

## *Abstract*

Mediation is a facilitated negotiation wherein two or more parties find a mutually acceptable solution with the help of a neutral mediator. It is an informal and economical method of ADR and is yet to be utilized efficiently in our country. India took an opportune step by signing the Singapore Mediation Convention, and now, in order to ratify this convention, we must pass a legislation on mediation within our country. A society that is looking for a paradigm shift in approach to dispute resolution, has to aim to make mediation the default response while in dispute.

## **Mediation Legislation in India; The Way Forward**

By Thangam Chandy<sup>1</sup>

“Justice delayed is justice denied”. The increasing awareness of rights among the burgeoning population, combined with the inevitable complexities of life have led to a heavy pendency of cases and consequent delays in our judicial system. This is compounded by a lack of infrastructure, a comparatively low number of judges in relation to the population, and the judiciary countenancing inordinate delays and adjournments. The need of the hour is a mechanism which can help decrease these delays and accelerate the process of dispute resolution, even while working with some of the bottlenecks detailed above.

### **What is mediation and why do we need it?**

Mediation is essentially a facilitated negotiation in which two or more parties with different perspectives find a mutually acceptable solution with the help of a neutral facilitator.<sup>2</sup> It is an efficient and cost effective process which enables parties to find business friendly solutions while preserving relationships unlike litigation or arbitration.

The spread of awareness of mediation as a legitimate alternative to litigation would result in a significant decrease in the number of cases filed in courts, thereby reducing the overall delays in the system. Why would anyone choose to bear the cost and spend the time and effort

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<sup>2</sup>Constantin-Adi Gavrilă, *Defining Mediation*, MEDIATE.COM (Jan, 2014), <https://www.mediate.com/articles/GavrilăA6.cfm>.

following up on a never-ending litigation, when he/she could opt for mediation and possibly reach a mutually beneficial settlement within a few sessions?

There has been a global spread of awareness on mediation and its benefits. The international success of its implementation can be seen in countries like Italy and France where mediation is commonly utilised. In Australia, “Mediation and negotiated settlement are now first ports of call and it is no longer regarded as a sign of weakness to suggest these alternatives. While there is a place for litigation, it is regarded by commerce as slow, distracting and expensive” - Sid Wang, Partner at Clayton Utz, Sydney<sup>3</sup>. Several jurisdictions like Brazil, Bulgaria and Malaysia<sup>4</sup> have already enacted standalone legislations for mediation.

These are just a few examples of the widespread success of this method of dispute resolution.

Although India has provisions for the use of conciliation in certain existing legislations like the Industrial Dispute Act, 1947<sup>5</sup> and the Real Estate Regulatory Authority Act, 2016<sup>6</sup> to name a few, certain discrepancies such as the confusion between mediation and conciliation impede these provisions from being successful. The provisions of some domestic legislations such as Section 442 of Companies Act, 2013<sup>7</sup>, Chapter V of the Consumer Protection Act, 2019<sup>8</sup> and Section 12A of the Commercial Courts Act, 2018<sup>9</sup> provide for mediation. However, it is still not being widely used for dispute resolution. Parties in dispute are combative and lawyers are unfamiliar with the process, therefore making them reluctant to support it. Judges do not persuade the parties to attempt the process with the justification that it should be a voluntary process, but the fact is that more mediation will actually make more time for the judges.

### **The Singapore Mediation Convention, 2019**

The Singapore Mediation Convention of 2019 is a progressive development, which acknowledges mediation as an effective means of dispute resolution, worthy of substitution in

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<sup>3</sup> *A global trend towards mediation: views from lawyers in 13 countries*, KINGSLEY NAPLEY, (May. 6, 2014), <https://www.kingsleynapley.co.uk/insights/blogs/dispute-resolution-law-blog/a-global-trend-towards-mediation-views-from-lawyers-in-13-countries>.

<sup>4</sup> Ronald Bradbeer, *Mediation Around The World In The 21<sup>st</sup> Century: A Personal Journey*, CORPORATE COUNSEL BUSINESS JOURNAL, (Aug. 1, 2006), <https://ccbjournal.com/articles/mediation-around-world-21st-century-personal-journey>.

<sup>5</sup> The Industrial Disputes Act, 1947, sec. 4.

<sup>6</sup> The Real Estate Regulatory Authority Act, 2016, sec. 32.

<sup>7</sup> The Companies Act, 2013, sec. 442.

<sup>8</sup> The Consumer Protection Act, 2019, Chapter V.

<sup>9</sup> The Commercial Courts Act, 2018 sec. 12A.

place of litigation or arbitration. Its most salient feature is the enforcement of international commercial settlement agreements resulting from mediation<sup>10</sup>.

Just as our government promoted institutional arbitration through the amendment of the Arbitration Act 1996, we now also need to ensure development of institutional mediation. In order to ratify the Singapore Mediation Convention, it is an opportune time to consider a stand alone legislation for an umbrella policy on mediation, which would bring mediation in India on par with other jurisdictions. An overarching legislation would create legal sanctity and avoid inconsistencies between the various pieces of existing legislation. In a recent judgment the Supreme Court of India has recommended the enactment of a mediation law<sup>11</sup>.

### **Issues resolved by adopting an efficient approach:**

One of the biggest economic problems that our country grappled with was banks not having been able to recover money from debtors because of the antiquated legal system. Crores of rupees were and remain tied up in legal proceedings. If the banks were able to recover this money, and it was pumped back into the system, it would have a multiplier effect and help kick start the economy.

The Insolvency and Bankruptcy Code of 2016<sup>12</sup> (“**IBC**”), was a paradigm shift that provided for a time bound framework to recover moneys due from debtors. The Government has amended the IBC to ensure timely resolution of dues<sup>13</sup>. Creditors now come together with debtors and using a process with several elements of mediation involved, decide how to deal with the assets of the debtor in the best possible manner. The IBC has received international acclaim and is a bold step taken by our Government. The application of mediation through this code has saved time and money, while also safeguarding confidentiality of negotiations<sup>14</sup>.

“Enforcing contracts and resolving insolvency are two of the parameters used for calculating the World Bank’s Ease of Doing Business Rank. It is therefore safe to say that bringing

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<sup>10</sup> Nadja Alexander, *Singapore Convention on Mediation*, KLUWER MEDIATION BLOG, (Jul. 24, 2018), <http://mediationblog.kluwerarbitration.com/2018/07/24/singapore-convention-mediation/>.

<sup>11</sup> Manisha Karia, *Effective Implementation of Mediation in India: The way forward*, BARANDBENCH, (Dec. 23, 2019), <https://www.barandbench.com/columns/effective-implementation-of-mediation-in-india-the-way-forward>.

<sup>12</sup> The Insolvency and Bankruptcy Code, 2016.

<sup>13</sup> Advocate K. Vaitheeswaran & Advocate C.J Yeshwanthram, *The Nuts and Bolts of the IBC (Amendment) Bill, 2019*, LAWSTREETINDIA, (Jul. 30, 2019), <http://www.lawstreetindia.com/experts/column?sid=312>.

<sup>14</sup> Veena Mani, *Changes in IBC will allow provision for mediation to cut costs, time*, BUSINESS-STANDARD.COM, (Apr. 22, 2019), <https://www.business-standard.com/article/economy-policy/changes-in-ibc-will-allow-provision-for-mediation-to-cut-costs-time-1190> (Placeholder1)42100645\_1.html.

mediation legislation into force would only improve the pace at which both these parameters are dealt with, thereby increasing the country's overall ranking.” - Rukmini Menon, director and mediator at CAMP Arbitration and Mediation Practice (CAMP).

### **Current Status of Mediation Legislation**

Given the need to expedite the process of enacting a standalone mediation legislation in our country, a group of eminent and committed professionals in the mediation sector have been working together on a draft document since 2016. This working group includes pioneering mediation institutions like CAMP-Bangalore, FCADR-Chennai, Maadhyam Delhi, retired judges, senior partners of law firms, academicians from leading national and international universities, and think tanks. The group has submitted its recommendation to the Ministry of Law and Justice seeking the setting up of a committee to look into the various aspects required for coming up with a comprehensive legislation.

Recommendations covering aspects such as:

- (I) domestic and cross-border mediations and their enforcement;
  - (ii) training and registration of mediators; and
  - (iii) the establishment of a self-regulatory body for mediators;
- have been made to the ministry.

The approach in the draft has been to remove the distinction between mediation and conciliation as the process is somewhat similar. They involve neutral assistance in reaching a resolution of disputes, with no powers given to the neutral to impose a solution. The law also proposes the repeal of Part III of the Arbitration and Conciliation Act, 1996, which deals with conciliation.

The draft provides for self-regulation by a professional body, which sets standards on the basis of which parties and advisors choose mediators. Parties will then be entitled to the special status given to a mediated settlement agreement. A code of conduct and ethics is also included in the draft, which helps parties / advisors to be aware of what to expect of the process and of the mediator<sup>15</sup>. Cross-border mediation is included in Part III of the draft to provide a framework

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<sup>15</sup> Ajmer Singh, *Supreme Court forms committee to draft mediation law, will send to government*, THE ECONOMIC TIMES, (Jan. 19 2020), <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms?from=mdr>.

for mediation in cross-border disputes, and certainty in enforcement of settlements in such disputes.

The Supreme Court Mediation/Conciliation Project Committee has also formed a committee of eminent Mediators/Judges/experts on mediation to recommend appropriate provisions for a Mediation law.

The current backlog and pendency rates in Indian courts will take decades to be cleared if we continue to function at the same pace. It is the time for change and bold steps need to be taken in this regard. If the IBC could change the principle of “debtor in possession” to “creditor in possession” the Mediation Law can no doubt be given the push it deserves to ensure that the current backlog is tackled in an effective, efficient and speedy manner.