Settling disputes out of court

Mandatory pre-litigation mediation in commercial disputes has been introduced by the recent Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018, which amends the Commercial Courts Act of 2015. This amendment is expected to alter parties' sense of responsibility in resolving disputes. Mandatory pre-litigation mediation puts the ball in the court of the parties involved, rather than looking at external agencies like courts, and urges them to engage with and resolve disputes.

The Commercial Courts Act was legislated to improve the enforcement of contracts, as part of improving the ease of doing business. The law defines "commercial disputes" to include regular commercial and business contracts, construction contracts, shareholder agreements, licensing agreements, etc. The law makes changes for reduction of timelines, tightening processes and designating special commercial courts and commercial divisions to deal with these disputes, among others.

The ordinance stipulates that no suits concerning commercial disputes will be filed under this Act unless the person filing the suit exhausts the remedy of pre-litigation mediation. If an urgent interim relief is required, this pre-litigation mediation can be dispensed with. However, in all other cases, the mediation is mandatory and will be conducted within a period of three months (extendable by another two months with the consent of the parties). Any settlement arrived at through mediation will have the status of an arbitral award on agreed terms and be enforceable like a decree of court. Importantly, the time limits for filing cases will pause during the time the pre-litigation mediation is underway.

Mediation is a process of resolution of disputes by the parties to them. It involves discussion of the conflicts, moving out of the loop of allegations and counter-allegations, and assessing where interests lie in resolving the disputes. Options for settlement are explored and a settlement is worked out through joint evaluation. The process is managed by a neutral person called the mediator, who may evaluate the disputes and weigh in on options for settlement (a variant called conciliation) but has no authority to impose a settlement. The participation of the disputants is voluntary. The terms of settlement, if the parties do settle, are decided by the parties. The discussions are confidential.

Mediation, and mandatory mediation specifically, is not new in India. The Arbitration and Conciliation Act, 1996, makes a settlement arrived at through conciliation enforceable like a court decree. Under the Code of Civil Procedure, judges can refer cases to mediation. The Micro, Small and Medium Enterprises (MSME) Development Act, 2006, mandates conciliation when disputes arise on payments to MSMEs.

While the ordinance is an attempt to make parties evaluate and utilise mediation, some questions arise. One of the advantages of mediation is its voluntary nature; how does this reconcile with the mandatory nature of pre-litigation mediation? Will a pre-existing mediation agreement be enforced? What will be the status of cross-border mediation?

Mediation policies in other countries mandate mediations through various mechanisms, with good effect. They show that mandatory mediation does not mean a compulsion to mediate and offer policy choices under the amendment.

Italy, which faces a high rate of pendency of cases, has adopted what is referred to as 'opt out' mandatory mediation. In 2010 and 2013, it introduced a law for pre-litigation mediation. Attempts to mediate were made mandatory for certain disputes (like partition and joint ownership of

property) before a case was filed in court.

This law reconciles the voluntary nature of the process, while mandating mediation. All disputants are required to attend, with their lawyers, one session of mediation. After this session, any or all the disputants can choose to opt out of mediation and the disputants can proceed with their case in court. Parties who mediate and settle get tax credits.

The outcome of this policy is encouraging. Disputants have found mediation worthwhile and continued with the process towards resolution. This has resulted from the opportunity of understanding the process in the mandatory first session. Italy has seen almost 200,000 cases going in for mediation until 2017. After trying out one session of mediation, when parties continued with the mediation, almost 50% of those cases were settled. More strikingly, Italy has seen a drop of 30-60% in the filings of certain categories of cases covered for mandatory mediation.

Another approach to mediation policy has been to impose costs on disputants refusing to mediate, as is done in the U.K.

The ordinance is an important step in mainstreaming mediation, but it is not enough. Most disputes seek urgent orders for preservation of status quo or restraint orders on filing. With such an application, pre-litigation mediation could effectively be given a go-by. There is a need for a comprehensive policy on mediation, rather than the abbreviated and disconnected steps so far. This policy would encapsulate the process, the role and professional responsibilities of mediators, the rights and obligations of parties in the process, and the outcome of the mediation agreement. When seen in the context of a deliberate and well-considered law, mediation as a process would be more credible to disputants, as has happened in the case of arbitration.

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Why India is upset over the UN body’s report

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