct of mediators. Note that the law governing arbitration in India was amended in 2019 to provide for setting up the Arbitration Council of India, whose functions include grading of arbitral institutions, and accreditation of arbitrators.<sup>15</sup> This provision has not yet come into force. The 2019 amendment requires the Arbitration Council to have a full-time member who is an eminent arbitration practitioner with substantial knowledge and experience in institutional arbitration.

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

*Bill:* Clauses 2(2), 40 and 53

Under the Bill, the Council will discharge its major functions by issuing regulations. It must take approval from the central government before issuing such regulations. Regulations may prescribe: (i) professional standards for mediators, (ii) conditions for registering mediators and recognising mediation institutes and mediation service providers, and (iii) the manner for grading mediation service providers. The question is whether it is appropriate for the Council to require prior approval from the central government before issuing regulations.

First, the Council may play only a nominal role if it must obtain approval from the central government for discharging its essential functions. Second, the central government (or agencies, corporations, and public/local

bodies owned or controlled by it) may also be party to mediations under the Bill. Note that no such previous approval for issuing rules and regulations is mandated for the National Medical Commission (which regulates the education and profession of doctors) and the Bar Council of India (except when prescribing the conditions for non-citizens to practice as advocates).<sup>12,14</sup> On the other hand, regulations made by the respective Councils of the Institute of Chartered Accountants of India (ICAI) and the Institute of Company Secretaries of India (ICSI) are subject to the approval of the central government.<sup>13,16</sup>

### No provision for enforcing certain international mediated settlements

*Bill:* Clauses 2(1), 3(f) and 28(2)

The Bill applies to international mediations (i.e., where at least one party is a foreign party) of commercial disputes, if they are conducted in India. However, there may be instances involving an Indian party where the mediation is conducted abroad. In such cases, the problem arises with the enforcement of settlement agreements in India. The Bill provides that mediated settlement agreements will be enforceable in the same way as a judgment or decree of a court. This does not cover settlement agreements resulting from international mediation conducted outside India. Note that the Singapore Convention on Mediation provides a framework for cross-border enforcement of settlement agreements resulting from international mediation.<sup>17,18</sup> On August 7, 2019, India became a signatory to this Convention, but has not yet ratified it.

### Mediators conducting pre-litigation mediation require four registrations

*Bill:* Clause 6

The Bill makes pre-litigation mediation compulsory in case of civil and commercial disputes. Unless the parties agree otherwise, mediators conducting pre-litigation mediation must meet four conditions. They must be registered with the Mediation Council of India, and empanelled by a court annexed mediation centre, a recognised mediation service provider, *and* a Legal Services Authority (National, State, or District). That is, they must be registered/ empanelled at all four places. It is unclear why satisfying any one of these conditions is not sufficient for such mediators. For instance, a mediator registered with the Council but not empanelled by a court annexed mediation centre or a recognised mediation service provider will not be eligible to conduct pre-litigation mediation.

1. [‘Mediation’](#), Mediation and Conciliation Project Committee, Supreme Court of India.
2. [Mediation Training Manual of India](#), Mediation and Conciliation Project Committee, Supreme Court of India.
3. Section 89, [The Code of Civil Procedure, 1908](#); [Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co.](#), Supreme Court of India, Civil Appeal No. 6000 of 2010, July 26, 2010.
4. Section 12A, [The Commercial Courts Act, 2015](#).
5. [The Consumer Protection Act, 2019](#).
6. Section 442, [The Companies Act, 2013](#).
7. [Settlement through Mediation Report \(April 2021 to March 2022\)](#), National Legal Services Authority.
8. [Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India](#) (Chair: Retd. Justice B.N. Srikrishna), July 30, 2017.
9. [M.R. Krishna Murthi vs. New India Assurance Co. Ltd.](#), Supreme Court of India, Civil Appeal Nos. 2476-2477 of 2019, March 5, 2019.
10. [‘Designing the Future of Dispute Resolution: The ODR Policy Plan for India’](#), NITI Aayog, October 2021.
11. Section 60I, [Family Law Act 1975](#) (Australia); [The Civil Procedure Act 2005](#) (New South Wales, Australia); [Halsey vs. Milton Keynes General NHS Trust](#), Court of Appeal (England), [2004] 4 All ER 920.
12. [The Advocates Act, 1961](#).
13. [The Chartered Accountants Act, 1949](#).
14. [The National Medical Commission Act, 2019](#).
15. Section 10, [The Arbitration and Conciliation \(Amendment\) Act, 2019](#).
16. [The Company Secretaries Act, 1980](#).
17. [United Nations Convention on International Settlement Agreements Resulting from Mediation](#), United Nations Commission on International Trade Law (UNCITRAL), March 2019.
18. [Singapore Convention on Mediation](#) (Convention Text), last accessed on January 20, 2022.

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