

**COMMENTS AND SUGGESTIONS ON  
THE  
DRAFT MEDIATION BILL 2021**

*Prepared by*

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## **INTRODUCTION**

**The Centre for ADR of the National Law University Delhi would like to express our heartfelt gratitude for the Parliamentary Committee on the Draft Bill to seek our comments on the Bill.**

**We are also very thankful to the Committee for accepting most of the suggestions which we had sent earlier in November 2021.**

**However, we have few concerns with the current Bill which we are submitting for your perusal.**

**In Part I, we submit few general comments on the Bill and in Part II we have provided section wise comments for the committee to consider.**

## PART I

### GENERAL COMMENTS

#### I. ISSUES REGARDING CERTAIN EXEMPTIONS FROM THE BILL

1. Exclusion of court-annexed mediation and mediation under the Legal Service Authority Act 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<sup>1</sup>.
3. Under Section 2 (2) of the Bill, there is an exclusion of cases where government is a party. This is a cause of concern for us as government is the biggest litigator in our country and so like Singapore Mediation Act 2017 under section 5, the Act should be binding on government too. We feel there is no harm in giving a chance to mediation for settling disputes in which government is a party.

We also suggest deleting Section 80 CPC as being suggested in number of Reports of the Law Commission of India. One of the purposes of Section 80 was to give time to government authority to settle the dispute with the private party. Now, when the Bill is making pre-litigation mediation mandatory than Section 80 CPC is losing its relevance.

4. It is also not clear as to why the Bill only include mediation under a few legislations and few types like online, commercial and community mediation. There are other types of mediation like family mediation, workplace mediation, industrial disputes, etc which could also be included in here.
5. We can even include few matters related to tax, traffic challans, section 138 Negotiable Instruments Act, etc.
6. The Bill provides for Agreement to Mediate which is good step but we can also provide for stay of court proceedings in case of breach of an agreement to mediate like Section 8 of Singapore Mediation Act 2018.

#### II. ROLE OF LEGAL SERVICES AUTHORITY

1. The purpose of creating Legal Service Authorities was completely different and the Bill has given the addition responsibility of administering mediation also to LSA. There is a need of some level of expertise which will be required for administering mediation services, if the country wants to maintain the quality of mediation services. Also, when the Bill recognises the Mediation Service Providers and also court annexed mediation Centre, etc., than there is no need of creating multiplicity of authorities to implement the mandate of the Act.

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<sup>1</sup> Ruhi Paul, "Need to Re – Look into the Rules Governing Mediation", M.D.U, Vol. XIX, July 2017, ISSN:2230-746X

2. We may promote state funded mediation services like Delhi Dispute Resolution Society to administer mediation services.

### 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.

### IV. INTERNATIONAL COMMERCIAL MEDIATION (ICM)

1. **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)<sup>2</sup>.
2. **List of exclusions:** Singapore Convention provides for both International Mediation and International Commercial Mediation but the Act 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.

### V. GROUNDS OF CHALLENGE

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. Fraud as a ground has been a ground of litigation in arbitration matters also<sup>3</sup>. 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.

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<sup>2</sup> *UOI v. Vodafone group PLC*, CS (OS) 383/2017 DHC

<sup>3</sup> *A. Ayyasamy v. A. Paramasivam and Ors.* (2016), *Avitel Post Studios 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.

**PART II**  
**SPECIFIC COMMENTS**

**SECTION WISE COMMENTS**

1. **Section 2(2)** – Disputes in which government is a party should be included (like Singapore Mediation Act) with some exclusions (if needed).
2. **Section 3(f)** - International mediation may be commercial as well as non-commercial (discussed above) as the Preamble to the Bill talks about mediation which is commercial or otherwise. Though the Singapore Convention only talks about commercial mediation but that doesn't mean that we can not include other types in our law.
3. **Section 7** – If we refer to Schedule I,
  - a. in view of entry no.1 we can do away with entry no.5 (which has words like public policy, morality, etc) as it has already been a source of lot of litigation and repeated amendments under section 34/48 of the Arbitration Act of India.
  - b. In respect of entry 3, it is no needed to be completely excluded from mediation but we could add that such agreements have to be submitted to the court for approval and court has to ensure the best interest of the legally incapable person as is done under Order XXXII CPC.
  - c. Entry 7 doesnot make any sense as in mediation, all the parties which have some interest are considered to be party to the dispute and we do not have necessary party like in litigation. Even the definition of party in the Bill is wide enough.
4. **Section 8** – There should be some time limit within which to commence mediation process after the interim relief is granted by the court/tribunal like section 9 of the Arbitration Act.
5. **Section 13 (ii)** - there is no need to allow “any other person” to be able to challenge the mandate of a mediator.
6. **Section 20(1)** - Making 2 sessions mandatory is against the philosophy of mediation and it will just add up to the litigation time.
7. **Section 21**- There is no need of blanket rule of 6 months' time for mediation for all types of cases. We may say that maximum time is six months within which mediation has to be completed.
8. **Section 21(2)** – both clauses talk about 180 days. So, we think there is a typographical error in clause 2.
9. **Section 22** – Neither the Singapore Convention nor the Singapore Mediation Act 2017 provides for mandatory registration of settlement agreement. This is against the confidential nature of the proceedings. It should be depending upon the will of the parties whether they want to register the agreement or not.

10. **Section 22 (8)** – Is not clear.
11. **Section 26** – There is no need to exclude court annexed mediation from the Bill due to reasons discussed above in general comments section.
12. **Section 26(4)** - It was never mandatory to submit the agreement to the court under Section 89 CPC in view of the confidentiality of the process. It was depending upon the will of the parties and if parties choose to submit the agreement than under Order XXIII CPC court could pass a consent decree.
13. **Section 29 (2)** - The ground of impersonation is vague and it is not clear what sort of and whose impersonation is being required here. Anyways, it can be included in fraud also. Also, the ground of fraud is also very vague and it can be main ground for challenging the agreements. The grounds are not in sync with the Mediation Convention or the Singapore Mediation Act.
14. **Section 29 (3)** – Time period is too short in cases of fraud as sometimes fraud is discovered much later. Even under Section 17 of the Limitation Act, time period start from the date of discovery of fraud or mistake or the date when parties could have discovered it. So, some such clause should be added here also.
15. **Section 30** – The fee should not be left at the discretion of parties as it can lead to exploitation in cases of imbalance of power between parties.
16. **Section 32** – There is a need to reframe the section as it is not clearly drafted. The language of the previous Bill was still better.
17. **Section 34** – For eligibility for the Council, expertise in Mediation should be mentioned as if experience in ADR is the criteria than experts in Arbitration will be selected as ADR in India still mean arbitration whereas Arbitration and Mediation is completely different from each other.
18. **Section 40** – Neither the Mediation Convention nor the Singapore Mediation Act provides for electronic depository of mediated settlement agreements. In view of confidentiality of the process, there is no need of making registration and digital depository mandatory. These should be voluntary and only for the purpose of enforcement of the settlement. Even most of the Arbitral Institutions doesn't publish the arbitral awards.
19. **Section 44 (2)** – Instead of DM and SDM, community mediation can be administered by mediation service providers or govt. mediation services like Delhi Dispute Resolution Society of Delhi. The SDM and DM may refer such disputes to mediation but they may not be the appropriate authority to administer mediation services.
20. **Section 44 (5)** – It should be mandatory for these lay people to undergo mediation training programs before they could act as mediators.
21. **Section 45** – There is no need of having a panel of three mediators for all types of community disputes as having more mediators will make it less cost and time efficient.
22. **Schedule V** – We should not use mediation and conciliation as the purpose of this Bill is to put an end to the confusion between mediation and conciliation.

**Submitted by Centre for ADR**



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