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ROLE OF MEDIATION IN COMMERCIAL DISPUTES

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Introduction

Recently the Ministry of Law & Justice has notified some provisions of the much awaited the Mediation Act, 2023. The Central Minister of Law and Justice, Arjun Ram Meghwal mentioned in Rajya Sabha that the establishment of the Mediation Council of India under section 31 of the Mediation Act, 2023 was under process for institutionalization of the conduct of mediation in the country and One Working Group had been constituted for framing of subordinate legislation under the Act. On October 9, 2023, various provisions of the Mediation Act were brought into force by the Central Government, which inter alia, include provisions relating to : (i) non-applicability of the Mediation Act to the proceedings conducted by Lok Adalat and Permanent Lok Adalat (Section 26); (ii) Mediation Council of India (Section 31 to 38); (iii) Mediation Fund (Section 45 to 47); and (iv) other miscellaneous provisions such as definitions, power to make rules and regulations under the Mediation Act, power to remove difficulties in giving effect to the provisions of the Mediation Act, non-applicability to pending proceedings and transitionary provisions (Section 1, 3, 50 to 54, 56 to 57).

There were three major reasons for need of a separate mediation law, mainly, continuous pendency or set aside of arbitral awards, lower ranking of India in 'ease of doing business' due to pendency of commercial disputes and adoption of Singapore Convention on Mediation. Though arbitration law has undergone significant changes to keep pace with current developments in the arbitration landscape and to enable arbitration as a viable dispute resolution mechanism.

The increased sophistication with which mammoth corporates, mid-segment businesses and even small & gig economy players conduct their businesses today has bred a trusting atmosphere in which entities are willing to accept amicable forms of dispute resolution, such as mediation, instead of turning to traditional litigation. Commercial entities are benefited from this shift since it helps them to maintain a healthy business relationship with their contemporaries even in the face of commercial disputes that may arise in the course of business, without having to compromise on confidentiality or reputation.

Stagnation in Arbitration and Conciliation

The Amendment Act of 2015 [416] provided for expeditious, fast track and time bound conclusion of arbitral proceedings, neutrality of arbitrators and cost-effective delivery mechanism. This was followed by the Amendment of 2019 [417] with the main objective of giving boost to institutional arbitration and to reduce the share of ad-hoc arbitration in the country. Further, Amendment of 2021 [418] provided for unconditional stay of enforcement of arbitral awards where the underlying arbitration agreement, contracts or making of the arbitral award are induced by fraud or corruption.

[416] Arbitration and Conciliation (Amendment) Act, 2015
[417] Arbitration and Conciliation (Amendment) Bill, 2019
[418] Arbitration and Conciliation (Amendment) Act, 2021

India and Ease of Doing Business

Again, this present Government has been aggressively pursuing various reform measures to create an effective, efficient, and transparent "Contract Enforcement Regime" and the Commercial Courts Act, 2015 is an important legislative reform to facilitate the process of ease of doing business and ease of living simultaneously. In Enforcing Contracts indicator, India achieved 163rd position in the Doing Business Report 2020, an improvement of 23 positions from the 186th rank comparing the business regulations of 190 countries in the Doing Business Report 2015. In this context, the making of mediation ecosystem in this country was another challenge for government.

Mediation of Commercial Disputes

Mediation is a process whereby a neutral third party facilitates negotiations between the parties to a dispute to help them find a consensual outcome. The mediator is actively involved but generally has no power to adjudicate or say who is right and who is wrong. Importantly, in a mediation the parties retain ultimate control over the decision of whether to settle and on what terms.

The increasing use of mediation throughout the world has largely been attributed to the encouragement given by courts to use mediation as an aid to settlement. Many jurisdictions (such as England and Australia) have written mediation into their court processes.

The use of mediation is well established in the UK and it is now as important a form of dispute resolution as the more "mainstream" options. Its use is promoted across the EU member states via the European Mediation Directive. Other developments such as the coming into force of the Singapore Convention on Mediation [419] will further the cause of mediation globally. These developments, together with the ADR centers established around the globe, ensure that commercial parties are more aware of the benefits of mediation and other forms of ADR.

Mediation can be used successfully together with arbitration or litigation - where parties agree to seek to resolve a dispute by mediation first and only proceed to arbitration or litigation if the mediation fails to produce a settlement.

Over 90 per cent. of commercial disputes are settled prior to a court or arbitration hearing. Critics of mediation therefore often question what mediation adds to the dispute compromise process that cannot be achieved through direct negotiations. However, mediation is more than simple negotiation, it is a technique for enhancing negotiation which shifts the focus from the parties' respective positions to settlement itself. Whereas negotiations usually take place between the lawyers and are part of the adversarial process, mediation is a process in itself into which all the parties – the commercial parties and their lawyers – invest time and effort. At least a day will be set aside with all key players physically present and the presence of the mediator – the independent third party – creates a sense of formality and a "day in court". This provides a structure and discipline to the negotiation, encourages negotiation and enhances the seriousness of the intention to settle.

Background - Mediation in India

There are an estimated 50 million pending cases in our courts today and an increasing caseload per judge across all major courts in the country. As we aspire to become a developed country by 2047, the size of India's economy will also grow exponentially. Increasing prosperity will impose greater demands on our justice delivery system. There will be many more property and contractual disputes on the civil side while simultaneously increasing the law and order challenges on the criminal side. Policy-makers have two approaches to reduce caseload in India's courts.

[419] The United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation (the "Convention")

Firstly, the cases which are in the judicial system are sought to be disposed of quickly by expanding the judicial infrastructure and speeding up the procedural elements of a case. Secondly, multiple efforts are made to ensure that the flow of new cases which enter the judicial system is also minimized. This includes decriminalization of offences, the government choosing not to contest cases below a certain monetary threshold and most importantly, encouraging alternative methods of dispute resolution like arbitration, mediation and conciliation. Providing legal and institutional support to mediation is a part of the effort. A conciliatory approach to dispute resolution (as opposed to the adversarial approach of the common law litigation) has been a part of India's civilizational heritage through the institution of Panchayats. However, with the advent of British rule, mediation and other amicable forms of dispute resolution gradually lost out to the preferred mode of court-led dispute resolution using adversarial common law litigation. After Independence, there were several attempts made to reinvigorate these alternate forms of dispute resolution. The system of Lok Adalats created by the Legal Services Authorities Act, 1987 was a notable step in this direction. But all these legislative efforts met with limited success.

Indian Approach in Mediation

Already there were few areas wise development of adjudication through mediation procedure introduced directly in Company Laws [420], Commercial Court Laws [421], Consumer Laws [422] and indirectly in Real Estate laws and anti-sexual harassment law in the form of conciliation. Although the concept of mediation and conciliation were present in our matrimonial laws in very tacitly from very beginning. According to Section 55 of the Mediation Act [423], 2023, this latest mediation law shall have overriding effect for conduct of mediation or conciliation over the Indian Contract Act, 1872, the Code of Civil Procedure, 1908, the Legal Service Authorities Act, 1987, the Arbitration and Conciliation Act, 1996, the Micro, Small and Medium Enterprises Development Act, 2006, the Companies Act, 2013, the Commercial Courts Act, 2015 and the Consumer Protection Act, 2019 in the manner specified in third schedule to tenth schedule of the Act. Though procedures of the Industrial Disputes Act, 1947, the Brahmaputra Board Act, 1980, the Cine-Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981, the Family Courts Act, 1984, the Legal Services Authorities Act, 1987, the Maintenance and Welfare of Parents and Senior Citizen Act, 2007, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, the Finance Act, 2016, the Industrial Relations Code, 2020 are excluded from the Mediation Act, 2023.

Mediation Act 2023 - Making Mediation Voluntary Again

United Nations Convention on International Settlement Agreements Resulting from Mediation 2018 ("Singapore Convention") [424] which was signed by India in July 2019 was the impetus for the latest cycle of efforts to promote mediation in the country, notably through the Mediation Bill 2021 which is the first ever comprehensive code on mediation in India. Section 6 of the Mediation Bill 2021 was another example of the statutory mandate to compulsorily use mediation for dispute resolution before going to courts. Notably, the provision applied even in cases where the parties chose not to have a mediation clause in their agreement.

Section 6 of the Mediation Bill 2021 originally read as follows :

"(1) Subject to other provisions of this Act, whether any mediation agreement exists or not, any party before filing any suit or proceedings of civil or commercial nature in any court, shall

[420] Companies Act, 2013
[421] Commercial Courts Act, 2015
[422] Consumer Protection Act, 2019
[423] Section 55 – Provisions of the Act to have overriding effect on mediation or conciliation contained in other laws
[424] The United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation (the "Convention")

take steps to settle the disputes by pre-litigation mediation in accordance with the provisions of this Act.

Provided that pre-litigation mediation in matters of commercial disputes of Specified Value shall be undertaken in accordance with the provisions of section 12A of the Commercial Courts Act, 2015, and the rules made thereunder"

The Mediation Bill 2021 made a few notable changes based on the experience of pre litigation mediation of commercial cases under the 2015 Act. Clause 8 of the 2021 Bill allowed for the designated court to grant interim relief either before or during the mediation proceedings. But unlike Section 12A of the 2015 Act [425], the parties were not allowed to opt out of the mediation process even if there was a case for urgent interim relief to prevent irreparable damage to one of the litigants.

Further, Clause 20 of the Mediation Bill 2021 mandated that parties be forced to sit through at least two sessions of mediation before initiating the litigation process and empowered the court to impose penalty on a litigant who failed to do so without reasonable cause. This was unlike the 2015 Act where no minimum number of mediation sessions was imposed upon the litigants in commercial cases. Clause 21 of the Mediation Bill [426] also imposed a time limit of six months for the mediation process to be complete, subject to further extension by another six months with prior consent of both parties.

Burgeoning Pro-mediation Environment in India

The legislature introduced Chapter IIIA into the Commercial Courts Act, 2015 ("CCA") through an amendment in 2018 which inserted Section 12A mandating compulsory pre/institution mediation in case of a commercial suit of specified value, which does not contain any application for urgent interim relief.

Further, in a bid to strengthen and codify the law on mediation, the government of India has also presented the Draft Mediation Bill, 2021 ("Draft Bill") for public comments. Interestingly, Section 6 of the Draft Bill is also worded to make pre-litigation mediation compulsory before the institution of any formal adjudicatory proceedings before any court or tribunal. Notably, even the non-existence of a specific mediation agreement to this effect shall not qualify as a bar to the aforesaid mandate.

Compulsory pre-litigation mediation can aid in speedy and effective disposal of commercial suits. The speed with which the justice delivery system in any country responds to the problem of docket explosion, particularly in the realm of commercial disputes can be regarded as a safe index of the ease of doing business in that country. Resultantly, an emerging pro-mediation environment may uplift India on the Ease of Doing Business index and tackle the challenge of docket explosion in commercial suits.

Mediation under Commercial Courts Act, 2015

The Commercial Courts Act 2015 ("CCA") was enacted to constitute commercial courts for adjudicating commercial disputes. Section 2(1)(c) [427] defines a 'commercial dispute' as :

"A dispute arising out of- i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents; ii) export or import of merchandise or services; iii) issues relating to admiralty and maritime law; iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same; v) carriage of goods; vi) construction and infrastructure contracts, including tenders; vii) agreements relating to immovable property used exclusively in trade or commerce; viii) franchising agreements; ix) distribution and licensing agreements; x) management and consultancy agreements; xi) joint venture agreements; xii)

[425] Commercial Courts Act, 2015
[426] Mediation Bill of 2023

[427] Commercial Courts Act, 2015

shareholders agreements; xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services; xiv) mercantile agency and mercantile usage; xv) partnership agreements; xvi) technology development agreements; xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits; xviii) agreements for sale of goods or provision of services; xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum; xx) insurance and re-insurance; xxi) contracts of agency relating to any of the above; and xxii) such other commercial disputes as may be notified by the Central Government.

Explanation. - A commercial dispute shall not cease to be a commercial dispute merely because - (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property; (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions."

Evidently, the definition of 'commercial dispute' is quite broad and all encompassing. Subsequently, a 2018 Amendment to the CCA was promulgated for, inter alia, the insertion of Section 12A titled 'Pre-institution mediation and settlement'. The said provision mandates that a plaintiff/applicant seeking to institute a suit for adjudication of a commercial dispute under the CCA shall first be required to initiate pre institution mediation for the same dispute unless the plaintiff/applicant intends to seek urgent interim relief under the said Act.

The Central Government has also notified the Commercial Courts (Pre-institution Mediation and Settlement) Rules 2018 that will govern such mediation proceedings under the CCA. On making of an application to the concerned Authority (as notified by the Central Government) for initiation of pre-institution mediation, the said Authority will issue a notice to the opposite party to appear and give consent to participate in the mediation. In the absence of response or refusal to participate from such opposite party to the said notice, the Authority shall treat the mediation to be a non-starter and prepare a report to that effect. Should the opposite party agree to participate in such mediation, then such Authority shall complete the process of mediation within three months from the date of application by the applicant to initiate mediation. However, with the parties' consent, the said period may be extended by two more months. Any settlement between the parties shall be reduced to writing and shall be signed by the parties to the dispute and the mediator. The settlement arrived at under Section 12A of the CCA shall have the same status and effect as if it is an arbitral award on agreed terms under Section 30(4) of the ACA [428]. The provision further states that the period during which the parties remained occupied with the pre-institution mediation shall not be computed for the purpose of limitation under the Limitation Act 1963 [429].

The parties, their authorized representatives or counsel, and the mediator are bound to maintain the confidentiality of the proceedings. Stenographic, audio or video recording of the mediation sessions is not permitted. In effect, pre-institution mediation under the CCA continues to remain a voluntary process. Only initiation of the process of mediation is mandatory before institution of a suit, and the choice is left with the opposite party to decide whether to participate in such proceedings.

The provision is a well-intended nudge and offers a quick, cost-effective dispute resolution mechanism to disputants. A potential pitfall of this provision is lack of the parties' ability to

[428] Section 30 of Arbitration and Conciliation Act, 1996

[429] The Limitation Act of 1963 does not apply to the pre-institution mediation period of a commercial dispute.

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choose their mediator. It is well known that a mediation is only as good as the mediator. It is also possible that the opposite party may use pre-institution mediation as a tool to somewhat protract initiation of a suit by the applicant. However, largely, on balance, the advantages outweigh the disadvantages.

Section 12A of the Commercial Courts Act, 2015

Section 12A of the 2015 [430] Act makes pre-litigation mediation compulsory for commercial cases. In case the plaintiff does not do so, the suit is liable to be dismissed under Order VII, Rule 11 of the Civil Procedure Code as being barred by law.

Section 12A reads as follows:

"(1) A suit, which does not contemplate any urgent interim relief under

this Act, shall not be instituted unless the plaintiff exhausts the remedy

of pre-institution mediation."

The 2015 Act was the result of the Indian government's concerted efforts to provide an effective and timely resolution of commercial disputes which was a major roadblock in improving India's rank in the World Bank's Ease of Doing Business index. Accordingly, Section 12A was added in 2018, the same year that India negotiated and signed the Singapore Convention of Mediation (the equivalent of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

Under Section 12A, parties to all commercial disputes above a certain monetary threshold (INR three lakh) must mandatorily undergo mediation before instituting a commercial suit. The only exception is if there is a time-sensitive urgency (for example, infringement of intellectual property rights) which requires an interim relief to prevent irreparable loss to the litigant.

Section 12A also mandates that the mediation process must be completed within three months from the date of application (extendable by two months with mutual consent of both parties). If a settlement is reached within the stipulated period, it shall be binding as an arbitral award under Section 30 of the Arbitration and Conciliation Act 1996 [431]. If not, the parties may refer the dispute to the commercial courts established under the Act.

Until recently, there was some confusion about whether the mandate for prelitigation mediation was binding on parties or merely procedural compliance was enough. This debate arose due to the contradictory decisions of Bombay and Calcutta High Courts on one hand, saying that before attempting mediation parties.

Nature of Section 12A of the CCA

The requirement for parties to mediate prior to the institution of a suit, before a commercial court of appropriate jurisdiction under Section 12A of the CCA is different from mediation ordered by courts after the institution of a commercial suit under Section 89 of the Code of Civil Procedure, 1908 [432] ("CPC"). In the former, the parties have to comply with the mandate of pre-litigation mediation by themselves at the pre-institution stage without the involvement of courts.

Disputes under Section 12A can be bifurcated into two distinct classes of commercial suits : (a) where no urgent interim relief is sought—in this case the requirement of pre-litigation mediation must be satisfied before institution of a commercial suit; and

(b) where an urgent interim relief is sought -— in this case, the parties are allowed to approach the courts directly without exhausting the requirement of pre-institution mediation

Despite several pro-mediation steps taken by the legislature and the judiciary, thus far, there existed contrasting views on whether pre-litigation mediation contemplated under Section 12A of the CCA is mandatory or procedural in

[430] Commercial Courts Act, 2015

[431] Section 30 of the Arbitration and Conciliation Act of 1996 deals with settlement in arbitration proceedings.

[432] Section 89 of the Code of Civil Procedure (CPC) of 1908 allows courts to resolve disputes outside of the court system.

nature. The next section briefly analyses the evolution of law vis-à-vis consequences of non-compliance with pre-litigation mediation under Section 12A of the CCA.

Pre - Litigation Mediation : End of Discordant Judicial Trends

Amidst a positive focus on mediation in the background, the Apex Court has recently dealt with the seminal question of the nature of Section 12A of the CCA in its landmark judgment in Patil Automation Private Limited & Ors. vs. Rakheja Engineers Private Limited [433] ("Patil Automation") declaring that pre-institution mediation is compulsory in nature and non-compliance with the same shall result in rejection of plaints under Order VII, Rule 11 of the CPC. A crucial implication of the said judgment is that, in regard to a suit covered under Section 12A of the CCA, where interim relief is not contemplated, there can be no substantial compliance with Section 12A of the CCA by way of post institution reference to mediation by the courts. Thus, parties must satisfy the requirement of pre-litigation mediation before institution of a commercial suit.

Previously, the nature of Section 12A of the CCA lacked clarity due to discordant judicial opinions laid down by High Courts of various states.

While the Bombay High Court [434] and the Calcutta High Court [435] held that Section 12A of the CCA is mandatory in nature, the Hon'ble Madras High Court [436] had taken a starkly opposite view. The Hon'ble Madras High Court in the case of Shahi Exports Pvt. Ltd vs. Gold Star Line Limited [437] held that the court is not a substitute to alternative dispute redressal mechanisms, but it is the other way round and the right to access to justice, being a constitutional right, cannot be deprived for not resorting to mediation. Thus, a dichotomy was evident in the difference in opinion expressed by High Courts in India on the nature of Section 12A, which has been effectively settled by the Supreme Court through the Patil Automation judgment.

In the case of Patil Automation, supra, the Supreme Court has reversed the decision of the lower courts after an analysis of the nature of the CCA and the jurisprudence laid down by different High Courts to declare that Section 12A of the CCA is mandatory in nature. In this regard, the trial court had previously held that Section 12A of the CCA is a procedural provision and any rejection of a plaint on the ground of non-compliance with it would have a catastrophic effect. The High Court confirmed the stance taken by the trial court and further observed that procedures are a handmaid of justice and are meant to advance justice and courts are not to be bogged down by the technicalities of procedure so as to lose sight of their main duty which is to advance justice. Additionally, the High Court observed that rejection of a plaint due to non-compliance with Section 12A of the CCA could not have been the intention of the legislature. Contrastingly, the Hon'ble Supreme Court, took a diametrically opposite view from the trial court and the High Court by interpreting the provision strictly and held that Section 12A of the CCA cannot be described as a mere procedural law. The Hon'ble Supreme Court further observed that the design and scope of the CCA, as amended in 2018, to insert Section 12A, makes it clear that the Parliament intended to give it a mandatory flavor.

Uncertainty and Potential Concerns

While the judicial mandate has settled the dust on whether there is a need for compulsory exhaustion of pre-litigation mediation, litigating parties may continue to face some level of obscurity for initiating an action under Order VII, Rule 11 of the CPC on the ground of non-compliance with Section 12A of the CCA.

For instance, Section 12A of the CCA is worded in a manner whereby the requirement to mediate

433 Para 53, Patil Automation Private Limited & Ors. vs. Rakheja Engineers Private Limited, 2022 SCC OnLine SC 1028
434 Deepak Raheja vs. Ganga Taro Vazirani, 2021 SCC OnLine Bom 312.
435 Laxmi Polufab vs. Eden Realty, 2021 SCC OnLine Cal 1457
436 Shahi Exports Pvt. Ltd vs. Gold Star Line Limited, Judgment dated 17 August 2021 passed by The Honourable Dr. Justice G. Jayachandran in A.No.35 of 2021 in C.S.No.669 of 2019.
437 Judgment dated 17 August 2021 passed by The Honourable Dr. Justice G. Jayachandran in A.No.35 of 2021 in C.S.No.669 of 2019

before institution of a suit can be bypassed when the plaintiff seeks an "urgent" interim relief. However, neither the CCA nor the courts in India have defined the contours of what constitutes "urgent" interim relief or what is the standard that demonstrates such urgency in claiming relief in the context of pre litigation mediation. A plaintiff, therefore, has a wide choice of defenses to circumvent the flimsy boundaries of what may constitute "urgent" interim relief.

Another issue that has come to the fore is whether the conduct of the defendant has any bearing on the question of compliance with Section 12A of the CCA. A recent judgment passed by the Delhi High Court in Bolt Technology, OU vs. Ujoy Technology Private Limited and Another [438], has seemingly added to the interpretation drawn by the Supreme Court regarding the mandatory nature of pre-litigation mediation by holding that refusal of the defendant to amicably settle the disputes satisfies the requirement of pre-litigation mediation. While reiterating that pre-litigation mediation provided under Section 12A of the CCA is a mandatory provision, the single judge bench of the Delhi High Court in the said decision held that the conduct of a defendant involving refusal to amicably settle a dispute violates the spirit of Section 12A of the CCA. Therefore, the defendant cannot turn around and object to the institution of a plaint on the ground of non-compliance with the provision, the Court noted. Notably, the decision rendered by the Apex Court in Patil Automation does not visibly carve out a situation wherein the defendant's conduct can have a bearing on exhaustion of the pre-litigation mediation requirement before instituting a plaint. Thus, judicial guidance in this regard may still be needed for an expeditious disposal of commercial suits.

It may well be the case that non-compliance with Section 12A of the CCA hinges directly on the maintainability of a commercial suit. The judicially affirmed mandatory nature of the provision may benefit parties in a potential adversarial action to resolve their dispute amicably, resulting in a win-win situation for all. However, several intertwined aspects pertaining to the maintainability of such commercial suits wherein the pre-litigation mandate is foregone by the parties---for example the apparent lack of conclusiveness on what can be considered "urgent" interim relief --- is a question that remains open to debate. In the absence of absolute clarity on the foregoing aspects, the courts may subject applications under Order VII, Rule 11 of the CPC [439] on the basis of non-compliance with Section 12A of the CCA to a case-by-case enquiry.

<u>Litigants Forced to Use Loophole under Section 12A</u>

The scope of Section 12A has been greatly diluted due to the carve-out provided in its language whereby in cases of urgent interim relief, the parties may bypass the pre-litigation mediation and directly file a suit in the courts. Since no parameter has been set out for considering "urgent interim reliefs", it is left to the discretion of the courts to be decided on a case-to-case basis. Considering the wide and dynamic scope of courts to grant interim relief in commercial disputes, most litigants are forced to use it as an antidote to avoid the unnecessary friction of forced mediation.

By way of illustration, infringement of intellectual property is a common element in common disputes. There is a well-established jurisprudence on the wide ranging powers of courts to award injunction in case of IPR infringement. This is often used as an excuse to sidestep mediation. Even the Parliamentary Standing Committee analyzing the Mediation Bill acknowledged this issue. The practice of using "urgent interim relief" to avoid the unnecessary friction of mandatory prelitigation mediation was corroborated in our conversation with stakeholders.

The Mediation Bill 2021 responded to this reality by closing this gateway that parties had under

[438] FAO (OS) (COMM) 45/2023

[439] Civil Procedure Code of 1908

the 2015 Act to quicken the dispute resolution process. Accordingly, Clause 8 of the 2021 Bill mandated the court to direct the parties back to the mediation process after granting urgent interim relief. This is the opposite of the course of action in Section 12A of the 2015 Act. The Standing Committee in its report on the Mediation Bill also corroborated this practice of bypassing the requirement of pre-litigation mediation due to the wide discretion provided to courts in granting interim relief. It said :

"…Further it has emerged from the experience of implementation of prelitigation mediation under the Commercial Courts Act, 2015, that the provisions of interim relief were being used by the parties to delay prelitigation mediation, wherein the party files an application for interim relief, which does not get decided for a long period of time."

The language of Clause 8 of the 2021 Bill and the observations of the Standing Committee highlights the limits of trying to change litigant behavior through a top-down legislative approach. As the Manivannan paper notes, it is a well established axiom of policy-making that the coercive power of the State must be used rarely and only to address market failure. Considering the hardship imposed on litigants by India's lengthy and complex court processes, parties in a commercial relationship have a built-in incentive to try out all possible means of amicable dispute resolution and litigation remains an option of last resort. If the parties have reached the stage where they see no other alternative to litigation, there is no benefit in delaying the inevitable by mandating pre-litigation mediation at this late stage.

Recommendation

In its 117th Report on the Mediation Bill 2021, the Standing Committee of the Parliament astutely noted that policy-makers must study the challenges faced in implementing the mandatory pre-litigation mediation provisions in the 2015 Act before expanding its scope for other categories of civil cases. There is incontrovertible evidence to suggest that, at least for commercial cases, forcing unwilling parties to mediate only makes it an additional stage of the

litigation and not an alternative. As pointed out by the Manivannan paper, the inevitable court litigation simply got delayed by 3-5 months with additional legal costs to no avail.

Further, the scope of Section 12A [440] has been greatly diluted due to the carveout provided in its language whereby in cases of urgent interim relief, the parties may bypass the pre-litigation mediation and directly file a suit in the courts. Considering the wide and dynamic scope of courts to grant interim relief in commercial disputes, most litigants are being forced to use it as a pretext to avoid mediation. As a result, an unnecessary wrinkle in timely and cost-effective dispute resolution has been created. By way of illustration, infringement of intellectual property is a common element in commercial disputes. There is a well-established jurisprudence on the

wide-ranging powers of courts to award injunction in case of IPR infringement. This is often used as an excuse to sidestep mediation. Even the Parliamentary Standing Committee analyzing the Mediation Bill acknowledged this issue.

Section 12A has failed to take into consideration the simple fact that given the time-consuming and expensive nature of litigation process in India, it is always a measure of last resort once all scope for an amicable settlement has been exhausted. In most business transactions, the parties usually attempt to amicably settle their disputes through informal and formal consultations before sending legal notices and initiating litigation. Therefore, a court-mandated mediation becomes a "repetitive and redundant process".

Based on the feedback of all stakeholders including the Parliamentary Standing Committee, the government in 2023 wisely took the decision to roll back the coercive nature of

[440] Section 12 of the Commercial Courts Act of 2015

mandatory mediation for civil cases under the Mediation Bill 2021. Section 6 of the Mediation Bill 2023 makes pre-litigation mediation in civil cases voluntary, as it should be. In order for the mediation system to be effective, it must earn its place in the dispute resolution ecosystem by virtue of its performance and not by a mandate. If made mandatory, it will just add an extra process and additional burden. Hence, we propose that Section 12A of the Commercial Courts Act 2015 must be amended to make pre-litigation mediation for commercial cases voluntary.

Conclusion

The Mediation Act, 2023, describes the legislative framework for mediation to be adopted by disputing parties, especially institutional levels where various stakeholders have been identified to establish a full - bodied and effective ADR ecosystem in India. Now time will show whether Mediation law will able to become a pivotal legislative format for the growth of a culture of amicable settlement of disputes, out of court especially to draw international investments.

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