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Why Commercial Mediation Should be Voluntary

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Why Commercial Mediation Should be Voluntary

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Executive Summary

Mediation is a procedure where a neutral intermediary helps parties reach a mutually satisfactory settlement in a dispute. In theory, this can reduce the inflow of cases clogging the legal system.

Under Section 12A of the Commercial Courts Act, 2015, it is mandatory for parties in a commercial dispute to first attempt mediation before filing a case in the courts: '*A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation.*' Thus, all commercial disputes above a certain monetary threshold (Rs 3 lakh) must mandatorily undergo mediation before the litigation process can start. The only exception is if there is a special time-sensitive urgency.

Given the enthusiasm for mediation, the original Mediation Bill 2021, contained a similar provision to make pre-litigation mediation mandatory for all civil cases. However, upon consideration, a Parliamentary Standing Committee decided against it. The revised Mediation Bill passed in August, and formalised as the Mediation Act 2023, changed the provision to make pre-litigation mediation voluntary. So, if mandating pre-litigation mediation is unsuitable for civil cases, why should it be compulsory for commercial cases?

In an article published in March 2023, Pavithra Manivannan used data from the two district-level commercial courts in Mumbai and found that mandatory mediation had a poor record in resolving commercial disputes. Since Mumbai is India's commercial capital, it provides a good testing ground for the approach's success. We updated the data till September to see if things had changed.

What does the evidence say about the impact of mandatory pre-litigation mediation on dispute resolution in commercial cases? There are three types of disposals, as laid down in the 2015 Act and reported by the courts:

- Settled: Cases where mediation was successful, and the parties have amicably arrived at a mutual settlement.
- Failed: Cases where mediation was attempted and failed.
- Non-starter: Cases where the opposite party has refused to participate in the mediation process.

The evidence from the two Mumbai courts suggests:

- Between 2020 and 2023, around 98 percent of the applications for pre-litigation mediation were non-starters because the parties did not participate in the proceedings.
- Only 2 percent of the cases were under the 'failed' or 'settled' category.
- Of the 2 percent of applications that attempted pre-litigation mediation, approximately 1 percent failed, and only 1 percent led to a settlement.

In other words, 99 percent of the system was held hostage by the possibility of a 1 percent resolution. By way of illustration, between January and September 2023, there were 3,404 applications for pre-litigation mediation in the two district courts. Data shows:

- An overwhelming 3,170 applications were non-starters.
- 120 mediations failed.
- Only 114 cases were settled successfully.

The requirement of pre-litigation mediation under the 2015 Act is not working, and only adds to the time and cost of inevitable litigation. This mandatory step delays the process by three to five months and adds to legal fees. Since litigants know that mediation is futile, many try to use a carve-out in Section 12A for urgent cases to bypass pre-litigation mediation and directly file a suit in court. This leads to many farcical situations.

Given the time-consuming and expensive nature of litigation in India, it is always a measure of last resort once all scope for an amicable settlement has been exhausted. In most business transactions, the parties attempt to amicably settle their disputes through informal and formal consultations before sending legal notices and initiating litigation. Therefore, a mandated mediation at this late stage is unlikely to work in India, especially when forced.

For the mediation system to be effective, it must earn its place in the dispute-resolution ecosystem by its performance and not by a mandate. The evidence clearly shows that it adds extra time and cost to the process. Hence, Section 12A of the Commercial Courts Act, 2015, must be amended to make pre-litigation mediation for commercial cases voluntary. This will reduce the timeline of dispute resolution in commercial cases by three to five months and lower the legal costs that entrepreneurs have to bear.

Why Commercial Mediation Should be Voluntary

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I. Introduction

This EAC-PM Working Paper looks at the issue of compulsory pre-litigation mediation in India for commercial disputes, as mandated under Section 12A of the Commercial Courts Act 2015 ("2015 Act") and whether Section 12A be amended to make this process voluntary. We discuss the issue in light of the recent amendment to the Mediation Bill 2021 wherein a similar provision had been introduced in Section 6 of the original bill in 2021 to make pre-litigation mediation mandatory for all civil cases. However, upon due consideration by the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice in July 2022, the revised Mediation Bill passed in August 2023 and formalized as Mediation Act 2023 changed the language of the corresponding provision to make pre-litigation mediation voluntary.

This Working Paper follows up on the suggestion of the Standing Committee for policy-makers to study the challenges faced in implementing pre-litigation mediation under the 2015 Act before mandating it across other categories of cases. We provide evidence from commercial cases in district courts of Mumbai to suggest that pre-litigation mediation under the 2015 Act is not working and only adding to the time and cost of the inevitable litigation.

Background - Mediation in India

There are an estimated 50 million pending cases in our courts today and an increasing caseload per judge across all major courts in the country. As we aspire to become a developed country by 2047, the size of India's economy will also grow exponentially. Increasing prosperity will impose greater demands on our justice delivery system. There will be many more property and contractual disputes on the civil side while simultaneously increasing the law and order challenges on the criminal side.

Policy-makers have two approaches to reduce caseload in India's courts. Firstly, the cases which are in the judicial system are sought to be disposed of quickly by expanding the judicial infrastructure and speeding up the procedural elements of a case. Secondly, multiple efforts are made to ensure that the flow of new cases which enter the judicial system is also minimized. This includes decriminalization of offences, the government choosing not to contest cases below a certain monetary threshold and most importantly, encouraging alternative methods of dispute resolution like arbitration, mediation and conciliation. Providing legal and institutional support to mediation is a part of the effort.

A conciliatory approach to dispute resolution (as opposed to the adversarial approach of the common law litigation) has been a part of India's civilizational heritage through the institution of Panchayats. However, with the advent of British rule, mediation and other amicable forms of dispute resolution gradually lost out to the preferred mode of court-led dispute resolution using adversarial common law litigation. After Independence, there were several attempts made to reinvigorate these alternate forms of dispute resolution. The system of Lok Adalats created by the Legal Services Authorities Act, 1987 was a notable step in this direction. But all these legislative efforts met with limited success.

Typically, there are three routes to start the mediation process in India[1]. Firstly, the parties to a contract have a mediation clause in the section on dispute resolution and voluntarily choose to initiate the process. Secondly, the court issues directions under the Civil Procedure Code or sector-specific laws (under the Civil Procedure Code, Consumer Protection Act 1986 etc.) to seek out-of-court settlement. Thirdly, there are statutory mandates to resolve disputes using mediation as under Section 12A of the 2015 Act. Section 12A of the 2015 Act states: *"A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation…"*

II. Mediation Act 2023 - Making Mediation Voluntary Again

United Nations Convention on International Settlement Agreements Resulting from Mediation 2018 ("Singapore Convention") which was signed by India in July 2019 was the impetus for the latest cycle of efforts to promote mediation in the country, notably through the Mediation Bill 2021 which is the first ever comprehensive code on mediation in India. Section 6 of the Mediation Bill 2021 was another example of the statutory mandate to compulsorily use mediation for dispute resolution before going to courts. Notably, the provision applied even in cases where the parties chose not to have a mediation clause in their agreement.

Section 6 of the Mediation Bill 2021 originally read as follows:

> *"(1) Subject to other provisions of this Act, whether any mediation agreement exists or not, any party before filing any suit or proceedings of civil or commercial nature in any court,* ***shall*** *take steps to settle the disputes by pre-litigation mediation in accordance with the provisions of this Act:*
>
> *Provided that pre-litigation mediation in matters of commercial disputes of Specified Value shall be undertaken in accordance with the provisions of section 12A of the Commercial Courts Act, 2015, and the rules made thereunder"* [emphasis added]

The Mediation Bill 2021 made a few notable changes based on the experience of pre-litigation mediation of commercial cases under the 2015 Act. Clause 8 of the 2021 Bill allowed for the designated court to grant interim relief either before or during the mediation proceedings. But unlike Section 12A of the 2015 Act, the parties were not allowed to opt out of the mediation process even if there was a case for urgent interim relief to prevent irreparable damage to one of the litigants.

Further, Clause 20 of the Mediation Bill 2021 mandated that parties be forced to sit through at least two sessions of mediation before initiating the litigation process and empowered the court to impose penalty on a litigant who failed to do so without reasonable cause. This was unlike the 2015 Act where no minimum number of mediation sessions was imposed upon the litigants in commercial cases. Clause 21 of the Mediation Bill also imposed a time limit of six months for the mediation process to be complete, subject to further extension by another six months with prior consent of both parties.

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[1]Deepika Kinhal and Apoorva, *Mandatory Mediation in India - Resolving to Resolve*, Indian Public Policy Review 2020, 2(2): 49-69. See: https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India-Resolving-to-Resolve.pdf

Standing Committee Report

The Mediation Bill 2021 was tabled in the Rajya Sabha in December 2021 and was duly referred to the Standing Committee on Personnel, Public Grievances, Law & Justice for review. In July 2022, the Standing Committee issued its 117th Report on the Mediation Bill, making certain recommendations.

On the issue to making mediation mandatory for civil cases, the Standing Committee was very clear[2]:

> *"The Committee notes that Section 6 of the Bill provides for mandatory pre-litigation mediation before any party files any suit or proceedings of civil or commercial nature in any Court. The Committee also notes that the Bill provides for pre-litigation mediation even if parties do not agree to mediate, and block their access to the courts and tribunals across the board for all kinds of cases except those categories of disputes excluded in the First Schedule, till they first resort to mediation. The Committee further notes that Section 20 and Section 25 of the Bill make such unwilling parties to stay in mediation for at least two mediation sessions and compels the party who fails to attend the first two mediation sessions "without reasonable cause" with the possibility of costs in subsequent litigation for such "conduct". Consequently, the parties have to wait for several months before being allowed to approach courts or tribunals.*
>
> *The Committee further notes that making pre-litigation mediation mandatory may actually result in delaying of cases and may prove to be an additional tool in hands of litigants to delay the disposal of cases. The Committee also notes the views of few experts that not only pre-litigation mediation should be made optional but also be introduced in a phased manner instead of introducing it with immediate effect for all civil and commercial disputes and* ***the challenges faced in implementing Pre-Litigation Mediation under the Commercial Courts Act, 2015 should be studied before mandating it across other categories of cases****.*
>
> ***Against this background, the Committee recommends that the compulsory provision of Pre-litigation mediation should be reconsidered."*** [emphasis added]

The Union Cabinet accepted this recommendation of the Standing Committee. Accordingly, the Mediation Act 2023 which received Presidential assent in September 2023 after being passed by the Parliament in August 2023 made one crucial change to Section 5 on pre-litigation mediation. It now reads as follows:

> "*5. (1) Subject to other provisions of this Act, whether any mediation agreement exists or not, the parties before filing any suit or proceedings of civil or commercial nature in any court,* ***may voluntarily and with mutual consent*** *take steps to settle the disputes by pre-litigation mediation in accordance with the provisions of this Act:*

[2] Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, "One Hundred Seventeenth Report on The Mediation Bill, 2021

Provided that pre-litigation mediation in matters of commercial disputes of Specified Value shall be undertaken in accordance with the provisions of section 12A of the Commercial Courts Act, 2015, and the rules made thereunder." [emphasis added]

As is evident, in response to the feedback from the Standing Committee and other stakeholders, the Mediation Act 2023 makes pre-litigation mediation voluntary for civil cases.

III. Section 12A of the Commercial Courts Act, 2015

Section 12A of the 2015 Act makes pre-litigation mediation compulsory for commercial cases. In case the plaintiff does not do so, the suit is liable to be dismissed under Order VII, Rule 11 of the Civil Procedure Code as being barred by law[3]. Section 12A reads as follows:

"(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation."

The 2015 Act was the result of the Indian government's concerted efforts to provide an effective and timely resolution of commercial disputes which was a major roadblock in improving India's rank in the World Bank's *Ease of Doing Business* index. Accordingly, Section 12A was added in 2018, the same year that India negotiated and signed the Singapore Convention of Mediation (the equivalent of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

Under Section 12A, parties to all commercial disputes above a certain monetary threshold (INR three lakh[4]) must mandatorily undergo mediation before instituting a commercial suit. The only exception is if there is a time-sensitive urgency (for example, infringement of intellectual property rights) which requires an interim relief to prevent irreparable loss to the litigant.

Section 12A also mandates that the mediation process must be completed within three months from the date of application (extendable by two months with mutual consent of both parties). If a settlement is reached within the stipulated period, it shall be binding as an arbitral award under Section 30 of the Arbitration and Conciliation Act 1996. If not, the parties may refer the dispute to the commercial courts established under the Act.

Until recently, there was some confusion about whether the mandate for pre-litigation mediation was binding on parties or merely procedural compliance was enough. This debate arose due to the contradictory decisions of Bombay[5] and Calcutta[6] High Courts on one hand, saying that before attempting mediation parties

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[3] Khaitan & Co - Radhika Gupta, Shayan Dasgupta and Kanika Sharma, *Compliance Of Section 12A of the Commercial Courts Act When Both Parties Refuse to Participate in the Pre-Institution Mediation*, Lexology (3 January 2023). See: https://www.lexology.com/library/detail.aspx?g=aeb6ce35-f562-4c87-a70e-fad24b6249bc

[4] Section 2(1)(i) of the 2015 Act

[5] *Deepak Raheja vs. Ganga Taro Vazirani*, 2021 SCC OnLine Bom 312

[6] *Laxmi Polyfab vs. Eden Realty*, 2021 SCC OnLine Cal 1457

cannot approach commercial courts. On the other hand, the Madras High Court in *Shahi Exports Pvt. Ltd vs. Gold Star Line Limited*[7] gave a liberal interpretation to the word "shall" in Section 12A and held that since the right to access justice is a fundamental right, it cannot be encumbered by forcing parties to first subject themselves to a mediation irrespective of their willingness and ability to reach a successful settlement.

The dispute had to be finally settled by the Supreme Court in an August 2022 judgment *Patil Automation Private Limited & Ors. vs. Rakheja Engineers Private Limited*[8] where it sided with the Bombay and Calcutta High Court to hold that the directive of Section 12A is mandatory and parties must exhaust the option of pre-litigation mediation before approaching the courts under the 2015 Act.

In his commentary on this August 2022 judgment of the Supreme Court, noted corporate lawyer turned scholar Umakanth Varottil made an important point about the problem with mandating mediation without the existence of a "well-designed and well-oiled mediation machinery" in India and adequate number of well-trained professional mediators:

> *"In all, while the Supreme Court's ruling paves the way for mandatory pre-litigation mediation in commercial matters, the true effect will manifest only when the mediation mechanism in India achieves institutional and professional robustness. Failing this, litigants may be worse off as they may be compelled to pursue a less than optimal mediation apparatus, having been deprived of the option of invoking the litigation process straightaway."*[9]

IV. Mandatory Mediation is Paradoxical

As a dispute resolution process, mediation is characterized by its non-adversarial nature and active participation of both the parties[10]. The mediator seeks to forge a consensual settlement less through adjudication and more through resolution of a conflict. Forcing unwilling parties to sit through a long-drawn mediation process that has a coercive element to it and make it simply an additional layer of litigation since parties decide to open the doors of litigation only as a last resort.

For example, in a landmark June 2022 paper published by the DAKSH Centre of Excellence for Law and Technology at IIT Delhi[11]researchers demonstrated that mandating mediation to resolve a cheque bounce case (which disproportionately accounts for docket explosion in Indian courts) adds three

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[7] Application No. 35 of 2021 in C.S. No.669 of 2019

[8] 2022 SCC Online SC 1028

[9] Umakanth Varottil, *Supreme Court on Mandatory Pre-Litigation Mediation in Commercial Court Cases*, IndiaCorpLaw (5 September 2022). See: https://indiacorplaw.in/2022/09/supreme-court-on-mandatory-pre-litigation-mediation-in-commercial-court-cases.html

[10] Aditya Mehta, Pritvish Shetty, Saloni Jain & Agneya Gopinath, *Analysis: Mediation in India*, Cyril Amarchand Blogs, 31 October 2022. See: https://corporate.cyrilamarchandblogs.com/2022/10/analysis-mediation-in-india/

[11] Devendra Damle, Jitender Madaan, Karan Gulati, Manish Kumar Singh and Nikhil Borwankar, *Characterising cheque dishonour cases in India: Causes for delays and policy implications*. See: https://daksh-lawtech-iitd.org/wp-content/uploads/2022/04/Paper-cheque-Dishonour.pdf

hearings and 100 days to the time required for disposal. To quote Devendra Damle (from NIPFP) and Karan Gulati (From Vidhi Centre for Legal Policy) who co-authored the research paper:

> *"These findings counter the belief that cases referred to mediation take less time and fewer hearings to dispose of. This also means that recommending that more cases go to mediation will not reduce the delays in cheque bounce cases and consequently in the judiciary. Mediation increases delays and does not relieve the burden on judges. Instead, it will likely increase the time a court has to invest in the case."*[12]

The authors also quoted a 2004 paper[13] (that was revised in March 2022) from Dr. Roselle Wissler (Sandra Day O'Connor College of Law, Arizona State University) to note that even international experience does not provide any conclusive evidence that court-mandated mediation reduces the time and cost of resolution compared to traditional litigation.

Even Section 89 of the Civil Procedure Code 1908 which institutionalized mediation in civil cases in India from the year 2002, still gave discretion to the courts in referring civil disputes to mediation only when the court was convinced that there was some scope for reconciliation between the parties[14]. Mandating participation in mediation is contrary to the intrinsically voluntary nature of the process. It may not translate to a greater uptake of mediation since unwilling parties may attend the initial mediation sessions as a mere formality before withdrawing from the process.

Indeed, it could significantly delay dispute resolution, and result in additional costs. Additionally, commercial disputes are not a homogenous category and may arise due to a variety of reasons. Mediation is not always the most appropriate method of resolution for all such disputes. Forcing mediation in all circumstances would affect the process, the outcome of the dispute and public acceptance of the efficacy of mediation as a process.

V. Pre-Litigation Commercial Mediation Does Not Work

The best test of the practicality and efficacy of any policy/law is the actual outcomes that follow upon its implementation. In 2018, the 2015 Act was amended to include Section 12A which made it mandatory for a party filing a suit under the Act to exhaust the remedy of mediation before instituting any suit in any of the courts. Under the 2018 amendment, the mediation process was expected to be over in three months and the settlement agreement would have the force of an arbitral award. This was the first instance of coercing litigants to resort to mediation under a statutory mandate before approaching courts to resolve a commercial dispute.

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[12] Karan Gulati and Devendra Damle, *Mediating Cheque Bounce Cases Will Not Solve Judicial Delays*, Vidhi Blog, 30 June 2022. See: https://vidhilegalpolicy.in/blog/mediating-cheque-bounce-cases-will-not-solve-judicial-delays/

[13] Roselle Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases (2004)*. Conflict Resolution Quarterly, Vol. 22, p. 55, 2004, See: https://ssrn.com/abstract=1723283

[14] Section 89 (1) of the Civil Procedure Code 1908 reads as follows: *"Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for: (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through Lok Adalat: or (d) mediation."*

The 2018 amendment provided the opportunity for a real-time experiment to assess the utility and efficacy of making mediation mandatory for a narrow category of disputes and further implement this restrictive measure for other categories of civil cases if the evidence suggested so.

A March 2023 paper by Pavithra Manivannan titled *Why Mandating Mediation Will Not Be Effective For Litigants In Commercial Disputes*[15] used data from the two district-level commercial courts in Mumbai to make the case that it has been unsuccessful in resolving commercial disputes. Mumbai being the nerve-center of the Indian economy provides a good litmus test for the receptiveness of the private sector towards this top-down approach of inducing behavior change in litigants.

There are three types of disposals as laid down in the 2015 Act and reported by the courts:

(i) Settled: Cases in which mediation was successful and the parties have amicably arrived at a mutual settlement;

(ii) Failed: Cases where mediation was attempted and failed;

(iii) Non-starter: Cases where the opposite party has refused to participate in the mediation process

The findings of the paper are stark (see Table 1 below) and summarized as follows:

- Between 2020-2022, 31 percent of the total mediation applications were pending for more than the prescribed period of three months
- While the pendency reduced by about 50 percent between 2020 and 2022, 96-98 percent of the disposed cases between 2020-2022 were non-starters i.e. parties refused to participate in the proceedings.
- Only 2 percent of the cases were under the “failed” or “settled” category. Of the 2 percent applications that led to a pre-litigation mediation, approximately 1 percent failed and only 1 percent led to a settlement.

The Manivannan paper relied on data for the years 2020-2022. In Table 1 below, we have added data for the first nine months of 2023 to provide an updated scenario. The main conclusion remains the same since the data shows that mandating pre-litigation mediation in commercial cases does not work.

Table 1: Categories of Disposed Cases in Commercial Courts of Mumbai (2020-2023)

Year	Disposed Cases	Settled Cases	Failed Cases	Non-Starter Cases	% of Non-starter and Failed Cases
2020	304	3	0	301	99
2021	3555	22	28	3505	99
2022	7717	139	139	7431	98
2023*	3404	114	120	3170	97

* For the months January - September 2023

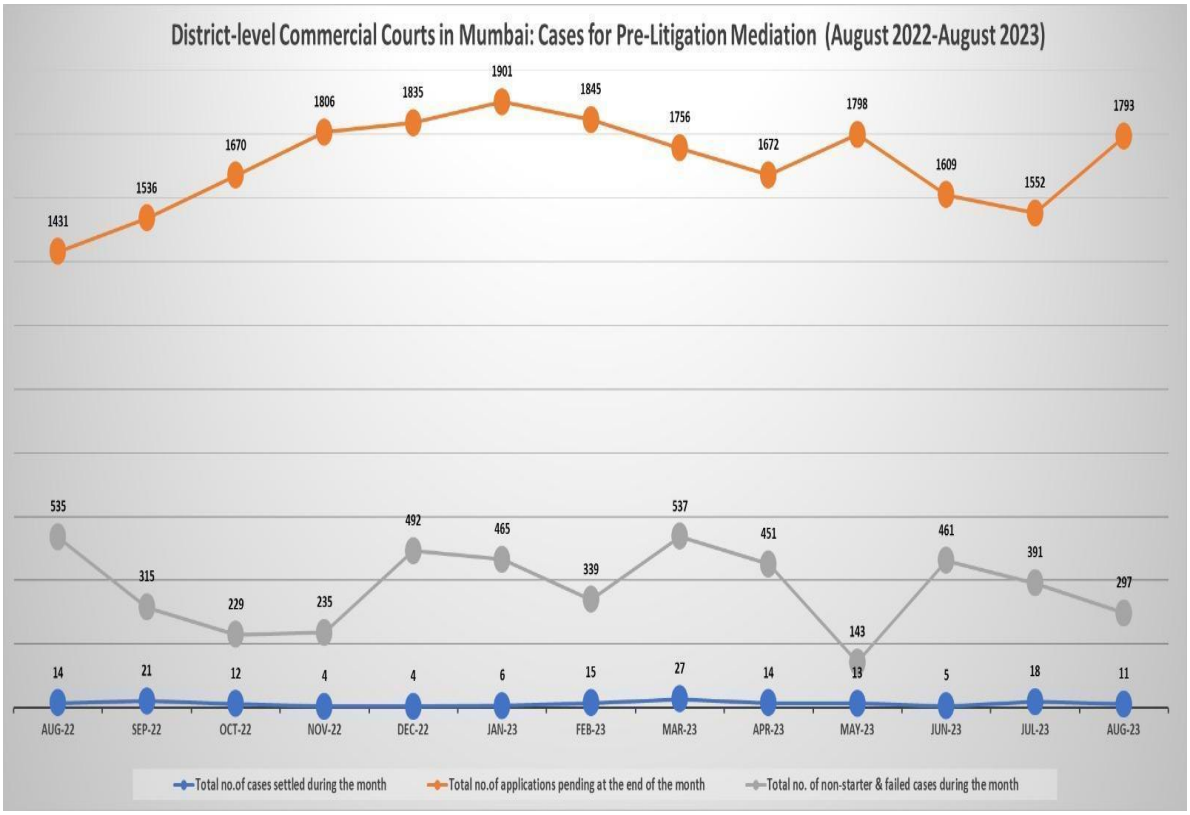
[15]https://www.bqprime.com/opinion/why-mandating-mediation-will-not-be-effective-for-litigants-in-commercial-disputes

The Table above confirms our hypothesis that mandating pre-litigation mediation for commercial cases is not working. The evidence from the two district-level commercial courts in Mumbai suggests that for the years 2020-2023, ***between 97-99 percent of the applications for pre-litigation mediation were non-starter because the parties did not choose to participate in the proceedings***. Of the 2-3 percent cases that came to the table, only half succeeded (i.e. one percent). ***Thus, this 1 percent is delaying the remaining 99 percent of the cases and the entire system is held hostage by the possibility of the successful resolution of just 1 percent of the cases.***

This is clear empirical evidence of the failure of pre-litigation mediation to provide quick and amicable dispute resolution for commercial cases and reduce the litigation burden on India's courts. Most litigants simply file the paperwork by way of procedural formality and wait for the stipulated time period to be over before starting litigation, which they originally intended to do.

Let us consider more recent evidence. The graph given below shows a month-wise break-up of the total mediation applications and their status, as reported on the e-Courts portal by the two district-level commercial courts in Mumbai from August 2022 - August 2023:

Figure 1 - ***Status of Mediation Applications in District Level Commercial Courts of Mumbai (August 2022 - August 2023)***



As is evident from Figure 1, the total number of pending pre-litigation mediation applications in commercial courts are only increasing (orange line) with only a small fraction of the disposed cases being settled successfully (blue line). Most cases that come up for pre-litigation mediation in Mumbai are non-starter because parties are not invested in the mediation process.

Litigants Forced to Use Loophole under Section 12A

The scope of Section 12A has been greatly diluted due to the carve-out provided in its language whereby in cases of urgent interim relief, the parties may bypass the pre-litigation mediation and directly file a suit in the courts. Since no parameter has been set out for considering "urgent interim reliefs", it is left to the discretion of the courts to be decided on a case-to-case basis. Considering the wide and dynamic scope of courts to grant interim relief in commercial disputes, most litigants are forced to use it as an antidote to avoid the unnecessary friction of forced mediation.

By way of illustration, infringement of intellectual property is a common element in common disputes. There is a well-established jurisprudence on the wide-ranging powers of courts to award injunction in case of IPR infringement. This is often used as an excuse to sidestep mediation. Even the Parliamentary Standing Committee analyzing the Mediation Bill acknowledged this issue. The practice of using "urgent interim relief" to avoid the unnecessary friction of mandatory pre-litigation mediation was corroborated in our conversation with stakeholders.

The Mediation Bill 2021 responded to this reality by closing this gateway that parties had under the 2015 Act to quicken the dispute resolution process. Accordingly, Clause 8 of the 2021 Bill mandated the court to direct the parties back to the mediation process after granting urgent interim relief. This is the opposite of the course of action in Section 12A of the 2015 Act.

The Standing Committee in its report on the Mediation Bill also corroborated this practice of bypassing the requirement of pre-litigation mediation due to the wide discretion provided to courts in granting interim relief. It said:

> *"...Further it has emerged from the experience of implementation of pre-litigation mediation under the Commercial Courts Act, 2015, that the provisions of interim relief were being used by the parties to delay pre-litigation mediation, wherein the party files an application for interim relief, which does not get decided for a long period of time."*[16]

The language of Clause 8 of the 2021 Bill and the observations of the Standing Committee highlight the limits of trying to change litigant behavior through a top-down legislative approach. As the Manivannan paper notes, it is a well-established axiom of policy-making that the coercive power of the State must be used rarely and only to address market failure[17]. Considering the hardship imposed on litigants by India's lengthy and complex court processes, parties in a commercial relationship have a built-in incentive to try out all possible means of amicable dispute resolution and litigation remains an option of last resort. If the parties have reached the stage where they see no other alternative to litigation, there is no benefit in delaying the inevitable by mandating pre-litigation mediation at this late stage.

[16] See note 3

[17] See note 16

Recommendation

In its 117th Report on the Mediation Bill 2021, the Standing Committee of the Parliament astutely noted that policy-makers must study the challenges faced in implementing the mandatory pre-litigation mediation provisions in the 2015 Act before expanding its scope for other categories of civil cases.

There is incontrovertible evidence to suggest that, at least for commercial cases, forcing unwilling parties to mediate only makes it an additional stage of the litigation and not an alternative. As pointed out by the Manivannan paper, the inevitable court litigation simply got delayed by 3-5 months with additional legal costs to no avail.

Further, the scope of Section 12A has been greatly diluted due to the carve-out provided in its language whereby in cases of urgent interim relief, the parties may bypass the pre-litigation mediation and directly file a suit in the courts. Considering the wide and dynamic scope of courts to grant interim relief in commercial disputes, most litigants are being forced to use it as a pretext to avoid mediation. As a result, an unnecessary wrinkle in timely and cost-effective dispute resolution has been created.

By way of illustration, infringement of intellectual property is a common element in commercial disputes. There is a well-established jurisprudence on the wide-ranging powers of courts to award injunction in case of IPR infringement. This is often used as an excuse to sidestep mediation. Even the Parliamentary Standing Committee analyzing the Mediation Bill acknowledged this issue.

Section 12-A has failed to take into consideration the simple fact that given the time-consuming and expensive nature of litigation process in India, it is always a measure of last resort once all scope for an amicable settlement has been exhausted. In most business transactions, the parties usually attempt to amicably settle their disputes through informal and formal consultations before sending legal notices and initiating litigation. Therefore, a court-mandated mediation becomes a "repetitive and redundant process"[18].

Based on the feedback of all stakeholders including the Parliamentary Standing Committee, the government in 2023 wisely took the decision to roll back the coercive nature of mandatory mediation for civil cases under the Mediation Bill 2021. Section 6 of the Mediation Bill 2023 makes pre-litigation mediation in civil cases voluntary, as it should be.

In order for the mediation system to be effective, it must earn its place in the dispute resolution ecosystem by virtue of its performance and not by a mandate. If made mandatory, it will just add an extra process and additional burden. Hence, we propose that Section 12A of the Commercial Courts Act 2015 must be amended to make pre-litigation mediation for commercial cases voluntary.

[18] Ibid