**MANDATING PRE-INSTITUTION COMMERCIAL MEDIATION IN INDIA: AN UNTIMELY AND PREMATURE ACT**

**BY – HRISHIKESH BHISE & SAHIL SONKHUSLE**

**ABSTRACT**

Mediation has been gaining much popularity in India since it was first introduced in 2000 (in the format we are familiar with today). Over the years, mediation has been seen to be adopted in the resolution of various disputes such as familial, property, motor accidents and much more. This popularity has much to do with the efficiency, in terms of both cost and time that mediation has to offer. With more than 30 million cases pending in courts across India, it is very essential to adopt quicker methods of dispute resolution.

Its popularity has led to mediation to be sought after for the resolution of commercial disputes. Businesses are always looking for ways to resolve their disputes at the earliest and at minimal cost. Further, mediation allows them privacy and the choice to settle More than forty thousand commercial disputes are pending in Indian courts – leaving businesses unhappy and courts burdened. To overcome this, the legislature introduced the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, wherein, pre-institution mediation was mandated in matters requiring urgent interim relief. Such mediations are to be conducted by authorities constituted under the Legal Services Authorities Act, 1987. However, parties are left with a choice to opt-out of such mediation at any point and seek further relief from a court of law.

After looking at the success of similar models implemented in Italy and Turkey, Section 12A of this Amendment Act seeks not only to smoothen out pre-institution commercial mediation in the country and but alsofor investors and other involved partiesto consider it as a viable and easily available option to resolve disputes. However, the authors of the paper believe that mandating such mediation might be a pre-mature act. Through this paper, the authors shall delve into issues (and thus support their contention) that the country faces in the effective enforcement of mandated pre-institution mediation for resolution of commercial disputes such as the lack of proper infrastructure and/or resources, skilled mediators, quality control mechanisms and so on.

The authors shall further discuss the success rate of such mediations as parties have been given a choice to opt out of settlement and further, the enforcement of such settlements. Because these settlements are often not abided by the parties, court proceedings become inevitable. To overcome this, the Section provides that such settlement shall have same status and effect as an arbitral award under Section 30 (4) of the Arbitration and Conciliation Act, 1996. While this may be fruitful, it might have repercussions which shall be discussed in the paper.

Thus, by way of this paper, the authors shall analyze Section 12A of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 and discuss in depth the impediments involved in its application and implementation. The authors shall further attempt to provide solutions to overcome such obstacles in a reasonable and practical manner – thereby helping to advance the legislature’s noble cause.

Mediation is a method of alternate dispute resolution wherein parties involved in a dispute attempt to reach settlement with help from a neutral and a third-party mediator. It is a non-binding process and is majorly controlled by the parties involved. Thus, the furtherance of any mediation depends solely on the continued acceptance of the parties involved.[[1]](#footnote-1) In its essence, mediation focuses upon the parties’ needs and interests, provides for full disclosure of competing interests and positions, confers a right of self-determination upon the parties, allows for procedural flexibility and maintains privacy and confidentiality.[[2]](#footnote-2) Moreover, mediation helps overcome the downfalls of litigation such as the expenses attached with it, or the procedural rigidity that exists because courts dispense justice in accordance to the law. Additionally, in litigation, the role of the parties is rather limited whereas the legal profession plays a vital role. Further, the adversarial system has placed an unnecessary reliance upon corroboration of facts and determination of law by way of conflicting viewpoints. On the other hand, mediation encourages amiability and allows parties to understand the other’s issues, empathise and resolve these issues genially. It is due to the above that mediation is much sought after.

Mediation, in its rudimentary form, has existed in India since time immemorial. It was commonly practiced by businessmen and merchants in the pre-colonial era to resolve their disputes. In fact, there is evidence that merchant associations then required merchants to refer their matters to mediation before moving the court or else they would face disbarment.[[3]](#footnote-3) These worked well until the British courts established in India became recognised for their integrity and gained people’s confidence. These courts systems were retained after independence and continued to perform just as well. However, with the advent of the 21st century and after the economic reforms of 1991, businesses (both public and private) in India grew widely. With them, grew the burden upon courts which led to delays in the judicial decision-making process and a backlog of cases. Thus, alternatives were explored, and mediation found its attraction. Mediation was first legally recognised in the Industrial Disputes Act, 1947,[[4]](#footnote-4) and soon, machinery to help advance mediation was evolved.

As a progressive move, the Indian Legislature enacted the Legal Services Authorities Act, 1987[[5]](#footnote-5) whereby the National Legal Services Authority was constituted and vested with the following duties:

* To encourage the settlement of disputes by way of negotiations, arbitration and conciliation;
* To lay down policies and principles for making legal services available in the conduct of any case before the court, any authority or tribunal;
* To frame most effective and economical schemes for the purpose.

Due to its advantages, mediation has become a very widely accepted method to resolve commercial disputes[[6]](#footnote-6). To understand what commercial is, we must first look at its definition. For the purposes of this paper, the authors have adopted UNCITRAL’s definition of “commercial”, which encompasses all relationships of a commercial nature, including exchange of goods and services, joint venture and other forms of business cooperation, and licensing arrangements.[[7]](#footnote-7)

With rapid commercial growth in India, there has been a proportionate rise in the number of litigations that arise out commercial matters. As a result, courts have been heavily burdened with cases and many businesses have been left unsatisfied. To help cope with this, the Indian legislature enacted the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018[[8]](#footnote-8) (“Bill”). Section 12A of this Bill provides for mandatory pre-institution mediation for the resolution of commercial disputes. As a consequence, a plaintiff must exhaust his remedy to dispute resolution by mediation before filing a suit in accordance with the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (“Rules”), unless the suit contemplates any urgent interim relief under the parent Commercial Courts Act, 2015 (“Act”).[[9]](#footnote-9) This step is welcomed with open arms given that commercial disputes amount to a good percentage of the number of casespending in courts in India and also how it would promote business across the country. Only the introduction of this amendment has led to a rise in India’s rank in the World Bank’s World Ease of Doing Business Index.[[10]](#footnote-10)

Mandating pre-institutional commercial mediation is certainly a step forward. However, given currently scenario in India, its enforcement might be faced with impediments, and thus prove to be pre-mature. Of these, the authors believe the most significant are: a) authorisation of of the State Authorities and District Authorities (constituted under the Legal Services Authorities Act, 1987) as the relevant authorities to conduct the pre-institution mediation; b) Lack of experience and skilled mediators;c) Reduction of threshold amount for mediation from Rs. 1 crore to Rs. 3 lakhs; d) Giving a settlement arrived at through such mediation the status and effect of an arbitral award and under S.30 (4) of the Arbitration and Conciliation Act, 1996.

The object of the Legal Services Authorities Act is to “provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”.[[11]](#footnote-11) To this extent, such authorities provide free legal services to persons who are eligible. As a consequence, they are immensely overburdened with work. Further, with the introduction of this Act, they are required to mediate all commercial matters that fall under Section 12A of the Bill. This might lead to a rushing the process of mediation and hastily not arriving at a settlement or arriving at one which the parties may regret later. Moreover, the Legal Services Authorities vastly handle matters of family and property law; and the domain of commercial law shall be difficult for them to conquer quickly (not to undermine their ability in any way).

Further, a for a mediation to be successful, the presence of a skilled mediator is of great essence. It is the mediator’s task to facilitate the way to a settlement between the parties by listening to both parties, using various communication techniques to encourage the parties to discuss their issues, assisting the parties to engender settlement options and motivating the parties to agree on mutually acceptable settlement.[[12]](#footnote-12) To be able to perform such a variety of tasks and much more, mediators need to be highly trained and skilled. It is difficult to find such mediators in India because of the many taboos attached to mediation. This concern shall be defeated only by beginning to train mediators in law schools by way of courses and simulations. Further, judges and lawyers must also be encouraged to undergo training for mediators to facilitate overall growth and better success rate of mediation.

The reduction of the minimal value of a suit from Rs. 1 crore to Rs. 3 lakhs is certainly an excellent attempt to allow more people and businesses access to the legal system. However, this also implies that more suits shall now be filled, and more matters shall have to be mandatorily mediated. The Legal Services Authorities are already overburdened, and further, there is a want for skilled mediators. Thus, this reduction of the threshold shall only prove to be troublesome.

The Bill envisages, under S.12A (5), that a settlement arrived at under S.12A shall have the same status and effect as if it is an arbitral award on agreed terms under sub-section (4) of S.30 of the Arbitration and Conciliation Act, 1996.[[13]](#footnote-13) As a consequence, any mediated settlement can be enforced as an arbitral award. To understand this concept and to contemplate its effect, we must first look at S.30 of the Arbitration and Conciliation Act, 1996 which provides for settlements made by parties to a dispute during the course of an arbitral proceeding. The Section encourages such settlement by way of mediation, conciliation and so on. It is further stated here that once such settlement has been reached, arbitral proceedings shall be terminated, and an arbitral award shall be drawn out based on the agreed terms. Such arbitral award shall be in accordance to S.31 and shall have the same status and effect as any other arbitral award has on the substance of the dispute.

While this might prove effective in the enforcement of settlements reached in mandatory mediations, it might prove detrimental too because an arbitral award is different from a mediation settlement. For instance, an arbitral award is the result of adjudication done by an arbitrator based on merit, while a mediation settlement is often non-binding and is not decided by the mediator, as his task is to facilitate and not adjudicate. In light of this, the New York Convention[[14]](#footnote-14) does not permit enforcement of mediated settlements reached before the commencement of arbitral proceedings and covers only the awards rendered in *ad hoc* or institutional arbitrations.[[15]](#footnote-15)

Further, the authors believe that this might lead to a combination of mediation and arbitration, more commonly known as “med-arb” in which the parties attempt to resolve their dispute using mediation and proceed to arbitration only if they are not successful in reaching a settlement.[[16]](#footnote-16) While the provision does not precisely lead to this combination of alternate dispute resolution method, its outcome might be similar. This is because the arbitral award in “med-arb” might be from a settlement proposed during mediation[[17]](#footnote-17) or be based upon mediation-type considerations or evidence.[[18]](#footnote-18)

Moreover, when parties are able to reach a settlement through mediation, the possibility of judicial review is important because it protects self-determination by ensuring that the parties actually entered into a valid settlement agreement. Additionally, it safeguards mediation process norms that promote the fair conduct of mediation by protecting against mediator’s misconduct.[[19]](#footnote-19) Thus, to bind such a settlement by way of an arbitral award would in some way or the other challenge the norms of mediation.

Further, challenging such a settlement-turned-award becomes difficult because it can be done only if the award is against the public policy of India, as in the Arbitration and Conciliation Act, 1996. Thus, the authors are of the belief that to give the status and effect of an arbitral award to a mediation settlement would be more detrimental than fruitful.

In conclusion, the authors believe that mandating mediation for commercial disputes before moving court is a step forward, both for India’s legal system and its economy. However. it is still a pre-mature step for India lacks resources for its enforcement. Countries where a similar model pre-exists, invested a great deal in building the necessary resources before implementing it – something we must now do.

1. Guide to WIPO Mediation (5th June 2019)*,* https://www.wipo.int/amc/en/mediation/guide/ [↑](#footnote-ref-1)
2. Mediation and Conciliation Project Committee, Supreme Court of India, Mediation Training Manual of India (5 June 2019), <https://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf> [↑](#footnote-ref-2)
3. Id. [↑](#footnote-ref-3)
4. Industrial Disputes Act, 1947, No. 14, Acts of Parliament, 1947 (India). [↑](#footnote-ref-4)
5. Legal Services Authorities Act, 1987, No. 39, Acts of Parliament, 1987 (India) [↑](#footnote-ref-5)
6. S. 2(1) (c), The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, No.4, Acts of Parliament, 2016 (India). [↑](#footnote-ref-6)
7. “The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road”. Article 1(1), footnote 2, UNCITRAL Model Law on International Commercial Conciliation (2002). [↑](#footnote-ref-7)
8. Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018, No. 28, Acts of Parliament, 2018 (India). [↑](#footnote-ref-8)
9. http://mediationblog.kluwerarbitration.com/2018/09/01/mandatory-pre-institution-commercial-mediation-india-premature-step-right-direction/ [↑](#footnote-ref-9)
10. http://pib.nic.in/newsite/PrintRelease.aspx?relid=184513 [↑](#footnote-ref-10)
11. Legal Services Authorities Act, 1987. [↑](#footnote-ref-11)
12. Supra 2, at 1. [↑](#footnote-ref-12)
13. Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India). [↑](#footnote-ref-13)
14. 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968) [↑](#footnote-ref-14)
15. http://arbitrationblog.kluwerarbitration.com/2015/11/25/enforcement-of-settlement-agreements-reached-in-arbitration-and-mediation/ [↑](#footnote-ref-15)
16. Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review [↑](#footnote-ref-16)
17. Hallam v. Fallon, No. 134145, 2003 WL 21143014 (Cal. Super. Ct. May 16, 2003) [↑](#footnote-ref-17)
18. Bowden v. Weickert, No. S-02-017, 2003 WL 29419175 (Ohio Ct. App. June 20, 2003) [↑](#footnote-ref-18)
19. Supra 4. [↑](#footnote-ref-19)