



## An analysis of the Draft Mediation Bill, 2021

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On November 05, 2021 the Ministry of Law and Justice issued a circular placing the Draft Mediation Bill, 2021 dated October 29, 2021 (**Draft Bill**) in public domain, inviting comments and suggestions from all stakeholders.

The Draft Bill aims to facilitate and promote mediation in India, particularly institutional mediation for the resolution of disputes, encourage community mediation, and make online mediation an acceptable and cost-effective process. It proposes to bring about a standalone law on mediation and contemplates the international practice of using the terms 'conciliation' and 'mediation' interchangeably as India is a signatory to the Singapore Convention on Mediation. This article aims to provide a brief analysis of the Draft Bill, highlighting some of its significant provisions and the gaps that exist in the legislation which require further deliberation.

### Salient features of the Draft Bill

#### ▪ **Definition of mediation:**

- As per Section 2 of the Draft Bill, 'domestic mediation' has been defined 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 an international mediation
- As per Section 3(c) of the Draft Bill, 'international mediation' has been defined as a 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 Draft Bill mandates that a party 'shall' before filing any suit or proceeding in any Court or Tribunal, take steps to settle the disputes by pre-litigation mediation in accordance with the provisions of the Draft Bill, and the same can be carried out 'irrespective of the existence of any Mediation Agreement'.

#### ▪ **Time-limit for completion of mediation:**

- Section 20 of the Draft Bill stipulates a period of 90 days from the commencement of mediation for its completion, with a further extension for an additional period of 90 days with the consent of parties.

### HSA **Viewpoint**

**The Draft Bill undoubtedly has its fair share of positives and is indeed a welcome step as far as the recognition and promotion of mediation is concerned. Upon its implementation, it will encourage effective settlement of disputes and expand the scope and reach of alternative dispute resolution. Addressing the concerns regarding certain gaps and loopholes will Help ensure that the Mediation Act, as and when enacted, contains clear and elaborate provisions which will facilitate the alternative dispute resolution mechanism of mediation.**



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- **Recognition and enforcement of domestic and international Mediation Settlement Agreements:**
  - Section 21 of the Draft Bill defines a 'Mediated Settlement Agreement' to mean and include an agreement or interim agreement in writing between some or all parties resulting from mediation which settles some or all of the disputes between such parties and which is authenticated by the mediator.
  - The Draft Bill has incorporated provisions to recognize both domestic and international mediation under Part I and III of the Draft Bill respectively. Consequently, Section 28 and Section 50 of the Draft Bill have recognized a Mediated Settlement Agreement for domestic and international mediation, as final and binding as between the parties and the person claiming thereunder.
  - The Draft Bill provides that a Mediated Settlement Agreement can be enforced in accordance with the provisions of the Code of Civil Procedure, 1908. For an international Mediation Settlement Agreement, as per Section 51 of the Draft Bill, the parties applying for enforcement shall approach the respective High Court with the Settlement Agreement or an attested copy of the same along with any other evidence that may be required to prove that the Settlement Agreement is covered under the Singapore Convention.
  - Further, for the benefit of the parties to the dispute, the Draft Bill provides certain grounds to challenge the Agreement under Section 29(2), which lays down four grounds of challenges for a domestic Mediated Settlement Agreement:
    - Fraud
    - Corruption
    - Gross impropriety
    - Impersonation
  - Whereas, in the case of an international Mediated Settlement Agreement, the grounds to challenge laid down in Section 52(2) of the Draft Bill are:
    - The subject matter of disputes is not capable of settlement by mediation under the law of India
    - The settlement agreement was induced or effected by fraud or corruption
    - It is in contravention with the public policy of India
- **Recognition of institutional mediation:**
  - Section 3(i) 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 Draft Bill. Lok Adalat's constituted under the National Legal Services Authorities Act, 1987 and mediation centres annexed to courts are also included in the term 'Mediation Service Provider'.
  - As per Sections 43 and 44 of the Draft Bill, Mediation Service Providers shall be graded by the Mediation Council of India and shall be required to maintain a panel of mediators, provide infrastructure and facilities for the efficient conduct of mediations, register and file Settlement Agreements, amongst other functions.
- **Due recognition to online mediation:**
  - Chapter 6 of the Draft Bill recognizes online mediation setup conducted by using applications and computer networks, resorted to either wholly or in part, at any stage of the mediation process, with written consent of the parties. The conduct of all such online mediations shall be governed by the provisions of the Information Technology Act, 2000.
- **Establishment of the Mediation Council of India:**
  - Chapter 7 of the Draft Bill envisages establishment and incorporation of the Mediation Council of India and lays down its broad duties, powers, and functions.
- **Community mediation:**
  - The Draft Bill under Section 47 provides for the kind of disputes wherein community mediation may be resorted to i.e., any dispute likely to affect peace, harmony and tranquility amongst the residents or families of any area or locality. It also lists out the kind of persons which may be included in the mediation panel by the concerned authorities, i.e., persons of standing and integrity who are respected in the community, representative of area/resident welfare associations etc. Further, Section 48 of the Draft Bill spells out the procedure for community mediation.



## Areas that need further clarification

While the Draft Bill is certainly a step in the right direction in terms of recognizing and promoting mediation as an effective and accepted method for dispute resolution, there are certain gaps and loopholes in the legislation which need to be addressed:

- The Draft Bill does not provide any details pertaining to the qualifications of a trained mediator nor provides any reference of the 'capacity to mediate'.
- Mandatory pre-litigation mediation mechanism would defeat the essence of mediation where the parties are unwilling to mediate.
- The requirement in Section 18 of the Draft Bill that the mediator shall communicate '*the view of each party to the other to the extent agreed to by them*' could give rise to possible conflict of interest, besides striking at the root of the requirement of confidentiality of the mediation process.
- The Draft Bill does not address as to what provisions would govern an international mediation that takes place in India but relates to non-commercial disputes that have arisen under a foreign law, such mediation not being covered by either Part I or Part III of the Draft Bill.
- The Draft Bill does not specify whether a Mediation Service Provider can be a company.
- The Draft Bill provides that a domestic mediated settlement may be challenged on the ground of 'gross impropriety', without making any endeavor to define the term or specify its contours.
- The consequences of non-registration of a Mediated Settlement Agreement have not been mentioned under the Draft Bill.

Addressing these concerns would ensure that the Mediation Act, as and when enacted, contains clear and elaborate provisions which will, in practical terms, facilitate the alternative dispute resolution mechanism of mediation.

