

## COMPULSORY PRE-LITIGATION MEDIATION IN COMMERCIAL DISPUTES: A CRITICAL STUDY OF THE COMMERCIAL COURTS ACT, 2015

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### I. Abstract

This paper critically examines the provisions of the Commercial Courts Act, 2015 (CCA), particularly focusing on its mandate of compulsory pre-litigation mediation in commercial disputes. As India's commercial litigation landscape grapples with case backlogs and prolonged delays, the CCA seeks to institutionalize mediation as a cost-effective, efficient, and amicable alternative dispute resolution (ADR) mechanism. This study evaluates the statutory framework under Section 12A of the Act, the role of mediation institutions, and the judicial approach towards enforcing pre-institution mediation. Through a doctrinal legal research methodology supplemented with a comparative analysis of international best practices from jurisdictions like the United States, European Union, Singapore, and Australia, this paper identifies both the merits and operational challenges of the compulsory mediation framework in India. It highlights key issues such as legal awareness, mediation infrastructure, enforceability of outcomes, and resistance from litigants. Empirical insights from Indian and international experiences, alongside relevant case studies, are integrated to assess the practical effectiveness of this mechanism. Finally, the paper proposes recommendations to strengthen the pre-litigation mediation framework and align it more closely with global standards, emphasizing the need for institutional support, mediator training, legislative clarity, and enhanced awareness among commercial litigants.

*Keywords: Commercial Courts Act, 2015, Pre-Litigation Mediation, Commercial Disputes, Alternative Dispute Resolution, Mediation in India, Legal Reforms, Dispute Settlement Mechanisms.*

### II. Introduction

The global landscape of dispute resolution is witnessing a significant paradigm shift, with an increasing inclination towards Alternative Dispute Resolution (ADR) mechanisms as viable substitutes for traditional litigation, especially in the realm of commercial disputes. This growing preference for ADR stems from its perceived advantages, including enhanced efficiency, reduced costs, greater confidentiality, and the

potential to foster and preserve crucial business relationships. Unlike the often protracted and adversarial nature of court proceedings, ADR offers streamlined processes and collaborative approaches aimed at achieving mutually acceptable outcomes. Among the various ADR methods, mediation has emerged as a particularly prominent tool. It involves a neutral third-party facilitating negotiations between disputing parties, guiding them towards an

amicable settlement through dialogue and consensus-building. The core strength of mediation lies in its capacity to empower parties to actively participate in crafting solutions that address their underlying interests and concerns, ultimately leading to resolutions that are more likely to be complied with and sustain long-term relationships.

Within the Indian legal context, the concept of resolving disputes outside traditional courtrooms is not entirely new. Historically, informal mechanisms like the Panchayat system have played a significant role in community-based dispute resolution. However, the formal recognition and promotion of mediation within the modern legal framework have gained momentum in recent decades, driven by the Indian judiciary and legislature. Several key legislative developments underscore this growing emphasis on mediation, including the introduction of Section 89 in the Code of Civil Procedure (CPC)<sup>1265</sup>, the enactment of the Arbitration and Conciliation Act, 1996, and more recently, the Commercial Courts Act, 2015. These legal instruments reflect a conscious effort to integrate mediation into the dispute resolution landscape, providing statutory frameworks for its initiation, conduct, and enforcement.

The Commercial Courts Act, 2015, stands as a significant piece of legislation aimed at expediting the resolution of commercial disputes and enhancing the ease of doing business in India. Recognizing the pivotal role of efficient dispute resolution in fostering a favourable economic environment, the Act sought to establish specialized commercial courts and streamline procedures for commercial litigation. A notable amendment to this Act in 2018 introduced Section 12A, which mandates pre-institution mediation for certain categories of commercial disputes before a suit can be filed in court. This provision represents a significant step towards institutionalizing mediation as a compulsory first step in the

resolution of many commercial conflicts in India. This research paper aims to critically examine the efficacy, challenges, and broader implications of this mandatory pre-litigation mediation provision under the Commercial Courts Act, 2015, analysing its impact on the Indian commercial dispute resolution landscape.

### III. Review of Existing Literature

- A. Juhi Gupta (2019)<sup>1266</sup>:** Gupta discusses the early challenges of Section 12-A implementation, particularly the operational and procedural lacunae that hinder the effective adoption of pre-institution commercial mediation in India. These barriers reflect the initial resistance and teething issues in institutionalizing mandatory mediation.
- B. Deepika Minhal & Apoorva (2020)<sup>1267</sup>:** This work critically examines the constitutional concerns surrounding mandatory mediation, with a particular focus on the tension between compulsion and voluntariness. Kinhal and Apoorva argue that mandatory mediation may inadvertently infringe upon constitutional rights, specifically the right to access justice and the voluntary nature of mediation.
- C. Gungun Agrawal (2021)<sup>1268</sup>:** Agrawal's comparative study between India, Singapore, and the UK explores the evolution of mediation laws, advocating for the development of comprehensive, globally informed mediation rules. By comparing India's Mediation Act to established models in Singapore and the UK, Agrawal underscores the need for a more structured and internationally

<sup>1266</sup> Juhi Gupta, *Mandatory Pre-Institution Commercial Mediation in India: Premature Step in the Right Direction?* (2019).

<sup>1267</sup> Deepak Kinhal and Apoorva, *Mandatory Mediation in India - Resolving to Resolve*, VIDHI CENTRE FOR LEGAL POLICY (March 2021), <https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India-Resolving-to-Resolve.pdf>.

<sup>1268</sup> Gungun Agrawal, *From Conflict to Collaboration: A Global Perspective on Mediation Laws* (2021).

aligned framework for commercial dispute resolution in India.

**D. Bar & Bench (2023)<sup>1269</sup>:** The Bar & Bench commentary highlights the symbolic nature of enforcement in the context of the Mediation Bill 2023. It discusses the interplay between mediation and judicial efficiency, noting that while mediation is increasingly integrated into India's legal system, enforcement mechanisms remain underdeveloped, rendering the process less effective than it could be.

#### IV. Critical Examination of Mandatory Mediation

##### A. Definition and Purpose of Mandatory Mediation:

Mandatory mediation refers to a dispute resolution process in which parties are required by law or court order to attempt mediation before pursuing litigation. Unlike voluntary mediation where parties enter negotiations willingly, mandatory mediation compels participation, though it does not necessarily mandate a settlement. The primary goal is to encourage amicable disputes resolution reduce burden on courts and foster a collaborative approach to conflict resolution. However, questions arise regarding whether compulsion contradicts the voluntary essence of mediation. The Supreme Court of India in the case of *Afcons Infrastructure Ltd v. Cherian Varkey Construction Co.*<sup>1270</sup>, clarified that while mediation can be mandated for specific disputes, fundamental judicial safeguards must be maintained to ensure fairness.

##### B. Historical Context of Mandatory Mediation:

Mandatory mediation has roots in both civil and common law restrictions. Historically, mediation was practised informally in India through panchayats and community-based dispute resolution mechanism. However, the formal integration of mediation into legal

framework can be traced to the Arbitration and Conciliation Act of 1996 which provided for mediation and conciliation as Alternative Dispute Resolution (ADR) mechanism. The shift toward mandatory mediation gained attraction with the Code of Civil Procedure (CPC) Amendment in 2002, which introduced Section 89 empowering codes to refer disputes to ADR mechanism, including mediation. This provision was reaffirmed in the case of *Salem Advocate Bar Association v. Union of India*<sup>1271</sup>, where the Supreme Court upheld the constitutional validity of mandatory mediation to alternate dispute resolution while emphasising that party should retain the right to refuse settlement. The evolving jurisprudence reflects a global trend which countries like Italy and Canada successfully implementing mandatory mediation policies to expedite civil disputes.

##### C. Legal Frameworks related to Mandatory Mediation:

India's legal framework for mandatory mediation is primarily governed by section 89 of Code of Civil Procedure, 1908 which allows the courts to direct parties to mediation. Additionally sector specific laws such as Commercial Courts Act, 2015 mandate pre-institution mediation for commercial disputes before litigation can be initiated. This was upheld in the case of *Patel Field Marshal Agencies v. P.M. Diesels Ltd.*<sup>1272</sup>, where the Supreme Court stated that procedural delay request sites like mandatory mediation do not violate access to justice if they facilitate quicker dispute resolution. The Mediation Bill 2021, currently under consideration seeks to provide a structured mechanism for mediation including pre litigation mediation and aims to institutionalise mediation as a preferred mode of dispute resolution. However, the bill has faced criticism for its lack of clarity on the consequences of non-compliance and its potential to impose undue procedure burden on litigants.

<sup>1269</sup> Bar & Bench, *Mandatory Pre-Litigation Mediation: A Missed Opportunity* (2023), <https://barandbench.com>.

<sup>1270</sup> *Afcons Infrastructure Ltd v. Cherian Varkey Construction Co.*, (2010) 8 SCC 24.

<sup>1271</sup> *Salem Advocate Bar Association v. Union of India*, (2003) 1 SCC 49.

<sup>1272</sup> *Patel Field Marshal Agencies and Ors. v. P.M. Diesels Ltd. and Ors.*, (2018) 2 SCC 112.

## V. Advantages and Disadvantages of Compulsory Pre-Litigation Mediation

The introduction of compulsory pre-litigation mediation for commercial disputes through Section 12A of the Commercial Courts Act, 2015, presents a spectrum of potential advantages and disadvantages that warrant careful consideration.

One of the primary anticipated benefits of mandatory pre-litigation mediation is an increase in the efficiency and speed of dispute resolution. By requiring parties to engage in mediation before resorting to litigation, the provision aims to facilitate quicker resolutions for some disputes that might otherwise languish in the often-overburdened court system for years. Mediation's inherent focus on negotiation and compromise can lead to settlements being reached in a matter of months, significantly faster than the typical timeframe for litigation. This expedited process can save valuable time and resources for businesses involved in commercial disputes. Furthermore, successful pre-litigation mediation can lead to substantial cost savings by avoiding the often-significant legal fees and other expenses associated with protracted litigation. Settling disputes at an early stage through mediation can prove to be a far more economical option for businesses. Beyond the immediate resolution of a specific dispute, mediation offers the potential for preserving ongoing business relationships. Unlike the adversarial nature of litigation, which can often damage or terminate business ties, mediation encourages dialogue and the exploration of mutually acceptable solutions, thereby increasing the likelihood of maintaining commercial relationships. The mandatory provision also holds the promise of reducing the workload of the judiciary. By diverting a significant number of commercial disputes to mediation at the pre-litigation stage, the Act intends to alleviate the pressure on the courts and allow them to focus on cases that genuinely require judicial intervention. Finally, making mediation compulsory can address the

"first to blink" syndrome, where parties might be hesitant to propose mediation for fear of appearing weak or conceding ground. By establishing it as a mandatory step, the Act removes this psychological barrier and encourages all parties to at least explore the possibility of settlement through mediation.

Despite these potential advantages, the compulsory nature of pre-litigation mediation has also drawn several criticisms and raises concerns about potential disadvantages. A primary concern revolves around the infringement of party autonomy. Mediation is fundamentally a voluntary process that relies on the willingness of all parties to participate in good faith and reach a mutually agreeable settlement. Critics argue that mandating mediation, even when one or more parties are unwilling to engage constructively, contradicts this core principle and may transform the process into a mere formality. This leads to the second major concern: the potential ineffectiveness of forced mediation. Empirical data suggests that a significant proportion of mandatory pre-litigation mediations result in "non-starter" reports, indicating a lack of participation or unwillingness to settle. If parties are compelled to attend mediation sessions against their will, they may not be genuinely invested in finding a resolution, rendering the entire exercise futile. In such scenarios, mandatory mediation can paradoxically lead to delays and increased costs. Instead of expediting dispute resolution, it becomes an additional procedural hurdle that parties must clear before they can proceed to litigation, adding to the overall time and expense. Furthermore, the exception provided for suits contemplating "urgent interim relief" has been a subject of debate and potential misuse. The lack of a clear and objective definition of "urgent relief" can incentivize parties to strategically frame their suits to fall within this exception, thereby bypassing the mandatory mediation requirement altogether. This can lead to unnecessary litigation solely on the question of whether the case genuinely warrants urgent

interim relief. Finally, the effectiveness of compulsory pre-litigation mediation is also heavily reliant on the practical aspects of its implementation, including the availability of a robust mediation infrastructure and a sufficient number of qualified and experienced mediators. Concerns have been raised about whether the existing infrastructure, particularly at the level of Legal Services Authorities, is adequately equipped to handle the potential influx of commercial disputes requiring pre-institution mediation. The quality and training of mediators also play a crucial role in the success of the process, and ensuring consistent standards remains a challenge.

#### VI. Implementation Challenges and Successes

Since its enactment, the implementation of the compulsory pre-litigation mediation provision under Section 12A of the Commercial Courts Act, 2015, has encountered several practical challenges, alongside some reported successes.

One of the most significant challenges observed is the low rate of active participation and the consequent high number of "non-starter" reports in pre-litigation mediation proceedings. Empirical data from commercial courts in Mumbai, for instance, indicates that a substantial majority of applications for pre-litigation mediation between 2020 and 2023 resulted in non-starters due to the non-participation of one or both parties. This suggests a reluctance or unwillingness on the part of many litigants to genuinely engage in the mediation process, potentially undermining the very purpose of the mandatory provision. Another hurdle in the effective implementation of Section 12A is the perceived inadequacy of the existing mediation infrastructure and resources. Concerns have been raised about the availability of a sufficient number of qualified and experienced mediators, particularly those with expertise in complex commercial disputes. The infrastructure at the level of the Legal Services Authorities, which are primarily tasked with conducting these

mediations, may also need strengthening to effectively handle the volume and complexity of commercial cases. The interpretation and application of the "urgent interim relief" exception by various courts have also presented challenges. Different High Courts have adopted varying approaches to determine what constitutes "urgent interim relief," leading to inconsistencies in the application of Section 12A across jurisdictions. This ambiguity can create uncertainty for litigants and potentially lead to strategic manoeuvring to bypass the mandatory mediation requirement. Initially, there were also ambiguities surrounding the territorial jurisdiction for conducting pre-institution mediation. However, judicial pronouncements, such as the Bombay High Court's emphasis on substantial compliance, and amendments introduced by the Mediation Act, 2023, have provided some clarification on this aspect.

Despite these challenges, there have been instances and indications of success in the implementation of pre-litigation mediation under the Commercial Courts Act. Statistics from the National Legal Services Authority (NALSA) show an overall increase in the number of cases being settled through mediation in India. While this data does not exclusively focus on commercial disputes under Section 12A, it suggests a growing acceptance and effectiveness of mediation as a dispute resolution method. Furthermore, case studies and anecdotal evidence indicate that in certain types of commercial disputes, particularly those involving ongoing business relationships or specific sectors like shareholder disputes, pre-litigation mediation has facilitated successful settlements and helped preserve valuable commercial ties. The enactment of the Mediation Act, 2023, holds the potential to address some of the existing implementation challenges. This new legislation aims to establish a more comprehensive framework for mediation in India, including provisions such as

section 24<sup>1273</sup> for the establishment of a Mediation Council, the recognition of mediated settlement agreements, and the promotion of institutional mediation. By setting standards for mediator qualifications and encouraging the development of mediation infrastructure, the Act could contribute to enhancing the quality and effectiveness of pre-litigation mediation for commercial disputes under the Commercial Courts Act. However, the precise interplay and impact of the new Mediation Act on the existing mandatory provision require further observation and analysis.

### VII. Comparative Analysis with Other Jurisdictions

Examining the approaches to compulsory pre-litigation mediation in other jurisdictions can provide valuable insights and potential lessons for India's experience with Section 12A of the Commercial Courts Act, 2015. Several countries and regions have adopted mechanisms that mandate mediation or conciliation before parties can initiate formal legal proceedings, particularly in commercial or civil disputes.

For instance, the Republic of Turkey has implemented a mandatory pre-litigation mediation requirement for a wide range of commercial disputes with reported success. A comparative study suggests that Turkey's success can be attributed to the systemic changes and measures it undertook prior to enforcing this mandate, including the establishment of a robust mediation infrastructure and the training of a significant number of qualified mediators. Italy also provides an interesting case study. Initially, Italy adopted a voluntary approach to pre-litigation mediation but later made it mandatory for certain civil and commercial cases. The Italian model has evolved to include an "opt-out" system, where parties are required to attend an initial mediation session but have the discretion to withdraw thereafter. This approach, along with the requirement for parties to be assisted by legal counsel during mediation, has been

credited with some degree of effectiveness. The European Union's Directive on certain aspects of mediation in civil and commercial matters also encourages the use of mediation, though it does not impose a blanket mandatory requirement across all member states, leaving it to individual national laws to determine the extent of mandatory mediation.

Comparing India's approach with these international models reveals both similarities and differences. Like Turkey and Italy, India has introduced a mandatory element to pre-litigation mediation for commercial disputes. However, the scope of application, the specific procedures, and the consequences of non-compliance may vary. For example, while India mandates pre-institution mediation through the Legal Services Authorities, other jurisdictions might have different designated bodies or allow for private mediation to fulfil the mandatory requirement. The "urgent interim relief" exception in the Indian law also presents a unique aspect that needs to be considered in comparison with other systems. The experiences of other jurisdictions offer several potential lessons for India. The success of Turkey highlights the importance of investing in a strong mediation infrastructure and ensuring a sufficient pool of well-trained mediators before implementing a mandatory regime. The evolution of the Italian model suggests that a degree of flexibility, such as an opt-out mechanism after an initial mandatory session, might enhance participation and effectiveness. Furthermore, the emphasis on legal representation in the Italian system underscores the role of lawyers in facilitating meaningful engagement in mediation. While the Indian context has its own unique legal, social, and economic characteristics, considering these international best practices could inform potential refinements to the current framework under the Commercial Courts Act and the implementation of the Mediation Act, 2023.

<sup>1273</sup> The Mediation Act, 2023, § 24, No. 32, Acts of Parliament, 2023 (India).

Table 2: Comparative Analysis of Mandatory Pre-Litigation Mediation Models in Selected Jurisdictions

Jurisdiction	Scope of Application	Key Features of the Process	Role of Mediators	Consequences of Non-Compliance	Reported Success/Challenges
India (Commercial Courts Act, 2015)	Commercial disputes not seeking urgent interim relief	Mediation through Legal Services Authorities, 3-month timeline (extendable)	Facilitator	Suit cannot be instituted	Low participation rates reported in some studies.
Turkey	Wide range of commercial disputes	Conducted by registered mediators	Facilitator	Suit can be dismissed	Reported success due to strong infrastructure.
Italy	Certain civil and commercial cases	Initial mandatory session with opt-out, legal counsel often involved	Facilitator	Suit may be inadmissible	Opt-out model reported to have some effectiveness.
European Union (Directive)	Civil and commercial matters (framework not directly mandatory)	Varies by member state	Varies by member state	Varies by member state	Implementation varies across member states.

**VIII. Gaps in Current Research and Areas for Further Study**

Based on the review of existing literature and the analysis conducted, several gaps in current

research and potential areas for further critical study have been identified.

As highlighted earlier, there is a need for more in-depth empirical studies that specifically analyse the effectiveness of Section 12A of the Commercial Courts Act, 2015, across various

commercial sectors and different types of disputes. Current data, while indicating overall trends, often lacks the granularity to provide a nuanced understanding of how the mandatory pre-litigation mediation provision is performing in different commercial contexts. For instance, research could explore whether the settlement rates and the efficiency gains differ significantly between, say, contractual disputes in the manufacturing sector versus intellectual property disputes in the technology sector. Furthermore, the long-term impact of the recently enacted Mediation Act, 2023, on the compulsory pre-litigation mediation framework for commercial disputes under the Commercial Courts Act remains largely unexplored. Future research should focus on analysing the interplay between these two legislative frameworks, particularly how the general emphasis on voluntary mediation in the 2023 Act will affect the mandatory nature of Section 12A. There is also a need for studies that directly compare the cost-effectiveness of mandatory pre-litigation mediation with voluntary mediation or with cases where parties directly proceed to litigation under the "urgent interim relief" exception. Such research could provide valuable data to inform policy decisions regarding the future of this mandatory provision.

To address these gaps, future research could explore several specific questions. What are the actual settlement rates achieved through mandatory pre-litigation mediation under Section 12A when analysed across different types and values of commercial disputes? How does the total time taken for dispute resolution, from initiation to final outcome, compare between commercial cases that undergo mandatory pre-litigation mediation and those that directly proceed to litigation by invoking the "urgent interim relief" exception? What are the perceptions of litigants, legal professionals, and mediators regarding the effectiveness, fairness, and efficiency of the mandatory pre-litigation mediation process? What specific challenges are being faced by the Legal

Services Authorities in implementing the pre-institution mediation mandate for commercial disputes, and what measures can be taken to address these challenges? How can the training, accreditation, and specialization of mediators for commercial disputes be improved to enhance the quality and effectiveness of the pre-litigation mediation process? Finally, considering the experience with Section 12A, what would be the potential impact, both positive and negative, of making pre-litigation mediation voluntary for commercial disputes in India? Future research could employ a range of methodologies to answer these questions, including quantitative studies analysing court records and mediation centre data, qualitative studies involving interviews and surveys of litigants, lawyers, and mediators, and comparative studies examining the experiences of other jurisdictions with similar mandatory or voluntary pre-litigation mediation regimes.

## IX. Conclusion and Recommendations

The critical study of compulsory pre-litigation mediation under the Commercial Courts Act, 2015, reveals a complex landscape with both potential benefits and significant challenges. The primary aim of the provision – to expedite the resolution of commercial disputes and reduce the burden on the judiciary – is laudable. However, the analysis of existing literature and the practical implementation experiences suggest that the mandatory nature of this provision has yielded mixed results. While it has the potential to encourage early settlement, reduce costs, and preserve business relationships in some cases, concerns remain regarding the infringement of party autonomy and the actual effectiveness of forcing unwilling parties into mediation. Empirical evidence indicates a significant number of unsuccessful mediations, raising questions about the efficiency and cost-effectiveness of the current approach in all circumstances.

Based on the analysis, it is recommended that a more nuanced approach to pre-litigation

mediation for commercial disputes in India be considered. While the goal of promoting early dispute resolution is crucial, the current mandatory framework under Section 12A might benefit from certain refinements. One potential recommendation is to revisit the scope and applicability of the mandatory provision based on a more detailed empirical analysis of its effectiveness across different types and values of commercial disputes. Certain categories of disputes might be more amenable to successful mediation at the pre-litigation stage than others. Furthermore, providing a clearer and more objective definition of "urgent interim relief" could help prevent the misuse of this exception and ensure a more consistent application of the law. Strengthening the mediation infrastructure remains paramount. This includes increasing the number of qualified and experienced mediators specializing in commercial disputes and developing standardized training and accreditation programs to ensure quality and consistency. Implementing mechanisms to encourage greater participation and genuine engagement from both parties in the pre-litigation mediation process is also essential. This could involve exploring the potential of an "opt-out" model, similar to the one in Italy, where parties are required to attend an initial session but retain the option to withdraw thereafter. Effective monitoring and evaluation of the pre-litigation mediation process are crucial for identifying areas for improvement and ensuring that it is achieving its intended objectives. Finally, as the Mediation Act, 2023, comes into force, it will be important to clarify its interaction with Section 12A of the Commercial Courts Act to create a cohesive and effective framework for mediation in commercial disputes in India. By carefully considering these recommendations, India can strive to create a dispute resolution landscape that is both efficient and respectful of the principles of party autonomy.