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THE NEW MEDIATION BILL AND THE POTENTIAL COUNTER-PRODUCTIVE PROVISIONS

***Divyansh Morolia**[*] & Devansh Dubey**[**]*

[Abstract: *The paper analyses the provisions of the New Mediation Bill[1] in the light of the requirement of such a development, given the pendency of cases in countries like India. However, subsequently, it points out the loopholes in the specific provisions of the bill, and a critical approach is used to analyse the requirement of 'mandatory pre-litigation mediation', as laid down by the bill. The concept of 'pre-litigation mediation' is analysed and a comparison of international jurisdictions is made about the same. Thereafter, the demerits of the said provision are highlighted and it is contended that especially in developing countries like India, such a provision is likely to do more harm than good. It is stated that mediation in such a 'mandatory' setting is likely to be unsuccessful and eventually, when such a matter goes to litigation, the same would be adversely affected by the likely breach of confidentiality. The bill lays down mandatory requirements to engage in a 'voluntary' process like mediation and opens up the gates for what can be called a 'non-consensual consensus'. A specific reference is made to the possible effects of the said development on matters related to Intellectual Property (hereinafter IP) and it is highlighted how a 'mandatory' mediation would be counterproductive, with a specific reference to the matters concerning IP. Lastly, the paper points out certain alternatives such as a 'mid-litigation mandatory mediation' and a 'mandatory arbitration' in selected matters that can be taken recourse to instead of the said 'pre-litigation mediation'.*]

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[1] The Mediation Bill, 2021, (Bill No. 43 of 2021 before the Parliament of India).

I

Introduction

A rapid increase in the pendency of cases is a major phenomenon in modern-day legal systems.[2] This issue is even more pertinent in developing countries like India wherein the figure of 'pending cases' is in crores.[3] Such a pendency is caused by factors like the increase in wrongs and crimes being committed due to a subsequent increase in the complexities of life, and a lack of proportionate increase in the number of judges.[4] This leads to a grave violation of the rights of the victims and causes other deleterious micro and macro impacts on the legal system such as high costs of legal fees, economic losses, and in some cases, even the death of witnesses or the parties. In countries like India, there have been cases that have even gone up to 50 years before a recourse could be provided to the parties.[5]

To remedy such a situation, 'Alternative Dispute Resolution' (*hereinafter* 'ADR') techniques are being taken recourse to. This includes processes like mediation, conciliation, and arbitration, which are largely based on the consensus of parties.[6] Specifically, 'mediation' is gaining popularity, parties are continuously coming to mediation tables and making efforts to solve their disputes 'amicably'. The said process has been widely successful,[7] and settlements between the parties have taken place in important legal matters.[8]

The recent 'Mediation Bill'[9] has been introduced in the parliament,[10] which aims to promote 'mediation' as a form of dispute resolution. The bill provides for the

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2 H. Sumedha, *The Clogged State of the Indian Judiciary*, THE HINDU EXPLAINED (10 May, 2022), available at: https://www.thehindu.com/news/national/indian-judiciary-pendency-data-courts-statistics-explain-judges-ramana-chief-justiceundertrials/article65378182.ece. (last visited May 10, 2022).

3 *Id*.

4 Akshay Sagar, *The Role of Judiciary in India and Pendency of Cases: An Overall view*, SSRN (Jan. 23, 2023) *available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3798261 (last visited Jan., 22, 2023).

5 *Dipali Biswas* v. *Nirmalendu Mukherjee* 2021 S.C.C. OnLine S.C. 869.

6 ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *available at:* https://mneguidelines.oecd.org/faqs-roster-of-mediators-for-national-contact-points-for-responsible-business-conduct.pdf (last visited Jan., 23, 2023).

7 U.S. DEPARTMENT OF JUSTICE, *available at:* https://www.ojp.gov/ncjrs/virtual-library/abstracts/effectiveness-mediation-independent-analysis-cases-handled-four (last visited Jan., 23, 2023).

8 *Perry Kansagra* v. *Smriti Madan Kansagra*, (2019) 20 S.C.C. 753.

9 *Supra* note 1.

10 PRS Legislative Research, *available at*: https://prsindia.org/billtrack/the-mediation-bill-2021 (last visited Jan., 23, 2023).

institutionalization of mediation, it also opens the way for the recognized community and online mediation.[11] If enacted, it would lead to the 'codification' of mediation in India. These features are a welcome step as they would provide for cost-efficient dispute resolution. However, one of the major provisions being proposed in the said bill is the 'mandatory pre-litigation mediation.' The theme of the paper would revolve around this specific provision. In the next section, this provision will be thoroughly analysed with a reference to the concept behind the same and the counterpart provisions in international jurisdictions. Subsequently, the fallacies in the provision would be highlighted and it would be proven why such a provision leads to more harm than good.

II

Mandatory Pre-Litigation Mediation

Mediation is generally a 'voluntary process' based on the consensus of the parties, however, in certain cases, it is mandated by law to refer the dispute to mediation before knocking at the doors of the court, hence, this 'pre-litigation' is 'mandated'. 'Pre-litigation mediation' refers to the attempt to resolve the dispute via mediation before the litigation process commences and, in such cases, litigation is taken recourse only if mediation fails.

Several countries have laws mandating this 'pre-litigation mediation', for instance, in Turkey, pre-litigation mediation is mandated for labour disputes,[12] and in Italy, such a dispute is mandatory for civil and business disputes.[13] Similar provisions also exist in the European Union. Such provisions have been consistently upheld in various matters.[14] Even in India, there exist provisions mandating mediation for certain specific disputes, for instance, the Consumer Protection Act[15] provided for mandatory pre-litigation mediation.[16] These provisions have been applied by courts time and again in different matters.[17]

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[11] *Supra* note 1.

[12] Labour Courts Act, 2017 (Act No. 7036 of 2017, The Parliament of Turkey).

[13] Law No. 60/2009.

[14] *Menini and Others* v. *Banco Popolare Società Cooperativa*, Case C75/16 (ECJ).

[15] Consumer Protection Act, 1986, (Act No. 68 of 1986).

[16] Mediation Bill, 2021, § 37, (Bill No. 43 of 2021).

[17] *Salem Advocate Bar Association* v. *Union of India*, AIR 2005 (SC) 3353; *K. Srinivas Rao* v. *D.A. Deepa*, (2013) 5 SCC 226; *Afcons Infrastructure Ltd. and Ors.* v. *Cherian Varkey Construction Co. (P) Ltd. and Ors.*, MANU/SC/0525/2010.

However, it must be noted that the new Mediation Bill makes this provision mandatory 'pre-litigation mediation' applicable to all 'commercial disputes'.[18] This 'commercial dispute' has been defined under the Commercial Courts Act,[19] and practically includes a majority of civil disputes, apart from the ones that are exempted.[20] Additionally, the new bill provides for penalties for non-fulfilment of the said requirement,[21] and also provides for the enforcement of the mediation agreements.[22]

III

Impacts of the Mandatory Requirement of Pre-Litigation Mediation

This section of the paper would highlight the deleterious effects that would follow, as a result of mandating the 'pre-litigation mediation'. It would, *firstly*, highlight that the said provision is wrong in principle and leads to a violation of the right to seek legal redressal, *secondly*, it would highlight that in cases where such a provision is being applied and the mediation is being mandated, it is more likely than not that such mediation would fail, and *thirdly*, it would make a specific reference on the application of the said provision on the matters concerning IP and would highlight how the same is even more detrimental in such matters.

The said provision is wrong in principle

Everyone has a right to seek redressal in court in case of wrongful acts being committed against them. This started off as a common law doctrine and subsequently, different jurisdictions have made laws for the same.[23] Actions putting restraint on legal proceedings or depriving some party of its right to seek redressal are void under the law.[24] However, an exception to this principle is made, in cases wherein the parties mutually decide to resolve their disputes by ADR methods and not go to courts for litigation, the same has been held to be valid.[25] Nonetheless, it must be noted that in such cases, the parties mutually decide to go for ADR proceedings and originally did have the option to resort to court proceedings which they mutually waived off.

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[18] Mediation Bill, 2021, § 6, Bill No. 43 of 2021.

[19] Commercial Courts Act, 2015, § 12A.

[20] Mediation Bill, Schedule 1, No. 43, Bills of Parliament (India).

[21] *Id*.

[22] *Id*.

[23] Constitution of India, Art. 32.

[24] Indian Contract Act, 1872, § 28.

[25] *Dilip Kumar Kar* v. *Hindustan Steel Works Construction Ltd.,* 2015 S.C.C. OnLine Tri 1023.

On the contrary, the mandatory pre-litigation provision in the new bill,[26] takes away this right from the parties, the same is different from the cases wherein the parties themselves decide to go for ADR because, in the latter, the decision is made by the parties, whereas in case of mandatory provisions, the autonomy of the parties is violated as the provision forces them to resort to mediation and takes away their right to approach the court in the first place. Although, the concept of 'court-mandated mediation' has already been existing[27] and the same has never been arraigned to be violative of principles, however, it is pertinent to note that in cases of 'court-mandated mediation', the court looks into the matter and directs the parties for mediation only at a situation wherein it feels that mediation is likely to be successful, whereas, in the case of mandatory pre-litigation mediation, the parties are forced to mediate, even before they are allowed to approach the court. Hence, this provision violates the principle of autonomy of the parties as well as their right to seek redressal in the courts.

Likelihood of failure in cases of 'mandatory' mediation

In cases of mandatory pre-litigation mediation, it is more likely than not that such a process would fail and would ultimately end up adding to the cost that parties have to incur and the time involved in resolving the dispute.

Mediation intends to resolve disputes amicably and the success of the same depends upon the intention of the parties.[28] Such processes are generally considered to be an *'empty formality'* wherein it is not likely to produce any result.[29] In cases wherein the parties are being 'forced' to meditate, it is highly likely that the parties would not be able to come to a common conclusion because doing so solely depends upon the 'consensus' between the parties.

Further, it must be noted that the provisions of the bill provide the parties with a two-week time to mediate and in practice, the time involved in successfully resolving disputes via amicable processes like mediation is considerably more than two weeks.[30] Hence, the said provision is a mere formality for a party that did not intend to mediate in the first place. Furthermore, it must be noted that a majority of mediation processes succeed when the parties come to a mediation table after the commencement of the litigation, especially in the latter stages of court litigation, this has been observed in

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[26] *Supra* note 1, § 6

[27] *Dayawati* v. *Yogesh Kumar Gosai,* 2017 S.C.C. OnLine Del 11032.

[28] James H. Carter, *'Issues Arising from Integrated Dispute Resolution Clauses: Part I,* in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND' (2005) ICCA Congress Series 446.

[29] *Id*.

[30] Harvard Education, *available at:* https://www.pon.harvard.edu/daily/mediation/navigating-the-mediation-process/ (last visited Jan., 23, 2023).

various cases where successful settlements have taken place.[31] This is because once the court proceedings begin, the weaknesses of the parties get exposed, and hence the parties are forced to settle, however, at the beginning of the legal disputes, parties mostly have an intention of 'winning' over their counterpart and are unlikely to engage in successful alternate dispute resolution processes.

Additionally, it must be taken into consideration that in processes, like mediation, parties reveal information that is 'confidential' and might be adversarial to them. Such information is bound to remain within the four walls of the room in which the mediation takes place, however, the new bill proposes no penalties or punishment for a 'breach' of this confidentiality. Consequently, it is likely that if the mediation process is unsuccessful, once the litigation process begins, this 'confidential' information might be used against the party by its counterpart. The information so obtained would be 'unlawful', however, there have been cases wherein such 'unlawfully' obtained information has even been used in the courtrooms. This would have a grave impact on the fairness of the court proceedings.

Hence, in cases of 'mandatory pre-litigation mediation', it is highly likely that such a process would fail, and when this happens, it would even impact the fairness of the litigation process, which would follow as a result of the likely breach of confidentiality.

Detrimental impacts on matters concerning IP

The new bill proposes a mandatory pre-litigation mediation for 'commercial disputes' and such 'commercial disputes' also include matters concerning Intellectual Property Rights.[32] Mandatory mediation in matters concerning IP rights is likely to be not just ineffective, rather counterproductive. *Firstly*, it is an established principle in India that IP rights are *'rights in rem'* as the same can potentially create a monopoly in the market and hence can affect the rights, not just of the parties to the matter, but also the general consumers in the market.[33] Consequently, IP matters are considered to be non-arbitrable.[34] By the application of the said bill, such IP rights would be mandatorily sent for mediation, doing so would violate the established principles as mediation involves consensual decisions between two parties and cannot potentially remedy the alleged breaches of *rights in rem*.

Secondly, it must be noted that IP-related matters are such wherein interim injunctions are widely granted.[35] Alleged infringements of IP rights such as patents and trade secrets have the potential of driving the victim companies out of the market if

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[31] *Surinder Singh Sibia* v. *Jaswant Kaur,* 2019 S.C.C. OnLine P&H 2479; *Narinder Singh & Ors.* v. *State of Punjab, (*2014) 6 S.C.C 466; *Byram Pestonji Gariwala* v. *Union Bank of India,* 1991 A.I.R. 2234.

[32] Commercial Courts Act 2015, § 12A, Act No. 04 of 2015).

[33] *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd.,* A.I.R. 2011 SC 2507.

[34] *A. Ayyaswamy* v. *A. Paramasivam,* (2016) 10 SCC 386.

[35] *Natco Pharma Ltd.* v. *Bristor Myers Squibb Holdings,* 2019 S.C.C. OnLine Del 9164.

intervention is not made by the courts in the forms of interim reliefs. It is to be considered that such reliefs cannot be granted in mediation processes and in cases of mandatory pre-litigation mediations, the complaining parties would face grave losses due to the lack of such interim reliefs.

Hence, specifically in IP-related matters, a mandatory pre-litigation mediation would prove to be highly counter-productive.

IV

The Harmful Impacts of the Bill on Developing Countries

The advent of the Mediation Bill seems like a step taken by the legislature to resolve the dichotomy created by judicial decisions with regard to the nature of pre-litigation mediation in India.[36] The conflict of views can be said to be resolved now by Section 6[37] of the mediation bill which makes pre-litigation mediation mandatory except for instances provided under the bill.[38]

However, the presence of a legislative framework does not ensure the success of pre-litigation mediation in India, when there are structural fallacies within the country and existing case studies of various countries that substantiate the claim that pre-litigation mediation may not be apt for developing countries like India.

Structural Fallacies in India

One of the many challenges that Mediation, as a process, faces in India, is the lack of awareness regarding the same, despite efforts to raise awareness of mediation and include it in the law school curriculum.[39] From an education point of view, there is a lack of emphasis on teaching mechanisms such as mediation, moreover, the lack of knowledge also stems from the fact that in India we do not have the required number of trained professionals to impart knowledge and the technicalities concerning mediation, to individuals who want to excel in mediation as academicians or professionals.[40] Subsequently, it has resulted in a lack of general understanding of the

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[36] *Patil Automation Private Limited & Ors.* v. *Rakheja Engineers Private Limited,* 2022 S.C.C. OnLine S.C. 1028.

[37] *Supra* note 1, § 6

[38] *Supra* note 1.

[39] Narain, Rashika and Abhinav Sankaranaraya, *Formulating a Model Legislative Framework for Mediation in India,* 11 NUJS LAW REVIEW 75-120, (2018).

[40] In the case of *Daramic Battery Separator India Pvt. Ltd.* v. *Union of India* (W.P.(C) 7857/2018), the petitioner had to approach the Delhi High Court because the National Legal Services Authority was unable to find a suitable commercial mediator within its pool of mediators.

public with respect to mediation.[41] The absence of incentives to mediate is one of the significant barriers. Certain beliefs about mediation exist in India, making it difficult for lawyers and their clients to regard it as a viable conflict settlement tool. It is claimed, for example, that recommending or participating in mediation displays a form of weakness and uncertainty of success at trial.[42] Because of the 'first to blink' phenomenon, each side is waiting for the other to make the initial step because neither party wants to be perceived as weak.[43] Another challenge that mediation faces is that it is perceived as inferior to litigation in terms of justice.[44] These beliefs originate mostly from the fact that mediation remains an unfamiliar practice that many lawyers misunderstand, leading to mistrust and, eventually results in, avoidance of the same. In certain circumstances, the client's avowed intention to punish the opponent through litigation acts as a barrier to a successful mediation. It becomes extremely difficult for the lawyer in such instances to mediate without seeming weak and risking losing the client to another counsel.[45] The bill does not address any of the structural fallacies which leads us to the conclusion that this may not be the most suited step for India.

Comparative Case Studies

In certain countries, such as Romania, mandatory pre-litigation mediation without proper incentives has reduced mediation to a simple formality before parties approach the courts and, in effect, operates as a barrier to access to the courts.[46] In many cases, such clauses and practices have become mere procedures and courts around the world exempt parties from undergoing compulsory mediation due to their futile nature.[47] It is highly unlikely that parties will reach a settlement through mediation in India as the bill

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41 Law Commission of India, *Report on Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions* (2011) *available at:* https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081051-3.pdf (last visited Jan., 23, 2023).

42 Juhi Gupta, *Bridge over Troubled Water: The Case for Private Commercial Mediation in India,* 11 AMERICAN JOURNAL OF MEDIATION 59-88 (2018).

43 Campbell C. Hutchinson, *The Case for Mandatory Mediation,* 42 LOYOLA LAW REVIEW 85-96, (1996).

44 *Supra* note 42, Juhi Gupta.

45 Campbell C. Hutchinson, *Supra* note at 90.

46 Stella Vettori, *Mandatory Mediation: An Obstacle to Access to Justice,* 15 AFRICAN HUMAN RIGHTS LAW JOURNAL 355-377 (2015).

47 *White Industries Australia Ltd.* v. *India*, Final award, IIC 529 (2011); *Apotex Holdings Inc. and Apotex Inc.* v. *United States of America,* Final Award ICSID Case No. ARB(AF)/12/1 (25 August 2014): *Asian Agricultural Products Ltd.* v. *Republic of Sri Lanka,* Final Award ICSID Case No. ARB/87/3 (27 June 1990); C. Schreuer, *Travelling the BIT Route Of Waiting Periods, Umbrella Clauses and Forks in the Road,* JOURNAL OF WORLD INVESTMENT AND TRADE (2004); J.E.S. Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?*, BRITISH YEARBOOK OF INTERNATIONAL LAW 452 (1954).

provides for an opt-out clause after two mediation sessions[48] which acts as a counter-incentive for parties to settle through mediation.

However, in England, the courts have imposed costs against parties who have refused to mediate without any reasonable grounds.[49] We do not have any such provisions under the bill in case one of the parties refuses to attend a mediation session or shows reluctance to collaborate and follow the procedure within the session, which can tamper the chances of success of mandatory mediation.

The European Union (*hereinafter,* the EU) sees mandatory mediation as a denial of access to justice.[50] The EU's Court of Justice concluded in *Menini and others* v. *Banco Popolare Società Cooperativa*[51] that national legislation requiring mandatory mediation as a precondition to litigation is not prohibited by the EU Alternative Dispute Resolution legislative framework, as long as the parties are not prevented from exercising their rights of access to the judicial system.[52]

In the U.S.A. and Italy, mandatory mediation has achieved abundant success due to reasons that are not effectively present in India. In the USA there is a strong public narrative to opt for ADR mechanisms supported by adequate infrastructure and the presence of an adequate number of trained professionals to make policies such as mandatory mediation successful, however, in India we do not have the required infrastructure and required number of trained mediators to efficiently implement such policies.[53] In Italy, the most significant changes were limiting the obligation of obligatory mediation to fewer categories of claims and requiring lawyers to participate in the mediation process.[54] The modified legislation stipulated that the agreement made by the parties in mediation would be binding, provided that it includes the signatures of the parties' attorneys (in addition to the parties' own signatures) to attest and certify

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48 *Supra* note 1.

49 *Halsey* v. *Milton Keynes General NHS Trust,* Court of Appeal (England), [2004] 4 All ER 920; *Dunnett* v. *Railtrack plc*, Court of Appeal (England), [2002] 2 All ER 850.

50 European Parliament, *available at:* https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf (last visited Jan., 23, 2023).

51 *Menini and another* v. *Banco Popolare Società Cooperativa*, Case C75/16.

52 Morek, Rafal, *To compel or not to compel: Is mandatory mediation becoming "popular"?, Kluwer Mediation Blog* (Nov., 19, 2018), *available at:* https://mediationblog.kluwerarbitration.com/2018/11/19/to-compel-or-not-to-compel-is-mandatory-mediation-becoming-popular/ (Last visited Jan., 23, 2023).

53 Vidhi Centre for Legal Policy, *available at:* https://vidhilegalpolicy.in/research/the-future-of-dispute-resolution-in india/#:~:text=Vidhi's%20new%20paper%2C%20by%20the,for%20a%20robust%20ODR%20framework.(last visited Jan., 23, 2023).

54 Mahmoud Elsaman, *Introducing Mandatory Mediation to Egypt's Administrative Courts: Two Feasible Approaches,* 2 COURTS & JUSTICE LAW JOURNAL 55-75 (2020).

conformity with necessary regulations and public policy.[55] In India there is ambiguity regarding the extent of the implementation of mandatory mediation, moreover, there is still no incentive for lawyers to ask their clients to settle their disputes via mediation instead of litigation.[56] The bill seeks to extend the applicability of mediation to every other commercial and family dispute which requires rapid infrastructural development as well as extensive technical training to individuals including the creation of additional incentives for lawyers.

V

Loopholes and the Possible Burden on Courts

The biggest benefit of this development is being flashed as it is a positive step towards reducing the burden on courts. But some provisions of the act itself may counteract towards achieving the said goal. Section 8 of the Bill[57] states that interim relief can be provided by the courts in exceptional circumstances.[58] Parties reluctant to go for mediation can file for interim relief as the provision is loosely drafted which gives any party an opportunity to file for interim relief which will result in increasing the burden on the courts. Furthermore, Section 29[59] lays down grounds for challenging the mediated settlement, fraud being one of the grounds is concerning as everything is tainted by fraud.[60] If a settlement is reached as a consequence of fraud, the settlement becomes unenforceable by the operation of law.[61] Making fraud a cause for contesting a settlement agreement is therefore likely to promote litigation rather than putting an end to the parties' issues. In the event of fraud, the party may seek to redress under general law. Further, fraud encompasses corruption and impersonation, as defined by the aforementioned regulation. The aforementioned grounds are also rendered obsolete.

Additionally, an application for contesting the mediated settlement agreement may not be submitted under section 29[62] after three months have passed from the date

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55 Giuseppe Conte, *The Italian Way of Mediation,* 6 Y.B. ARB. & MEDIATION 180 (2014).

56 Digital Sansad, REPORT ON MEDIATION BILL, 2021 (2022), *available at:* https://sansad.in/getFile/rsnew/Committee_site/Committee_File/Press_ReleaseFile/18/164/543P_2022_7_11.pdf?source=rajyasabha (last visited Jan., 23, 2023).

57 *Supra* note 1, § 8.

58 *Supra* note 1.

59 *Id.*

60 *Id.*

61 *Swiss Timing Ltd.* v. *Commonwealth Games 2010 Organising Committee,* (2014) 6 S.C.C. 677; *Vidya Drolia* v. *Durga Trading Corporation*, 2020 S.C.C. OnLine S.C. 1018; *N.N. Global Mercantile Pvt. Ltd.* v. *Indo Unique Flame Ltd. & Ors.*, 2021 S.C.C. OnLine S.C. 13.

62 *Infra* note 69.

on which the party making the application receives a copy of the mediated settlement agreement under section 21(3) of this bill.[63] However, if the court is convinced that the applicant was prevented from making the application within the three-month term by 'sufficient reason', it may hear the application within a further thirty-day period, but not beyond. The word 'sufficient reason' for the delay in bringing the settlement agreement challenge is vague and open-ended leaving space for parties to challenge the settlement agreement, consequently increasing the burden on the courts. Notably, Section 24(2)[64] renders information about domestic violence or child abuse disclosed by parties non-confidential. This is likely to undermine the parties' trust in the mediation process. Furthermore, the phrase 'public health or safety' is ambiguous and will result in a slew of lawsuits. Section 2(1) provides that 'where a party has more than one place of business, the place of business with the closest link to the mediation agreement will be considered as a place of business.' The aforementioned explanation is imprecise and vaguely phrased. The definition of 'closest relationship to the mediation agreement' is not defined in the Bill. Such ambiguity can give rise to a multiplicity of lawsuits. The crux of the matter is that the bill has numerous vaguely drafted provisions which can open the floodgates for litigation, increasing the burden on courts denying the primary benefit, and one of the fundamental objects of the bill which is to reduce the burden on courts.

VI

The Way Forward

The need of the hour is to eliminate adversarial adjudicatory litigation while providing quick, satisfying, and cost-effective justice. That is when alternative dispute resolution mechanisms including the Bar become important and necessary.[65] The intent of the legislature signifies the essence of the above lines, yet there are some aspects that are concerning and need to be catered. Obviously, an indigenous way must be formulated. Such an indigenous way must include training in order to develop a mediation process that is appropriate for our needs.[66] India should adopt a modified version of Italy's mandatory mediation opt-out mechanism.[67] We should learn from some of the difficulties that Italy had while

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[63] *Id.*

[64] *Id.*

[65] Justice R.V. Raveendran, *Section 89 CPC: Need For an Urgent Relook* 4 SCC J-23 (2007).

[66] Adrian Loke, *Mediation in the Singapore Family Justice Court* 11 SACLJ 189 (1999).

[67] Giovanni Matteucci, *Mediation and Judiciary in Italy 2019* 2 ASIA PACIFIC MEDIATION 65 *(2019).*

implementing obligatory mediation,[68] so that comparable difficulties do not occur in India. It adopted required meditation in 2013 with a four-year sunset provision, after which the rule will be revisited.[69] In India, a similar strategy may be used in which obligatory mediation would begin with a modest pilot program and then be gradually changed to compensate for any demonstrated problems that are uncovered. The NITI Aayog stated that a framework for obligatory pre-litigation mediation in India must be established with the number of available mediators in mind. It advocated for the progressive implementation of mandated pre-litigation mediation, initially for specific types of conflicts and later for a broader spectrum of problems. It concluded that the expansion of such conflict classes should result in an increase in capacity in terms of mediators and dispute resolution centres.[70]

An evidence-based approach to obligatory mediation would lend validity to any attempt to make mediation mandatory, an approach that Australia followed.[71] India could also learn from Romania's experience, which introduced an opt-in model of obligatory mediation and compelled parties to attend a mediation information session before beginning certain types of civil proceedings.[72] In the opt-in approach, after the necessary information session, the parties interested in mediation must initiate a separate process to actually meditate.[73] Romanian law also included an express clause requiring the court to dismiss a case if the parties failed to attend a mediation information meeting.[74]

An alternative can be mid-litigation mediation as most of the time parties are willing to mediate and come to a middle ground when there are spotted weaknesses that can be

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[68] D. Quek Anderson, *Mandatory Mediation: An Oxymoron - Examining the Feasibility of Implementing a Court-Mandated Mediation Program,* 11.2 CARDOZO JOURNAL OF CONFLICT RESOLUTION (2020).

[69] E.A. Frank Sander, *Another View of Mandatory Mediation* 13 DISPUTE RESOLUTION MAGAZINE (WINTER) 16 (2007).

[70] NITI Aayog, *Designing the Future of Dispute Resolution: The ODR Policy Plan for India*, *available at:* https://www.niti.gov.in/sites/default/files/2023-03/Designing-The-Future-of-Dispute-Resolution-The-ODR-Policy-Plan-for-India.pdf (last visited Jan., 23 2023).

[71] Vicki Waye, *Mandatory Mediation in Australia's Civil Justice System* 45 COMMON LAW WORLD REVIEW 214-235 (2016).

[72] European Parliament, CROSS BORDER-ACTIVITIES IN THE EU -MAKING LIFE EASIER FOR CITIZEN, *available at:* https://www.europarl.europa.eu/RegData/etudes/STUD/2015/510003/IPOL_STU(2015)510003_EN.pdf (last visited Jan., 23, 2023).

[73] De Palo, Giuseppe and Romina Canessa, *Sleeping - Comatose - Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union* 16 CARDOZO JOURNAL OF CONFLICT RESOLUTION 713-730 (2014-15).

[74] *Id.*

flagged in litigation and then the dispute can be referred to mediation.[75] The mediation can be conducted by trained mediator-cum-judicial officers by creating a separate cadre of Mediation Judges who shall conduct mediation five days a week. They should not be given any judicial work. For every district, the requirement may be assessed and a cadre be formed, which can increase the accountability and efficiency of mid-litigation mediation. This model caters to the structural fallacies which make a party reluctant to mediate, and at the same time also achieves the objective of reducing the burden on courts and ensuring speedy and fair justice.

[75] Claire Mulder, *Commercial Mediation: The United States and Europe, The view through practitioners' eyes,* DISPUTE RESOLUTION MAGAZINE (2017).