

Nifty 50 18,232.55 Sensex 61,294.20 Silver 70,596.00 Gold 55,503.00 Crude Oil 6,598.00

SUBSCRIBE NOW

SIGN UP / LOGIN

Companies / Markets / Portfolio / Economy / Opinion Companies News

MENU

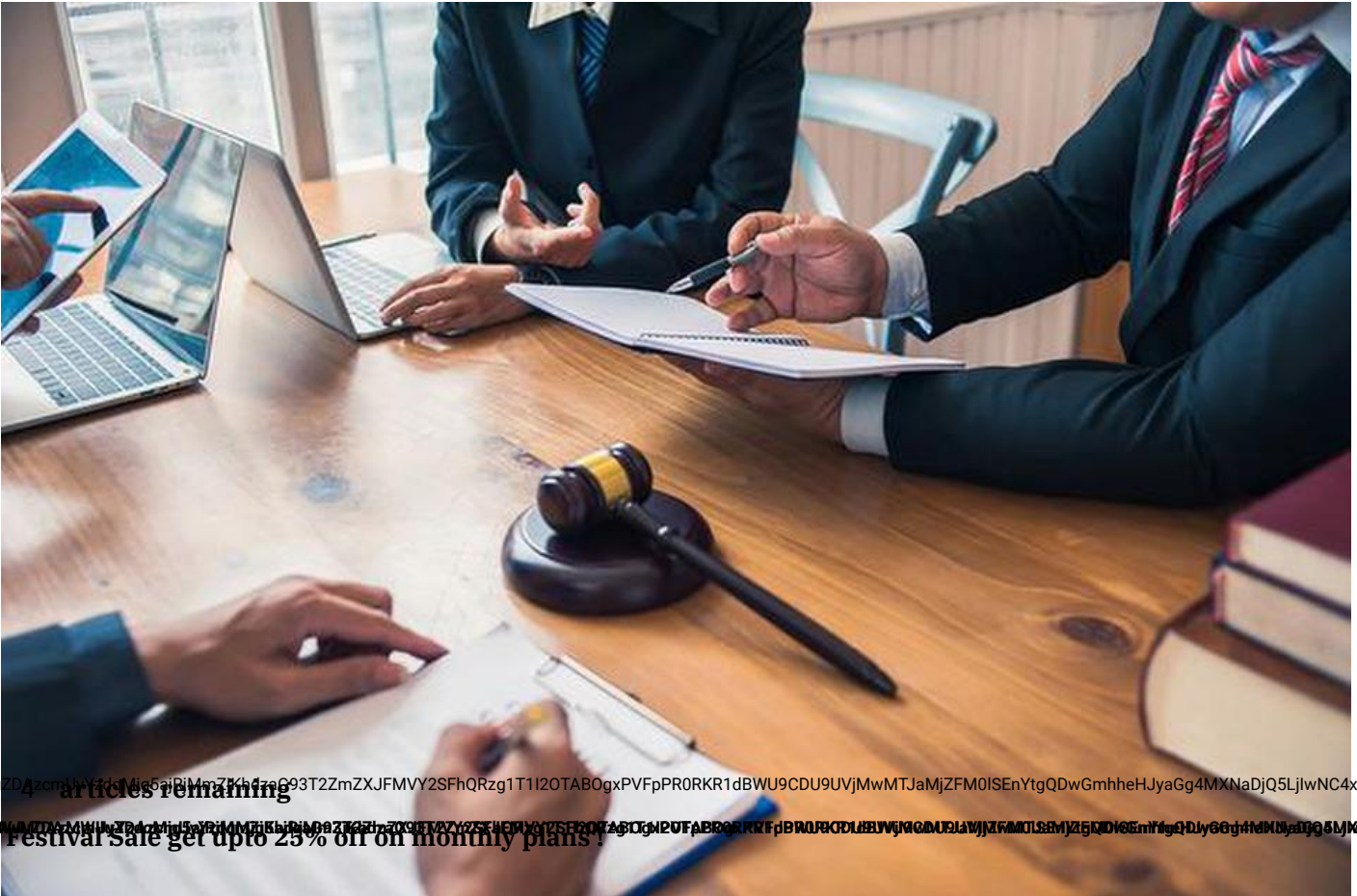
Home » Business Laws

Mandatory pre-litigation mediation needs lot of ground work before rollout

January 09, 2022 - Updated 07:12 pm IST

With awareness about mediation still low, making it mandatory may only lead to explosion of cases

0 COMMENTS SHARE



JuZDjzcnjUwz4sMie5jBmWz7Kk4zC93T2ZmZXJFMVY2SFhQRzG1T1120TABOgxPVFpPR0RK1dBWU9CDU9UVJMwMTJaMjZFM0ISEnYtgQDwGmhheHJyaGg4MXNaDjQ5LjIwNC4xN
Festival Sale get upto 25% off on monthly plans!

The question that looms large in the Indian context is whether India is ready for mandatory mediation as a pre-litigation tool. | Photo Credit:

Mediation has been gaining significant traction globally as an effective dispute resolution mechanism. The pro-mediation trend in India particularly has been on the rise in the recent past, with the government initiating various measures such as the introduction of mediation as a pre-litigation tool in certain specific sectoral laws, and being an early signatory to the UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention). Amidst these various policy measures, a uniform national legal framework for mediation will provide a much-needed impetus. Sensing the need for independent legislation for mediation, the Ministry of Law and Justice recently released the draft Mediation Bill 2021.

The mediation Bill is a significant step forward in establishing a clear framework for the mediation process in India. The Bill seeks to address various aspects of the key process and principles of mediation, including issues such as confidentiality, self-determination and voluntary-ness. It provides a regulatory framework for the practice of mediation, and significantly, provides a mechanism for the recognition and enforcement of mediated agreements, both domestic and international.

Opt-out clause

One of the significant features of the Bill is the introduction of a mandatory pre-litigation mediation process with an opt-out clause. It mandates that a disputing party shall take steps to settle the disputes before initiating litigation through mediation as a pre-litigation mechanism. However, the party concerned can 'opt-out' of the mediation after attending at least one mediation session if it wishes. This mandatory mediation process with an opt-out clause is not alien to the Indian context. For example, commercial disputes cannot be filed before the commercial courts unless an attempt to resolve the dispute through mediation is initiated, as envisaged in the Commercial Courts Act, 2015.

One of the primary reasons from a policy perspective for invoking mandatory recourse to mediation is to ensure it acts as a nudge for the parties to the dispute to resolve their differences and arrive at an early settlement, and thereby nip the disputes in the bud. An early resolution of disputes in addition to saving costs and time for the parties will also significantly enable the reduction in the pendency of cases in an already overburdened court system. This model of mandatory mediation with an opt-out clause has been successful in countries such as Italy and Turkey.

The empirical studies in these countries show that the settlement rate is much higher in a mandatory mediation framework. Further, there seems to be a growing interest among countries in invoking presumptive mediation or mandatory mediation with an opt-out clause to give mediation the thrust that it needs as an effective dispute resolution mechanism.

As much as proponents favour mandatory recourse to mediation, there is an equal number of voices that are opposed to it.

To them, the idea of mandatory mediation is against the fundamental principles; they argue that coercing parties into mediation could result in a settlement against their will. Further, where the parties' balance of power is disproportionate, the mandatory nature of the process could result in such difference in their positions being exacerbated.

This school of thought also seeks to contend that mandatory mediation precludes equal access to justice as parties would be better at solving certain disputes through litigation than a coerced settlement, with the right to access the courts also being a basic right of citizens. Further, experience shows that in countries with low levels of awareness about mediation, the mandatory mediation ends up as a mere empty formality, while being a burden on taxpayers money.

The question that looms large in the Indian context is whether India is ready for mandatory mediation as a pre-litigation tool. There can be no clear answer to this, in the absence of empirical evidence.

The dis-satisfactory response to mandatory mediation under the Commercial Courts Act 2015, however, is a clear indicator, that there is enough ground for scepticism. There is a lot of ground to be covered in creating awareness about mediation, more so in the community and private mediation space, before introducing it as a mandatory recourse.

Mediation nudge: Alternative ways

The success of mandatory mediation with an opt-out clause in Italy might have prompted the Indian policymakers to take a leaf out of it.

But having said that, India could have taken the path of countries that have not opted for a mandatory mediation, and instead conformed to the basic principle of keeping mediation voluntary. For instance, countries such as Ireland, Singapore and Scotland have put the onus on the legal fraternity to create awareness about mediation in their clients, as a prerequisite to initiating litigation. The lawyers and solicitors have to declare to the court to this effect, before they can commence legal proceedings.

While this certainly cannot be viewed as a solution to all the issues that could arise, it would address one of the critical concerns namely the participation of the legal community, which would play a major role in the success of the mediation framework. It is needless to mention the yeoman efforts taken by the judiciary in promoting mediation which has resulted in reasonably successful court-annexed mediation, even in complicated and long pending disputes.

However, the success of mediation outside of court intervention, such as private or community mediation lies largely in the hands of the legal community. The awareness about the significance of mediation in the legal fraternity is still very low. In a situation of lack of sufficient resources with the necessary professional expertise, with only a few expert mediators in the Country, invoking mandatory mediation would lead to an explosion of cases.

While setting up a regulatory body in the form of Mediation Council of India will certainly fast-track the mediation evolution, India needs to be patient and ensure that mediation becomes a default mechanism that parties adopt voluntarily, with full awareness, rather than a mandatory recourse imposed on them.

(The authors are advocates at J&M Legal)

