# DRAFT MEDIATION BILL 2021 – A CRITICAL ANALYSIS

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## Introduction

Mediation as an Alternate Dispute Redressal ["**ADR**"] offers an informal, simple, non-adversarial approach to resolve predominantly civil, commercial and family disputes arising between parties. To expand the scope and reach of this form of ADR, the Department of Legal Affairs, Government of India, has proposed a draft Mediation Bill, 2021 ["**Draft Bill**"] on 29th October, 2021 to facilitate timely and consensual resolution of disputes and serve the interest of stakeholders as an effective alternative remedy. The Draft Bill was opened for comments from the public and subsequently introduced in Rajya Sabha on 20th December, 2021 and referred to a Standing Committee thereafter.

The Draft Bill has been introduced with the primary objective to promote, encourage and facilitate mediation, especially institutional mediation, for resolution of disputes, to enforce domestic and international mediation settlement agreements, provide for a body for the registration of mediators, to encourage community mediation and make online mediation an acceptable and cost-effective process.

On 7th August 2019, India became one of the first signatories to the United Nations Convention on Enforcement of International Settlement Agreements resulting from Meditation ["**The Singapore Convention**"] to strengthen the legal framework on international dispute settlement. Pursuant to this, it was considered expedient that India gives effect to the Singapore Convention by introducing a standalone mediation law for the enforcement of international settlement agreements.

The Draft Bill aims to organise mediation in India and regulate aspects such as mediation agreements, the mediation process, appointment and termination of the mandate of a mediator, the mode of conducting a proceeding, settlement agreements executed as a consequence of mediation and setting up of the Mediation Council of India. It also recognises and provides for the enforcement of international mediation settlement agreements. The present article aims to critically analyse two of the proposed provisions under the Draft Bill, one pertaining to the provisions for challenging a mediated settlement agreement, and the second pertaining to the grant of interim relief under the Draft Bill, in view of the subsisting legal regime.

## Challenging mediated settlement agreements: Reopening the saga of judicial intervention

As per the proposed Section 21 of the Draft Bill, a "*mediated settlement agreement*" is an agreement or interim agreement in writing between some or all of the parties resulting from mediation, settling some or all of the disputes between such parties, and authenticated by the mediator. They provided that the terms of the mediated settlement agreement may extend beyond the disputes referred to mediation. The said provision also recognizes that a mediated settlement agreement that is void under the Indian Contract Act, 1872 ["**Contract Act**"], shall be deemed unlawful within the meaning of mediated settlement agreement.

However, as per the relevant portion of the proposed Section 29 of the Draft Bill,

> *"(2) A mediated settlement agreement can be challenged only on all or any of the following ground of: (i) Fraud; or (ii) Corruption; or (iii) Gross impropriety; or (iv) Impersonation.*
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> *(3) An application for challenging the mediated settlement agreement may not be made after three months have elapsed from the date on which the party making that application has received the copy of mediated settlement agreement under section 21(3) of this Act. Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."*

What the proposed Section 29 of the Draft Bill essentially does is: (a) restrict the grounds on which the mediated settlement agreement can be challenged; and (b) set a limitation period of 120 days within which the agreement may be vitiated by fraud, corruption, impropriety or impersonation. This raises questions about the legality of these provisions in the backdrop of the Contract Act and the Limitation Act, 1963 ["**Limitation Act**"].

As per Section 19 of the Contract Act, when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreementvoidable at the option of the party whose consent was so caused, unless the concerned party had the means of discovering the truth with ordinary diligence. On the other hand, the Draft Bill provides that the mediated settlement agreement can be challenged only on in cases of fraud, corruption, gross impropriety; or impersonation, thereby changing and possibly limiting the scope of the challenge. This prima facie would conflict with the provisions of the Contract Act and the proposed Section 21 of the Draft Bill, which recognises and imports the concept of void contracts.

In addition to limiting the scope of the challenge, the proposed Section 21 also reduces the time limit within which an agreement can be challenged as being induced by fraud. As per Article 59 of the Limitation Act, the limitation period for cancellation or setting aside of an instrument or decree or for the rescission of a contract is three years, from the date when the facts entitling the plaintiff

to have the instrument or decree cancelled or set aside or the contract being rescinded, first become known to such plaintiff. The Draft Bill not only reduces this limitation period to three months, which is extendable by 30 days but also alters the point in time from which such period is to be calculated. As per the Draft Bill, an application for challenging the mediated settlement agreement may not be made after three months have elapsed from the date the party making that application has received the copy of the mediated settlement agreement. Contrarily, the Delhi High Court in *Anita Rani Mangla v Bhagwat Dayal and Others* [1], placing reliance on Apex Court's decisions in *Prem Singh and Others v. Birbal and Others* [2] and *Mohd. Noorul Hoda v Bibi Raifunnisa and Others* [3], to reiterate that the starting point of limitation for cancellation of voidable documents is from the date of knowledge of alleged fraud of the Plaintiff, who is seeking the cancellation of the documents. This is contrary to the law sought to be laid down by the Draft Bill. Interestingly, the imposition of such limitations/ restrictions is not recommended under the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

**Interim measures: Mediation mirroring litigation**

Another relevant and possibly contentious set of provisions of the Draft Bill are the proposed Sections 6 and 8, as set out below. In addition to creating practical difficulties for the parties concerned, these provisions may render certain other provisions of law relatively redundant:

> *"6. (1) Subject to other provisions of this Act, irrespective of the existence of any mediation agreement or otherwise, any party before filing any suit or proceeding in any Court or Tribunal shall take steps to settle the disputes by pre litigation mediation in accordance with the provisions of this Act.*
>
> *8. (1) If exceptional circumstances exist, a party may, before the commencement of or during the continuation of mediation proceedings under this Part, file an application before a Court or Tribunal of competent jurisdiction for seeking urgent interim measures.*
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> *(2) The Court or Tribunal shall after granting or rejecting urgent interim relief, as the case may be, refer the parties to undertake mediation to resolve the dispute, if deemed appropriate."*

The scope of operation of the aforesaid provisions of the Draft Bill operates in the same vicinity as the Commercial Courts Act, 2015 ["**Commercial Courts Act**"], specifically, Section 12A thereof, which mandates that a suit, which does not contemplate any urgent interim relief, shall

[1] *Anita Rani Mangla v Bhagwat Dayal and Ors* [2018] SCC OnLine Del 11868.
[2] *Prem Singh and Others v Birbal and Ors* [2006] 5 SCC 353.
[3] *Mohd. Noorul Hoda v Bibi Raifunnisa and Ors* [1996] 7 SCC 767.

not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation. It is pertinent to keep in mind that the applicability of Section 12A is restricted to commercial disputes, set out in Section 2(1)(c) of the Commercial Courts Act. On the other hand, the Draft Bill mandates any party to take steps to settle the disputes by pre litigation mediation before filing any suit or proceeding in any Court or Tribunal. However, the same is subject to the proposed Section 7 read with Schedule II of the Draft Bill, which sets out subject matters of disputes in respect of whom mediation is not to be conducted.

Further, Section 12A of the Commercial Courts Act does away with mandatory pre-institution mediation if urgent interim relief is sought by the plaintiff. The Draft Bill does not provide any such exception/ leeway to the aggrieved party. Therefore, it leaves the plaintiff at the mercy of an uncooperative defendant, even in cases of urgent interim relief. In response to this, it may be argued that the proposed Section 8 provides that in case of exceptional circumstances, a party may file an application before a court or tribunal of competent jurisdiction for seeking urgent interim measures, before the commencement of or during the continuation of mediation proceedings. However, this provision is premised on a utopian assumption that the party against whom interim relief has been obtained or a party that has already obtained interim relief will bona fide participate in the mediation proceedings subsequently. Taking this one step further, the Draft Bill also fails to consider the likely eventuality in which, after having obtained interim relief, the mediation fails, but the plaintiff takes no further legal action. Therefore, not only does the Draft Bill in its current form completely override Section 12A of the Commercial Courts Act, but also does not account for several practical and likely scenarios that may defeat the purpose of the proposed law.

**Conclusion**

In the unlikely event that the Draft Bill is passed in its current form, the aforesaid provisions are likely to create uncertainty and lead to legal anomalies. Having said this, the need for a law to regulate and organise mediation in India cannot be denied in addition to India's international law obligations under the Singapore Convention. In fact, just before India signed the Singapore Convention, the Hon'ble Supreme Court asked the Government to consider the feasibility of enacting the Indian Mediation Act to take care of various aspects of mediation in general.[4] It is also incontrovertible that there is a need to have a comprehensive law that both recognizes and governs pre-litigation mediation in India to make it an effective means of resolution of disputes

[4] *MR Krishna Murthi v New India Assurance Co Ltd* [2019] SCC OnLine SC 315.

and to help raise it to the pedestal which is at par with other forms of ADR, given its efficiency and cost effectiveness.

The judiciary has been unwavering in its support for ADR. In as early as 2005, the Hon'ble Supreme Court in the landmark case of *Salem Advocate Bar Association v. Union of India* [5] took a strong pro-mediation stance by framing model rules and establishment of court annexed mediation centres thereby bringing mediation into a formal framework for the first time. The Covid-19 pandemic magnified the impact of delay on account of lack of access to courts and justice with disputes awaiting to even enter the system like never before. The situation compelled the bar and the bench to adopt and adapt technology as a means to deliver inclusive justice and resort to extreme measures for the first time in the history of the judiciary, for instance, – virtual hearings, e-filings, exemption from affirmation of affidavits, etc. a reality. These experiences made us realise the importance of ADR mechanisms like never before and to think and look beyond the traditional ecosystem of courts and tribunals and explore the possibility of bringing modes like mediation into mainstream dispute resolution.

Therefore, the introduction of the Draft Bill is a positive step in this direction to expand the scope and reach of ADR, specifically in light of India's policy goals to enhance ease of doing business in the country and become a preferred destination for foreign investment and collaboration. However, taking a cue from our arbitration experience, it is important that the Indian Legislature aims at addressing the teething issues generally associated with any nascent legislation to avoid creating legal anomalies resulting in litigation instead of rendering mediation as an effective mode of dispute resolution and as a substitute for traditional court system.

[5] *Salem Advocate Bar Association v Union of India* [2005] 6 SCC 344.