

The Mediation Bill, 2021

What are the changes which the Parliamentary Standing Committee has recommended to the draft Bill introduced in the Rajya Sabha last year? Will pre-litigation mediation be mandatory for all disputes before filing a suit in court?

EXPLAINER

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The story so far:

The Mediation Bill, 2021 was introduced in the Rajya Sabha on December 20, 2021, with the Parliamentary Standing Committee being tasked with a review of the Bill. The committee's report to the Rajya Sabha was submitted on July 13, 2022. In its report, the Committee recommends substantial changes to the Mediation Bill, aimed at institutionalising mediation and establishing the Mediation Council of India.

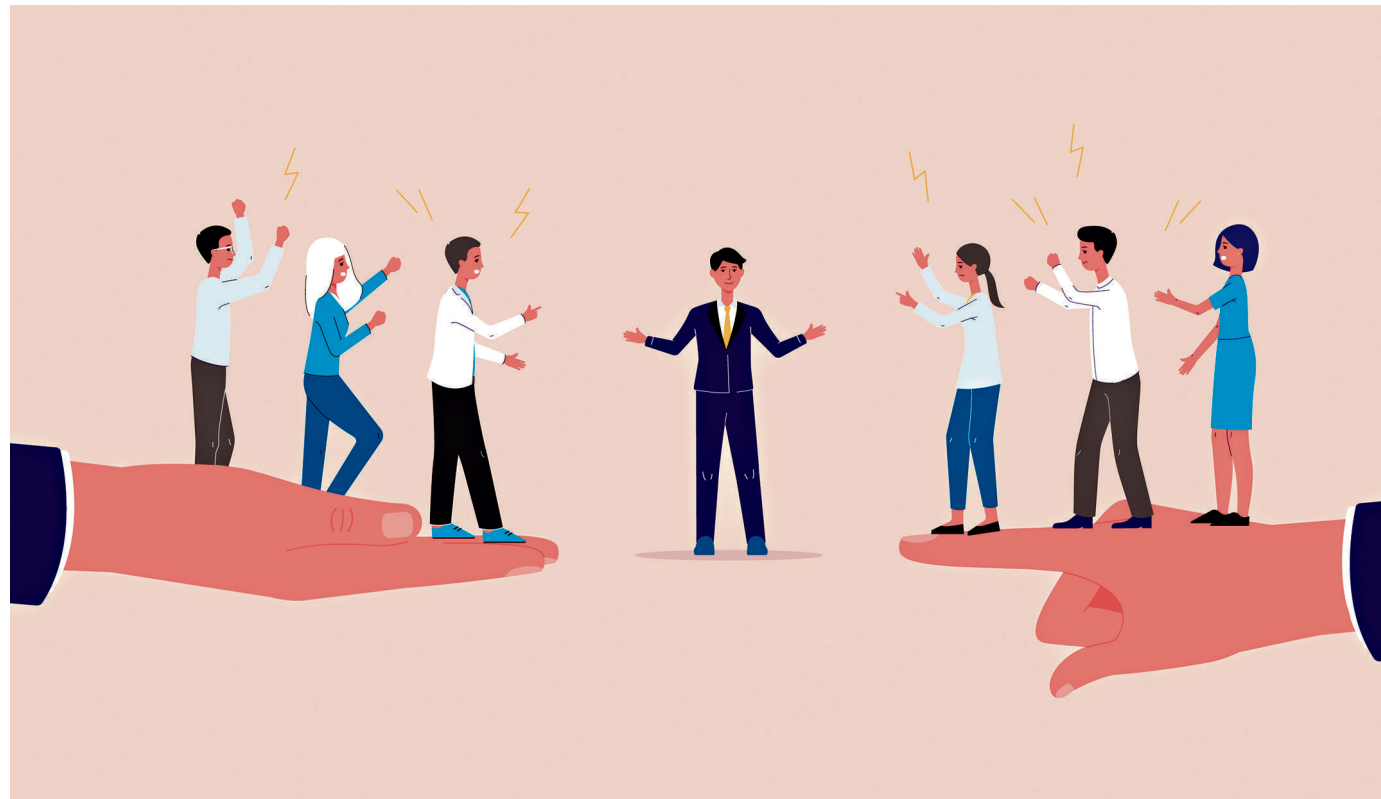
Why does India need to promote mediation?

While there is no standalone legislation for mediation in India, there are several statutes containing mediation provisions, such as the Code of Civil Procedure, 1908, the Arbitration and Conciliation Act, 1996, the Companies Act, 2013, the Commercial Courts Act, 2015, and the Consumer Protection Act, 2019. The Mediation and Conciliation Project Committee of the Supreme Court of India describes mediation as a tried and tested alternative for conflict resolution. As India is a signatory to the Singapore Convention on Mediation (formally the United Nations Convention on International Settlement Agreements Resulting from Mediation), it is appropriate to enact a law governing domestic and international mediation.

What are the key features of the Bill?

The Bill aims to promote, encourage, and facilitate mediation, especially institutional mediation, to resolve disputes, commercial and otherwise.

The Bill further proposes mandatory mediation before litigation. At the same time, it safeguards the rights of litigants to approach competent adjudicatory forums/courts for urgent relief. The mediation process will be confidential and immunity is



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provided against its disclosure in certain cases. The outcome of the mediation process in the form of a Mediation Settlement Agreement (MSA) will be legally enforceable and can be registered with the State/district/taluk legal authorities within 90 days to ensure authenticated records of the settlement. The Bill establishes the Mediation Council of India and also provides for community mediation.

What are the concerns with the Bill?

According to the Bill, pre-litigation mediation is mandatory for both parties before filing any suit or proceeding in a court, whether or not there is a mediation agreement between them. Parties who fail to attend pre-litigation mediation without a reasonable reason may incur a cost. However, as per Article 21 of the Constitution, access to justice is a constitutional right

which cannot be fettered or restricted. Mediation should just be voluntary and making it otherwise would amount to denial of justice. Additionally, according to Clause 26 of the Bill, court-annexed mediation, including pre-litigation mediation, will be conducted in accordance with the directions or rules framed by the Supreme Court or High Courts. However, the Committee objected to this. It stated that Clause 26 went against the spirit of the Constitution. In countries that follow the Common Law system, it is a healthy tradition that in the absence of statutes, apex court judgments and decisions carry the same weight. The moment a law is passed however, it becomes the guiding force rather than the instructions or judgments given by the courts. Therefore, Clause 26 is unconstitutional.

Furthermore, the Bill considers interna-

tional mediation to be domestic when it is conducted in India with the settlement being recognised as a judgment or decree of a court. The Singapore Convention does not apply to settlements that already have the status of judgments or decrees. As a result, conducting cross-border mediation in India will exclude the tremendous benefits of worldwide enforceability.

What next?

In order to enable a faster resolution of disputes, the Bill should be implemented after discussion with stakeholders. If the issues of the Bill aren't fixed, our aspirations to become an international mediation hub for easy business transactions could be crushed before they've even begun.

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THE GIST

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