

Evaluating Mandatory Pre-litigation Mediation under the Commercial Courts Act in India

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Abstract: India's legal system, burdened with an ever-growing caseload, has turned to Alternative Dispute Resolution (ADR) mechanisms to alleviate pressure on courts and expedite dispute resolution. The Commercial Courts Act, 2015, marked a significant milestone in this effort by introducing mandatory pre-institution mediation for commercial disputes above a specified monetary threshold. Despite the initiative's potential, its implementation has faced numerous challenges, including low participation, a lack of trained mediators, and concerns regarding the enforceability of mediated agreements. This article analyses the legal framework of mandatory pre-litigation mediation in India, evaluates its effectiveness, and explores the role of the Supreme Court in shaping this process. It also provides a critical assessment of the practical hurdles faced by the initiative and offers recommendations for its improvement. Ultimately, while mandatory pre-litigation mediation has demonstrated considerable potential, further institutional support and infrastructure development are essential to unlock its full potential.

1. Introduction

India's judicial system, historically burdened by case backlogs and delays, has increasingly turned to Alternative Dispute Resolution (ADR) to reduce the caseload and expedite dispute resolution. ADR mechanisms, such as mediation and arbitration, have been identified as effective tools in resolving disputes efficiently and outside the courtroom. ADR mechanisms are not merely secondary to formal litigation but can serve as effective alternatives. Using it as the primary method for resolving disputes can lead to quicker and more efficient outcomes and should be given equal standing to traditional litigation. A significant reform in this direction is the introduction of mandatory *pre-institution mediation under Section 12A* Commercial Courts Act, 2015, particularly aimed at facilitating early resolution of commercial disputes and reducing judicial burdens. In this context, the Supreme Court in *M.R. Krishna Murthi v. The New India Assurance Co. Ltd. and Others* AIR 2019 SUPREME COURT 5625 highlighted the need for a comprehensive Indian Mediation Act. The court urged the government to enact legislation, either as a standalone act or as a part of the Arbitration and Conciliation Act, 1996; to

comprehensively regulate mediation in a phased manner, beginning with specific categories of cases. Also in August 2020, the Bar Council of India made mediation a mandatory subject in legal education, highlighting its significance early in a lawyer's career (Bar Council of India, 2020) Alongside the Commercial Courts Act, 2015, the Mediation Bill, 2021 which is enforced as the Mediation Act 2023, seeks to create a robust framework for mandatory mediation, although challenges in implementation persist.

This article seeks to evaluate the pre institution mediation under Section 12 A Commercial Courts Act, 2015 and how it intersects with the provisions in Section 89 of the Civil Procedure Code, 1908, and the Mediation Act, 2023. It will further discuss the role of the Supreme Court in India, in critically analysing the implementation of mandatory pre-institution mediation and propose/suggest potential reforms to strengthen the framework.

2. Legal Framework for Pre-Litigation Mediation Under the Commercial Courts Act, 2015

The Commercial Courts Act, 2015, aims to expedite the resolution of commercial disputes by establishing special commercial courts for the

trial of commercial matters. A pivotal feature of the Act is the introduction of Section 12A, which mandates pre-institution mediation in commercial disputes where the value of the subject *matter exceeds ₹3 lakh*. Section 12A stipulates that: *Pre-institution mediation must be attempted before filing a commercial suit in court*. If the mediation results in a settlement, the terms are recorded as a settlement award under Section 30 of the Arbitration and Conciliation Act, 1996. This settlement is treated with the same legal effect as an arbitral award on the merits of the dispute. If no settlement is reached within two mediation sessions, the parties are free to proceed with litigation. This ensures the enforceability of mediated settlements while preserving their consensual nature.

2.1 Section 12A of the Commercial Courts Act, 2015

Section 12A of the Commercial Courts Act, 2015, represents a paradigm shift in India's legal framework by introducing mandatory pre-institution mediation and settlement for commercial disputes that do not involve urgent interim relief. This provision requires plaintiffs to exhaust mediation as a remedy before initiating litigation. Enacted with the objective of decongesting commercial courts and fostering ADR mechanisms, Section 12A is a significant step toward enhancing the efficiency of the Indian judiciary while promoting a culture of negotiated settlements. It reflects a proactive legislative intent to balance judicial resources and economic interests, creating a more business-friendly dispute resolution environment.

Section 12A's genesis lies in the broader policy objective of promoting ADR mechanisms in India, an endeavour that gained legislative momentum with the inclusion of Section 89 in the Code of Civil Procedure (CPC), 1908. Introduced in 2002, Section 89 empowers courts to refer disputes to arbitration, conciliation, judicial settlement (through Lok Adalats), or mediation if settlement elements are identified post-litigation filing. In contrast, Section 12A mandates pre-litigation mediation, marking a fundamental shift from court-directed ADR to party-initiated resolution processes. While both provisions aim to reduce the judicial burden and encourage settlements, their scope, timing, and operational dynamics differ. Section 89 applies to all civil disputes, granting courts discretion to refer matters for ADR. On the other hand, Section 12A is specific to commercial disputes

under the Commercial Courts Act and imposes mediation as a pre-condition to filing a suit, thereby acting as a filter for disputes that can be resolved amicably. Furthermore, the reliance of Section 12A on dedicated mediation authorities under the Legal Services Authorities Act, 1987 enhances institutional accountability and specialization in commercial matters.

Section 12A is a pivotal provision for several reasons. First, it addresses systemic delays in commercial litigation by redirecting disputes to mediation, which is faster, cost-effective, and less adversarial. This aligns with the economic imperative of improving India's ranking in the World Bank's Ease of Doing Business index, particularly in the "enforcing contracts" parameter. Second, it reflects a commitment to judicial reforms by reducing the pendency of cases in overburdened commercial courts, thereby improving the overall efficiency of the legal system. Moreover, Section 12A promotes a collaborative approach to dispute resolution, fostering relationships between disputing parties rather than exacerbating conflicts. This cultural shift toward ADR mechanisms aligns with India's constitutional ethos of ensuring justice delivery without any undue delay, (*speedy trial*) as envisioned under Article 21 of the Constitution of India. The provision also signals India's readiness to adopt global best practices in commercial dispute resolution, enhancing its attractiveness as a destination for foreign investment.

Section 12A offers a replicable framework for countries seeking to address judicial inefficiencies and promote ADR. Its innovative combination of mandatory mediation, time-bound processes, and enforceable outcomes can serve as a template for jurisdictions aiming to reform their dispute resolution systems. The provision's integration with existing legal aid frameworks ensures accessibility and scalability, making it adaptable to diverse legal and economic contexts. By institutionalizing mediation at the pre-litigation stage, Section 12A underscores the importance of early conflict resolution in commercial disputes, a principle increasingly recognized in international ADR frameworks such as the *Singapore Convention on Mediation*. Other countries can draw inspiration from India's model by establishing mandatory mediation mechanisms that are integrated into their judicial systems and supported by robust legal and administrative frameworks.

3. The Role of the Supreme Court in Promoting Pre-Litigation Mediation

The Supreme Court of India has been instrumental in promoting ADR mechanisms, particularly mediation, in the Indian legal system. Justice N.V. Ramana highlighted the necessity of promoting ADR mechanisms like mediation, which can reshape the judicial system by providing swift justice to millions and resolving disputes without prolonged legal proceedings (*The Hindu Bureau*, 2022). In several cases, the Court has emphasized the need for using mediation to alleviate court congestion and expedite dispute resolution.

The Supreme Court's decision in *Patil Automation (P) Ltd. v. Rakheja Engineers (P) Ltd.* 2022 SCC OnLine SC 848, addresses the mandatory requirement of pre-institution mediation under the Commercial Courts Act, 2015. The case highlights the significance of mediation as an ADR mechanism, where a neutral third party (the mediator) helps the parties reach a mutually agreeable solution, rather than adjudicating the matter like a judge. The Court emphasized that successful mediation can lead to a final and comprehensive resolution of disputes, reducing the burden on courts and promoting a more efficient legal process. The decision also reaffirms the government's push to decongest courts by encouraging mediation before resorting to litigation.

In *Shyam Telelink Ltd. v. Union of India* (2010) 10 SCC 165, the Supreme Court expressed concerns that while Section 89 allows courts to refer matters to ADR, it must not result in undue delays. The Court stressed the importance of time-bound mediation and urged courts to manage ADR referrals efficiently. The Court's view was that mediation should not be used as a tactic to delay litigation, and steps should be taken to ensure its timely execution.

4. The Mediation Bill, 2021: Issues and Challenges

The proposed Bill introduces a provision making participation in pre-litigation mediation mandatory, raising concerns about its alignment with the voluntary nature of mediation. While the mandatory aspect could potentially encourage more out-of-court settlements and alleviate the burden on the judiciary by reducing case pendency, it conflicts with the fundamental principle of mediation as a voluntary dispute resolution process. Additionally, the Mediation Council, tasked

with regulating the mediation profession, may lack sufficient representation from experienced, practising mediators, unlike other professional regulatory bodies such as the Bar Council of India, which ensures proper representation of its members. Furthermore, the requirement for the Mediation Council to obtain prior approval from the Central Government before issuing regulations governing its core functions is unclear and raises concerns, particularly given that the government itself could be a party in mediation processes. Lastly, the Bill limits its application to international mediation conducted within India and does not address the enforcement of settlement agreements arising from international mediation conducted outside the country, potentially leaving a gap in legal clarity and enforcement for cross-border mediation settlements.

Nevertheless, the Mediation Bill, 2021, was a critical step towards institutionalizing and regulating mediation in India. With the gaps being fulfilled, the bill got passed by the Rajya Sabha on August 1, 2023 and came into force on October 9, 2023.

5. The Mediation Act, 2023: Enhancing the Legal Framework

The Mediation Act, 2023, seeks to establish a more structured approach to mediation in India, complementing existing legislation like the Commercial Courts Act, 2015. It brings several notable changes in India's approach to dispute resolution, contrasting with the earlier 2021 Mediation Bill. One of the most significant alterations is the *reduction in the duration* of mediation proceedings, now limited to 120 days, with a potential 60-day extension, in contrast to the 180-day limit in the 2021 bill. Additionally, the 2023 Act places a stronger emphasis on the voluntary nature of mediation, granting parties the flexibility to withdraw at any stage, whereas the previous bill required them to attend at least two sessions before opting out.

Another crucial modification is the recognition of *pre-litigation mediation as both voluntary and consensual* under the 2023 Act, offering greater freedom compared to the 2021 Bill. The 2023 Act also provides parties with the *right to choose their mediator*, which was not clearly addressed in the earlier bill. Moreover, it introduces specific qualifications for mediators, ensuring that only accredited professionals can facilitate the process. The *enforcement of settlement agreements reached*

through mediation is also more clearly defined in the 2023 Act, filling a gap left by the 2021 Bill.

In a significant development, the 2023 Act establishes a regulatory authority responsible for registering mediators and mediation institutions, thereby creating a more structured oversight mechanism. Additionally, the Act identifies certain disputes, such as criminal cases and matters involving minors, that are not suitable for mediation, further delineating its scope. These reforms are intended to support the growth of institutional, online, and community mediation, in alignment with global practices, while helping ease the burden on India's judiciary. The Act has several key provisions to promote and regulate mediation such as: -

5.1 Pre-litigation Mediation Requirement (Section 5)

The Mediation Act, 2023, mandates pre-litigation mediation for civil and commercial disputes before filing a suit or initiating proceedings in court, irrespective of the existence of a mediation agreement. For commercial disputes of specified value, pre-litigation mediation must comply with Section 12A of the Commercial Courts Act, 2015. This requirement also extends to tribunals as notified by the Central or State Governments. Mediators must be registered with the Mediation Council, empanelled by court-annexed mediation centres, recognized mediation service providers, or authorities under the Legal Services Authorities Act, 1987. Courts and legal authorities must maintain panels of mediators for this purpose. In motor accident compensation cases, if no settlement is reached under Section 149 of the Motor Vehicles Act, 1988, Claims Tribunals must refer parties to mediation. Any settlement reached will be submitted to the Tribunal for approval, and if mediation fails, the mediator must forward a failure report for adjudication.

5.2 Exclusions from Mediation (Section 6)

Disputes listed in the First Schedule are excluded from mediation. However, courts may refer disputes involving compoundable or matrimonial offences connected to civil proceedings for mediation if deemed appropriate. The outcome of such mediation will not be treated as a court judgment or decree but will be considered by the court in accordance with applicable laws. Additionally, the Central Government has the authority to amend the First Schedule through notifications when necessary.

5.3 Provisions Relating to Mediators (Sections 8–12)

Parties may appoint mediators of any nationality (Section 8), with foreign mediators requiring specific qualifications. Parties are free to agree on the mediator and appointment procedure. If no agreement is reached, a mediation service provider will appoint a mediator from its panel within seven days. Mediators must disclose any conflicts of interest before or during the mediation process (Section 10), allowing parties to waive objections or request a replacement. The mandate of a mediator may be terminated due to a conflict of interest, withdrawal, or at a party's request (Section 11). Following termination, parties or the mediation service provider must appoint a new mediator within seven days (Section 12).

5.4 Provisions Relating to Mediation Proceedings (Sections 13–26)

Mediation under this Act must occur within the territorial jurisdiction of the relevant court or tribunal unless the parties mutually agree to an alternate venue or online mediation (Section 13). Proceedings commence upon notice or agreement between parties to appoint a mediator (Section 14). Mediators must act neutrally, prioritize confidentiality, and facilitate resolution without imposing settlements (Sections 15–16). Mediators cannot act as arbitrators or witnesses in related disputes (Section 17).

Mediation must conclude within 120 days, extendable by another 60 days upon agreement (Section 18). Settlements once signed and authenticated, are binding and may be registered with the Legal Services Authority (Section 20). Confidentiality is mandated, with exceptions for threats to public safety or legal misconduct (Sections 22–23). Mediation terminates upon settlement, party withdrawal, or mediator declaration of failure (Section 24). Unless agreed otherwise, the costs of mediation, including the mediator's fees, are shared equally by the parties (Section 25). Provisions exclude proceedings under Lok Adalats (Section 26).

5.5 Enforcement of Mediated Settlement Agreement (Section 27–29)

A mediated settlement agreement, once signed by the parties and authenticated by the mediator, becomes final, binding, and enforceable like a court judgment, allowing it to be used in legal proceedings (Section 27). However, if the agreement is not

reached through court-referred mediation or Lok Adalat, it can only be challenged on specific grounds such as fraud, corruption, or if the mediation involved unsuitable matters, and must be filed within 90 days, with a possible extension of another 90 days (Section 28). Additionally, the time spent in mediation is excluded from the limitation period for any related legal proceedings (Section 29).

5.6 Establishment and Functions of the Mediation Council of India (Section 31-39)

The Mediation Council of India is established by the Central Government as a body corporate with powers to manage property and enter contracts (Section 31). It aims to promote mediation in India and internationally, develop guidelines for mediator education and certification, manage the registration of mediators, and recognize mediation institutes and service providers (Section 38). The Council is also responsible for ensuring ethical conduct in mediation, collaborating with domestic and international stakeholders, and maintaining records of mediated agreements (Section 38). The Council comprises a chairperson and members appointed by the Central Government, including experts in law, mediation, and ADR, along with ex officio members from key government departments. A commerce and industry representative serves as a part-time member. Non ex officio members have a four-year term, with an age limit of 70 for the chairperson and 67 for others. Salaries, allowances, and terms are as prescribed. (Section 32).

6. Challenges and Opportunities in the Implementation of Mandatory Pre-Institution Mediation

Despite the Mediation Act 2023's emphasis on pre-institution mediation, several challenges have hindered its effective implementation.

While plaintiffs are required to initiate mediation before filing a suit, defendants are not compelled to participate in mediation, making the process effectively voluntary for the defendant. This discrepancy undermines the intended compulsory nature of mediation and leads to instances where the process stalls or fails to materialize.

India faces a significant shortage of qualified mediators. While the Mediation Act, 2023 seeks to establish a Mediation Council of India to regulate training and accreditation, the actual infrastructure and capacity to support a large-scale mediation program remain underdeveloped.

The Indian legal system is traditionally adversarial, and there is a general reluctance among parties to embrace mediation as a legitimate form of dispute resolution. Many parties view mediation as an inferior or secondary option compared to formal litigation. This cultural resistance to ADR is a significant barrier to the success of mandatory mediation initiatives.

Despite these challenges, there is considerable potential for improvement. A robust infrastructure for mediator training and certification is crucial, ensuring professionals are adequately skilled to handle complex disputes. Expanding court-annexed mediation centres and leveraging technology through Online Dispute Resolution (ODR) platforms can enhance accessibility, particularly for remote or cross-border cases, and address logistical constraints.

India could consider adopting a tailored version of Italy's opt-out model of mandatory mediation, taking into account Italy's experience, which underscores the necessity of meticulous planning to address potential initial challenges. Italy offers notable tax incentives for resolving disputes through mediation. Parties can claim a tax credit of up to €500, which is halved if no agreement is reached, and property transfer taxes are exempted for settlements up to €50,000 (*Mokal, 2023*). Including similar measures in the 2021 Bill could prove highly advantageous. Conversely, Romania's adoption of an opt-in model, which mandated litigants to participate in an informational session on mediation, faced constitutional challenges. Certain provisions of the Romanian model were deemed to impose unreasonable burdens and obstruct access to justice (*Kinhal & Apoorva, 2021*). This serves as a cautionary precedent, highlighting the imperative for balanced and inclusive legislative frameworks that uphold constitutional principles.

Public education campaigns and awareness programs about the benefits of ADR should be launched. Promoting mediation as a legitimate and effective dispute resolution mechanism can help overcome the cultural barriers that impede its widespread use. Programs should focus on educating both the general public and legal professionals about the cost-effective and time-saving benefits of mediation, and how it can offer a more amicable solution than traditional litigation.

7. A Strategic Shift Towards Efficient Dispute Resolution through Mandatory Mediation

Mandatory mediation presents a transformative solution to the challenges of court delays and backlogged judicial systems. By offering an expedited and cost-efficient resolution process, mediation allows parties to resolve disputes without enduring the protracted timelines typical of litigation. One of its key benefits is the flexibility it affords, enabling parties to reach creative, mutually acceptable solutions that extend beyond the rigid confines of legal remedies. This flexibility is especially significant in complex cases where traditional court judgments may fail to address the full scope of the parties' needs. Furthermore, mediation provides a more informal setting that encourages open and honest communication, building trust and fostering collaboration between parties.

In the commercial realm, mediation proves to be an invaluable tool by offering a confidential environment in which sensitive information, such as financial data or business strategies, can be shared without fear of public disclosure. The 2018 Amendment Rules enshrine the confidentiality of mediation, ensuring that discussions during the process remain protected, which is crucial for parties in high-stakes disputes (*The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 and the Commercial Courts (Statistical Data) Rules, 2018* | Department of Legal Affairs, MOL &J, GOI, n.d.) Also, Sections 22 and 23 of the Mediation Act 2023 establish strict confidentiality in mediation proceedings. Section 22 ensures that all communications, documents, and recordings related to mediation remain confidential and inadmissible in legal proceedings, except for mediated settlement agreements disclosed for enforcement or challenge. Section 23 extends this protection, barring mediators and participants from disclosing mediation details, except in cases of mediator misconduct or communications involving planned offences, domestic violence, child abuse, or public health threats. These provisions safeguard privacy while allowing necessary exceptions for accountability and public interest. By allowing open dialogue in a secure environment, mediation can resolve disputes in ways that preserve the integrity and continuity of business relationships.

However, the idea of mandatory mediation has sparked considerable debate, with critics

asserting that the voluntary nature of mediation is fundamental to its success. They argue that forcing parties into the process could lead to a lack of genuine engagement, diminishing the potential for constructive outcomes. As Lord Dyson holds the view in *Halsey v Milton Keynes General NHS Trust* (2004) “*It is not the function of the court to force the parties to settle by ADR. It is the function of the court to encourage the parties to consider ADR as a means of resolving their dispute.*” Despite these concerns, empirical data from jurisdictions such as Italy, where mandatory mediation resulted in a substantial settlement rate of 80%, counters the argument against compulsion (Shrivastava, 2021). Proponents of mandatory mediation contend that the voluntary aspect is maintained because any resolution reached still requires mutual agreement. Moreover, mandatory mediation removes psychological barriers that may prevent parties from initiating discussions, such as the fear of appearing weak. This creates an environment where both sides are more likely to approach the process on equal terms, increasing the likelihood of a mutually beneficial outcome.

From a policy perspective, mandatory mediation provides several essential advantages (Shrivastava, 2021). First, it offers a swift and cost-effective alternative to traditional court procedures, which is increasingly important as judicial systems become more congested. Second, it promotes greater awareness and familiarity with ADR mechanisms, especially in jurisdictions where such methods are underutilized. Countries like India and Turkey, where ADR is still gaining traction, can particularly benefit from mandatory mediation as it introduces an accessible and efficient option for resolving disputes. Third, mandatory mediation helps bridge the information gap, ensuring both parties are equally informed about the mediation process and its benefits. Finally, mandatory mediation aligns with the broader philosophical concepts of justice proposed by Amartya Sen i.e., Niti (procedural justice) and Nyaya (justice based on human well-being). While litigation adheres to Niti by adhering to formal procedural rules, mediation exemplifies Nyaya by prioritizing human interaction, emotional intelligence, and mutually agreed outcomes.

While practical concerns about mandatory mediation remain, especially in cases where urgent action is required, such as preserving evidence, these can be addressed by setting exceptions for

such scenarios. Mandatory mediation, especially in commercial disputes, provides a balanced approach that not only resolves conflicts efficiently but also safeguards relationships, a critical consideration in business. By promoting a shift toward early, collaborative dispute resolution, mandatory ADR ensures a more effective, equitable, and accessible system of justice that reduces the burden on courts and fosters healthier, long-term relationships between parties.

8. Conclusion

Mandatory pre-litigation mediation under the Commercial Courts Act, 2015, and further bolstered by the Mediation Act, 2023, marks a transformative step in India's journey toward an efficient and accessible dispute resolution system. Notwithstanding significant challenges including less defendant participation, inadequate mediator training, limited infrastructure, and cultural resistance, the initiative demonstrates substantial potential in scheme. With the Supreme Court's steadfast advocacy for ADR mechanisms, continued reforms hold the potential to significantly enhance the system's efficacy.

India's aspiration to become a global model for commercial dispute resolution hinges on its ability to address these barriers comprehensively. Strengthening mediator training programs and accreditation systems is essential to build trust in the process and ensure high-quality dispute resolution. Simultaneously, investing in mediation infrastructure, including the integration of ODR platforms, can revolutionize accessibility and efficiency, particularly for remote regions and cross-border disputes. Public education campaigns must actively promote mediation as a cost-effective and amicable alternative, fostering cultural acceptance and driving the transition from adversarial litigation to collaborative resolution.

India has the opportunity to draw inspiration from global best practices while crafting a model tailored to its unique legal and cultural landscape. For instance, adopting incentive-driven frameworks like Italy's tax benefits for mediated settlements could encourage participation, while avoiding the pitfalls of overburdened or constitutionally contentious mandates observed in other jurisdictions.

By addressing these challenges with a holistic and visionary approach, India can pioneer a

robust mediation framework that not only alleviates the burden on its judiciary but also sets a benchmark for other nations. Transforming its ADR system into a global exemplar would enhance India's standing as a preferred destination for business and investment, aligning with its broader goals of economic growth and international leadership in legal innovation. Through sustained commitment and strategic reform, India's mandatory mediation initiatives can become a cornerstone of a more equitable and efficient legal system, embodying a future-oriented vision of justice.

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