



**RESOLVING COMMERCIAL
DISPUTES THROUGH PRE-
INSTITUTION MEDIATION AND ITS
CHALLENGES: INDIAN
PERSPECTIVE**

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ABSTRACT

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, known as the Commercial Courts Act of 2015, has inserted the provision of mandatory Pre-Institution Mediation and Settlement under Chapter III A under Section 12 A of the Commercial Courts Act, 2015. This section was inserted with aim to resolve the commercial disputes through mediation at the initial stage. It provides that when any suit does not contemplate for any urgent relief would not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation and settlement in accordance to The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, made by the Central Government. This amendment intends to incorporate the most successful and widely used opt-out model in India to resolve the commercial disputes. This model is been used by many countries like Italy, Lithuania, Luxembourg, United Kingdom, Greece, Turkey, Ireland for resolving their disputes mainly in civil and commercial matters. This a thoughtful move of the Legislature as they have stepped in the right direction to ensure the commercial disputes find a quick, cost-effective, time-saving appropriate resolutions. Mediation is indeed an effective and appropriate mode of dispute resolution especially in commercial

matters where the parties will become partners in solution rather than partners in problem while resolving their disputes in their best interest. The practical effectiveness of this model faces few challenges in the Indian scenario.

KEYWORDS

Mediation, Commercial Disputes, Resolution, Pre-institution mediation, Settlement.

INTRODUCTION

The Commercial Courts Act, 2015, has been amended by The Commercial, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, to provide for an efficient means of resolution of commercial disputes which is consistently rising day by day. This Act has established Commercial Courts below the District Judge level in every jurisdiction except in areas where the High Courts have ordinary civil jurisdiction and also Commercial Appellate Courts at the District Level to hear appeal from the Commercial Courts below the level of district judge. The other major amendment that follows is the insertion of Section 12 A under the Chapter III A of the Commercial Courts Act, 2015. It introduces mandatory pre-institution mediation before filing of suit in the Court, where in case no urgent relief is to be sought by the parties. It also tries to provide for a speedy disposal of the commercial disputes and hence a deadline of 3 months (extendable by 2 months), within which the mediation has to be completed



whether settled or unsettled, has been provided by the amendment of 2018.¹

A mediated settlement has the same status that of an arbitral award under Section 30(4) of the Arbitration and Conciliation Act, 1996, which can be enforced as an arbitral award. The Commercial Courts Act of 2015 and The Commercial Courts (Pre-Institution Mediation and Settlement) Rules of 2018 provides a facilitative mediation model based on the principles of voluntariness and self-determination. The ethical standards of the mediator with regards to the confidentiality of the mediation process are also prescribed.² The Commercial Courts Rules of 2018 provides for the procedures for such pre-institution mediations. In order to initiate the mediation, the plaintiff has to file an application with the State or the District Legal services Authority established under the Legal Services Authorities Act, 1987. After receiving such application, a notice will be issued to the opposite party by the Authority asking him to appear within ten days of receiving the notice and consenting to participate in such mediation. If the Authority receives no response from the opposite party within a period of ten days of the receipt of such notice, then as per the Rules the Authority will issue a final notice to the opposite party. If the opposite party refuse or fails to comply or appear after receiving the final notice then the mediation process will be treated as a non-starter and accordingly prepare a report to that effect. If the opposite

party accepts and agrees to participate in the mediation process, it will lead to the initiation of the mediation proceedings. Following the dialogues, negotiations and after crossing the different stages of mediation, if the parties arrive at a settlement, the mediator will formulate the mediation settlement agreement which shall be binding on the parties.

Most of the Jurists, Scholars, Hon'ble Judges are of the view that in the contemporary era, where the Courts are already over-burdened with innumerable commercial matters, the best alternative dispute resolution is Mediation. The Pre-institution Mediation lessens the burden of Commercial Courts as well as improves India's Ease of Doing Business Index. In a special leave petition in the matter of Mr. Vikram Bakshi & Ors. v. Ms. Sonia Khosla (Dead) By Lrs.³, where the seeds of mutual distrust and lack of faith gave rise to more than 80 cases which are pending between the parties. The view of the Apex Court in this matter was that "there is always a difference between winning a case and seeking a solution and via mediation the parties will become partners in solution rather than partners in problem". The Court further emphasized that mediation leads to a state of peace in the society, the economic, commercial and financial benefits for the growth and development of the country were also underlined.⁴ Where it is seen that the Court had preferred mediation as an appropriate way of resolving the dispute

¹ The Commercial, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 (April 19, 2019), <https://www.prsindia.org/billtrack/commercial-courts-commercial-division-and-commercial-appellate-division-high-courts-0>

² Mandatory Pre-institution Commercial Mediation in India: Premature Step in the Right Direction? (May 2, 2019),

<http://mediationblog.kluwerarbitration.com/2018/09/01/mandatory-pre-institution-commercial-mediation-india-premature-step-right-direction/>

³ 2014 (II) CLR (SC) 385

⁴ Odisha Judicial Academy, Monthly Review on cases on Civil, Criminal & Other Laws, 2014(September) (April 19, 2019), http://orissajudicialacademy.nic.in/monthly_case_review/sep14.pdf



in this commercial matter involving a long legal battle.

DECODING SECTION 12 A OF COMMERCIAL COURTS ACT, 2015

In Section 12 A (1) of the Commercial Courts Act, 2015, it is clearly provided that the plaintiff cannot approach the Court to file a suit unless the plaintiff has exhausted the alternative method i.e. pre-institution mediation and settlement. The Court will hear and adjudicate the case on those facts which has been tried out in pre-institution mediation. The Section also provides an exception when the plaintiff can directly approach the Court without going for pre-institution mediation. Only when the case contemplates any urgent relief under this Act, the plaintiff can directly approach the Court. This provision stresses on the importance of forming an environment for the development of alternative modes of resolution of disputes in commercial matter.⁵

There has also been a reduction in the value of dispute, previously before the passing of the Ordinance of 2018, the value was brought down from Rs. 1 Crore to Rs. 3 Lakhs. This reduction will result into the increase in number of disputes arising amongst the small and medium sized companies.⁶ This will further saddle the Commercial Courts which are currently as per figures quite less. This Act has established Commercial Courts below the District Judge level in every jurisdiction except in areas where the High Courts have ordinary civil jurisdiction and

also Commercial Appellate Courts at the District Level to hear appeal from the Commercial Courts below the level of district judge.

The legislature's intent while framing this provision was based on several objectives. The primary one was speedy recovery of commercial cases. If such cases are dragged on for years and years then it will have a number of adverse effects on the economy of the country as well as the investors. This will also lessen the burden of Courts. This provision has been a step towards right direction but the legislatures have left the provision open for challenges from various angles. For instance, what is meant by "urgent interim relief" has not been described, many can take the ground of urgent interim relief and approach the Court directly without exhausting the remedy of pre-institution mediation. There are many other such ambiguity and practical challenges in executing this provision in India. No doubt insertion of this provision will be a game changer in the years to come if all the practical and technical challenges are addressed properly. If we take the example of Italy, it is important to take a note of the fact that Italy had reformed its legal system to adapt its judicial system to enforce mediation and thereby reducing the burden of Courts. There was a well thought out policy and the implementation of opt out model lead to Italy's Ease of Doing Business Index over

⁵ Decoding the Mandatory Mediation rule: An analysis of Section 12A of the Commercial Courts Act, 2015 (May 5, 2019), <http://mappingadr.in/decoding-the-mandatory-mediation-rule-an-analysis-of-section-12a-of-the-commercial-courts-act-2015/>

⁶ Commercial Court need much more than legislative intent for their success (May 5, 2019), <https://cfo.economicstimes.indiatimes.com/news/commercial-courts-need-much-more-than-legislative-intent-for-their-success/64573960>



past years.⁷ The essence of taking this example is to advice that India should also learn from this system and the ordinance of Commercial Court pre-institution mediation and settlement of 2018 to come up with a concrete plan which would address the various issues that arises from the lacuna persisting in the said provision of Section 12 A of the Commercial Courts Act, 2015.

TECHNICAL CHALLENGES IN EXECUTION

There is no doubt that the pre-institution mediation mode of alternative dispute resolution in especially commercial matters have been successful in many countries namely like Italy and Turkey. This vision of the legislature remains unquestionable. The major obstacle comes into play at the time of its execution. To start with the primary one, Section 12 A (2) of the Commercial Courts Act, 2015, have authorized the Authorities established under the Legal Services Authorities Act, 1987, for the purpose of pre-institution mediation. The Legal Services, Authorities Act, 1987, is a benevolent legislation mainly aimed at “ensuring fair and meaningful justice to the marginalized and disadvantaged sector of the society”.⁸ The Authorities under this Act mainly concentrates on providing free legal aid to the needy ones by providing legal representation, legal literacy and awareness. The other main task is to enforce the system of Lok Adalat and other alternative dispute resolution modes. The main question that arises is that whether the Authorities constituted under the Legal Services Authorities Act, 1987, will be able to do justice to the commercial matters

that are highly technical issues and they are or may not adequately trained in this subject matter. Most of them might not be a trained mediator particularly not being an accredited and trained commercial mediator. These issues impose serious hindrance in the application of the pre-institution mediation model in India.

The Bill of 2018 which amended the pecuniary value of commercial disputes from Rs. 1 Crore to Rs. 3 Lakhs and broadening the scope of the definition of Commercial matters. This will thereby increase the number of cases being referred for pre-institution mediation and the number of applications will pile up at the National, State and District Services Authorities. This will increase the already overburdened Authorities. Thereby the main objective of speedy recovery of commercial disputes will not be achieved leading to delay in delivering justice to these commercial matters. The underlying object will not be ultimately achieved for which the opt-out model has been legislated. For instance referring to an incident that took place at Delhi, where within a week of the introduction of Pre-institution mediation Rules 2018, Delhi High Court had issued a notice in a petition that challenged the constitutionality of Section 12 A of Commercial Courts Act, 2015. The petitioner had raised the grievance that there is no effective mechanism in place currently to implement the provision of mandatory pre-institution mediation. This has left most of the parties remediless. The Legal Service Authority (the Authorities under Section 12A) had directed to inform the parties that there is no introduction and establishment of

⁷ Decoding the Mandatory Mediation rule: An analysis of Section 12A of the Commercial Courts Act, 2015 (May 5, 2019), <http://mappingadr.in/decoding-the->

[mandatory-mediation-rule-an-analysis-of-section-12a-of-the-commercial-courts-act-2015/](http://mappingadr.in/decoding-the-mandatory-mediation-rule-an-analysis-of-section-12a-of-the-commercial-courts-act-2015/)

⁸ National Legal Services Authority (May 5, 2019), <https://nalsa.gov.in/content/vision-statement>



any mechanism till date despite the Rules having been notified on 3rd July, 2018.⁹

The second primary issue with regards to its implementation is lack of infrastructural development in India. There is a lack of infrastructural facilities which causes a hindrance in facilitating the commercial dispute resolution. There are very few number of Commercial Courts and all don't have original civil jurisdiction. There are no properly established mediation centres. Inadequate number of training centres to provide training to the Commercial Courts Judges and the Authorities who perform the mediation are also not well trained in commercial mediation.

The Legal Services Authorities who are entrusted with the duty to conduct pre-institution mediation of commercial matters, lack relevant and adequate proficiency and experience to mediate commercial matters. They mainly handle disputes pertaining to family, labour and insurance disputes, which are less technical than matters relating to commercial matters like Intellectual Property Right disputes and many more. If a mediator is trained in commercial mediation it is always a plus point as they are able to open an effective dialogue understanding the underlying issues of the parties and finally are able to draw out a workable settlement. It is not that the mediator has to be very well versed with all commercial laws and be highly qualified, it is just that a basic

minimum training in and exposure to commercial mediation leads to effective resolution of commercial disputes. It is more necessary in a country like India where the masses are having very minimal idea and knowledge of mediation and hence they rely on the mediator to guide them through the whole process.¹⁰

Moving to the next obstacle, lack of imposition of any sanction when the other party defaults in participating or reciprocating to the mediation process which leads to non-starter or delay in the mediation process. The provision of Section 12 A itself provides the opposite party with an opportunity to refuse to participate in the pre-institution mediation process.¹¹ This is also a major hindrance towards proper implementation of pre-institution mediation. As there are no sanctions attached to the refusal, non-attendance or appearance of the opposite parties, they tend to avoid the mediation process and prefer to litigate. This leads to non-fulfillment of the objective of the pre-institution model in India.

Thus, these are the major challenges in execution of the pre-institution mediation. The technical challenges involved impose serious challenges to the smooth implementation of this opt-out model. The question that arises next is that whether India is at a pre-mature stage to implement the

⁹India: Mandatory Pre-Institution Commercial Courts (May 5, 2019), <http://www.mondaq.com/india/x/727214/Arbitration+Dispute+Resolution/Mandatory+PreInstitution+Mediation+Commercial+Courts>

¹⁰ Mandatory Pre-institution Commercial Mediation in India: Premature Step in the Right Direction? (May 5, 2019), <http://mediationblog.kluwerarbitration.com/2018/09/>

[01/mandatory-pre-institution-commercial-mediation-india-premature-step-right-direction/](http://www.mondaq.com/india/x/727214/Arbitration+Dispute+Resolution/Mandatory+PreInstitution+Mediation+Commercial+Courts)

¹¹ Pre-Institution Mediation under the Indian Commercial Courts Act: A Strategic Advantage (May 5, 2019), <https://www.ipwatchdog.com/2019/05/04/pre-institution-mediation-indian-commercial-courts-act-strategic-advantage/id=108918/>



mandatory pre-institution mediation model in commercial matters.

A WAY FORWARD

The initiative of the Legislature to incorporate this opt-out model is commendable. The efforts need to be injected in the right direction and at the right time in order to overcome the practical difficulties in execution. It is natural to face some challenges while adapting to a new system. A lot of work needs to be done to implement the model in a successful manner. India can always refer to the opt-out models that have been successfully implemented in the other countries. There are few explanations and clarifications that are necessary to be incorporated by the Legislatures to remove the ambiguity that prevails. The provision of Section 12 A also requires few further amendments to ease the implementation of the mandatory pre-institution mediation model. There Government has to focus on the infrastructural development of the Commercial Courts, Mediation centres, and Mediation training centres for the Authorities by whom the disputes will be resolved and the Commercial Courts Judges. The resources should be utilized by the Government in order to facilitate the smooth implementation of the mediation process. The Legal Services Authorities should also take active measures to spread the legal awareness about commercial mediation among the masses.

The major requirement is that there has to be a provision for implementation of sanction for non-appearance or non-attendance. In other countries like Turkey, where the party fails to attend the initial mediation sessions

they are made liable to pay the litigation cost, even it succeeds later on. The case is same in Italy, where the Judge can sanction the party for his or her non-attendance in the initial mediation meetings.¹² Such provision does not exist in Indian scenario that's why the parties are ignorant about the same as they know they would be punished for their non-appearance and they are responsible for delay and the case remains pending for years in the Commercial Courts.

There requires a more enhanced explanation of the term "urgent relief" under Section 12 A of the Commercial Courts Act, 2015. The parties can directly approach the Court in cases of urgent relief, but there lies no definition and illustration as to the situations or circumstances that can fall under the term "urgent relief". It has been left to the whims of the parties to approach the Commercial Courts taking the plea of urgent relief and the rest depends upon the wisdom of the Judges to decide as to whether there is any urgency in the plaintiff's case. This ground can potentially be misused by the parties to delay the entire process and cause harassment to the opposite party. This would defeat the very objective of this provision.

There is a need for implementation of quality check methods and machineries. In India there exist no regulatory provisions which would govern the qualification of commercial mediators and no provision for their training and getting the mediators accredited. However, in Turkey it is seen that Turkish law lays down the quality check machineries over the entire mediation procedure and has established standards for

¹²Mandatory Pre-Institution Mediation in Commercial Matters: Is India Ready? (May 5, 2019), <https://indiacorplaw.in/2018/06/mandatory-pre->

[institution-mediation-commercial-matters-india-ready.html](https://indiacorplaw.in/2018/06/mandatory-pre-institution-mediation-commercial-matters-india-ready.html)

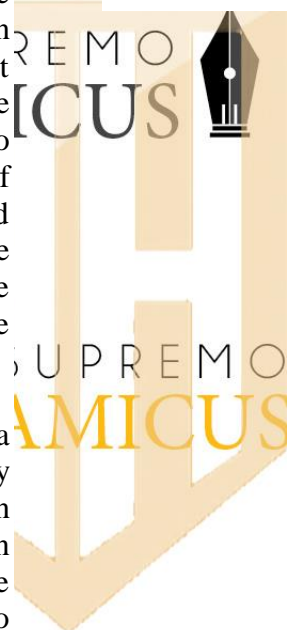


training of mediators. This develops the confidence of the parties on the credibility of the mediators. In India, there is no binding rule and laws that would check the proper appointment of qualified and well trained mediators and no quality check mechanism or method. Hence the opt-out model that is successfully running in the countries of Italy, Turkey, Ireland, Lithuania, Luxembourg, United Kingdom and Greece, as these countries have taken strong approaches towards the implementation of the opt-out model.¹³

Another amendment that needs to be incorporated in order to ease the implementation of the pre-institution mediation is by accrediting institutions apart from the Authorities constituted under the Legal Services Authority Act, 1987, to conduct the pre-institution mediation of commercial matters. Where the well trained commercial mediators would undertake the mediation process and carve out a practicable agreement. Thereby, it will enhance the implementation of the opt-out model.

Thus, the Legislatures should undertake a detailed analysis and make necessary amendments to the existing provision on mandatory pre-institution mediation in commercial matters. The whole issue including its practical implementation has to be dealt keeping in mind the various dimensions and possibilities. The reference of various successful opt-out models of other countries can guide the Legislatures in properly implementing it in India. Though it may take some time for the successful implementation of the opt-out model in India but it is not impossible to enforce it

effectively in India. Addressing the existing ambiguity and technical challenges and spreading awareness, amongst the public especially the commercial players in the market, the commercial disputes will efficiently be mediated through the pre-institution mediation without approaching the Commercial Courts and thereby saving the time and money of both the parties and the Courts. This would eventually lead to increase India's Ease of Doing Business Index and improve the economic condition as well.



¹³ Mandatory Pre-Institution Mediation in Commercial Matters: Is India Ready? (May 5, 2019), <https://indiacorplaw.in/2018/06/mandatory-pre->

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