THE PRE-LITIGATION PARADOX: MAKING PEACE WITH MANDATORY MEDIATION UNDER THE COMMERCIAL COURTS ACT AND THE VOLUNTARY REGIME OF THE MEDIATION ACT, 2023

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ABSTRACT

This paper analyses the legal and practical issues under the Indian commercial dispute resolution system of mandatory and voluntary mediation. It targets the conflict between Section 12A of the Commercial Courts Act, 2015, which shows that pre-litigation mediation is a mandatory procedure and Section 5 of the Mediation Act, 2023, which advocates mediation as a voluntary process. In the study, the doctrinal and comparative research methodology is developed on a statutory basis, judicial interpretation and international models.

The results demonstrate that in India, the mandatory mediation process has failed to enhance settlement rates and usually leads to mechanical involvement. The research establishes that mandatory mediation is a procedural filter of access to court and not a settlement mechanism. Meanwhile, the level of participation in voluntary mediation remains at a very low level. The comparative analysis with the United Kingdom and Italy shows that the indirect pressure in the form of cost sanctions and obligatory first sessions may enhance the engagement, especially in the case of the minimal use of compulsion to initial exposure and institutional preparedness.

This paper states that full compulsion and full voluntariness are neither effective in the Indian context. Rather, a graded compulsory method where the parties will be asked to complete a limited number of structured mediation sessions, but are free to proceed or withdraw, seems to be more appropriate. The reason behind the conclusion is that reform of mediation in India ought to highlight the structured exposure, institutional capacity, and behavioural alignment more than procedural force.

Keywords: Mandatory mediation, Commercial Courts Act, Mediation Act 2023, Access to justice, Alternative dispute resolution.

INTRODUCTION

Background

Alternative Dispute Resolution (ADR) contains other approaches, including arbitration, mediation, and conciliation, that assist parties to settle disputes without recourse to court.[1]. Among them, the most flexible and cooperative approach is mediation since it enables the parties to come to a settlement by discussing with the assistance of a neutral third party. Mediation is helpful in the business world as it can save time, decrease legal expenses, and most importantly ensure preservation of business relationships.

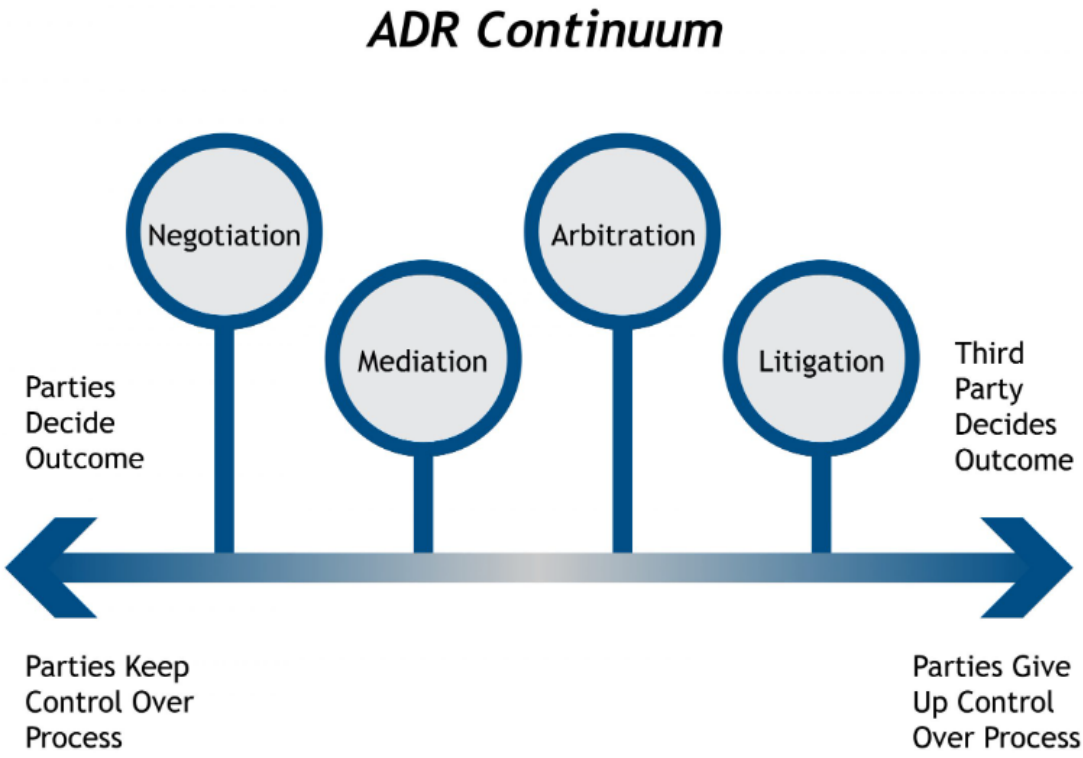

Figure 1: Representing the Dimensions of Alternative Dispute Resolution (ADR)

(Source: [2])

The principal reason why India undertook mediation reforms is due to the critical issue of

[1] Royal Institution of Chartered Surveyors. (2026). What is alternative dispute resolution? https://www.rics.org/dispute-resolution-service/alternative-dispute-resolution
[2] Randall, M., & Students, D. (2020, May 4). Alternative dispute resolution. CCC Online. https://pressbooks.ccconline.org/fundamentalsofbusinesslawCCD/chapter/chapter-4/

judicial delay. By 2023, Indian courts had over 50 million cases in their queue, with a big portion of them being civil and commercial cases[3]. Research indicates that a commercial dispute in India lasts approximately 3-5 years in the district court and even more in the High Courts[4]. The government estimates that delays in courts cost the Indian economy an estimated 1.5 per cent of GDP annually[5]. This indicates that slow dispute resolution is not only a legal problem but also an economic problem.

Although mediation was not a common practise, it existed at an earlier time. Court-annexed mediation centres' data indicate that in certain states, almost 90-98% of cases have not proceeded beyond the initial level of mediation due to a lack of willingness on the parties[6]. Most litigants thought that mediation wasted time, and instead, they preferred going to court. Consequently, voluntary mediation failed in alleviating court pressure in any significant sense. This collapse gave rise to the powerful legal changes to encourage mediation more efficiently.

Core Issue

The main problem discussed in this paper is the conflict between mandatory and voluntary mediation within the Indian legal system. Enforcement of mediation contradicts its primary concept of free consent. Meanwhile, the situation where mediation is fully voluntary has not been successful in India, with the level of participation being extremely low[7]. This leaves a policy vacuum in which both models fail to work well. Access to justice is another issue in this dispute. The compulsory mediation can postpone urgent cases and introduce additional procedures for small businesses. Conversely, voluntary mediation enables mighty subjects to escape settlement and persist with protracted court proceedings. There are weaknesses to both approaches.

The legislative framework: Conflicting mandates

The Commercial Courts Act was enacted in 2015 as part of accelerating commercial litigation.

[3] Benjie. (2024, March 5). Gathering dust. Law.asia. https://law.asia/practical-challenges-tackling-decades-old-cases/
[4] Daksh. (2016). Judicial efficiency and causes for delay. https://www.dakshindia.org/state-of-the-indian-judiciary-xhtml/section-two-6.xhtml
[5] Mathur, A. (2019). Judicial pendency. Atish Mathur. https://www.atishmathur.com/polity/judicial-pendency
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[7] Kinhal, D., & Apoorva. (2021). Mandatory mediation in India: Resolving to resolve. *Indian Public Policy Review*. https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India-Resolving-to-Resolve.pdf

In section 12A, the Act sets a binding requirement for parties to engage in pre-litigation mediation before initiating a commercial case, unless the litigation is urgent[8]. The Supreme Court explained this provision in *Patil Automation v Rakheja Engineers (2022),* in which the Court stated that under Section 12A, mediation is compulsory and that courts may dismiss cases submitted without mediation[9]. This ruling rendered mediation an obligatory procedure for commercial conflicts.

Conversely, the Mediation Act, 2023, was enacted to establish an appropriate legal structure of mediation in India[10]. Section 5 of this Act provides that the issue of mediation is voluntary and the parties are free to attend or not. Mediation can also be cancelled at any point[11]. This Act is intended to encourage mediation as a non-coercive and non-rigid approach.

The issue is that both these laws are effective simultaneously. Whereas the former law imposes mediation, the latter encourages voluntariness. This puzzles litigants, lawyers and even judges. The mediation is practised as a legal obligation, as well as a personal option, undermining its efficacy and clarity.

CRITICAL ANALYSIS OF THE EXISTING INDIAN REGIME

The primary findings of the research reveal significant structural flaws when analyzing the current statutory basis and judicial decisions.

1. Sec 12A as a Procedural Impediment

The initial significant conclusion is that Section 12A of the Commercial Courts Act serves as a firm legal impediment to access to court[12]. Following the ruling in *Patil Automation v Rakheja Engineers*, courts have taken pre-litigation mediation as a mandatory procedure[13]. In

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[9] Acuity Law. (2024, September 26). Pre-institution mediation mandatory for counterclaim under the Commercial Courts Act. https://acuitylaw.co.in/pre-institution-mediation-mandatory-for-counterclaim-under-the-commercial-courts-act/
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[12] S.S. Rana & Co. (2025, August 18). *Commercial counterclaims and the mandate of mediation: The jurisprudential expansion of Section 12A*. https://ssrana.in/articles/commercial-counterclaims-and-the-mandate-of-mediation-the-jurisprudential-expansion-of-section-12a/
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most instances, suits are dismissed at the filing stage where parties have failed to mediate. It is an indication that mediation is no longer a supportive construct but a procedural state.

However, this practise has not enhanced the outcome of settlements in any meaningful way. Court-annexed mediation centres provided reports that less than 15-20 per cent of commercial disputes are resolved via mandatory mediation[14]. In a few districts, parties are present at mediation to have the legal nonsense over with and to get away as soon as possible. This implies that mandatory attendance is not always a source of actual willingness to settle.

2. The Dilution of Legitimacy

The effect of the opt-in nature of Section 5 of the Mediation Act, 2023, on Section 12A is that it does not lessen its mandate but undermines its practical legitimacy[15]. Although pre-litigation mediation is a mandatory filing requirement in court, the voluntary structure of the Mediation Act sends an incongruent normative message. The parties are formally in compliance with mediation to fulfil Section 12A, but they are unwilling to engage in any meaningful manner since the governing mediation statute puts emphasis on free consent and withdrawal[16]. Consequently, Section 12A is more of a gatekeeping process, rather than a settlement-focused process, where mediation is moved off-substance and onto procedural compliance.

3. Normative Inconsistency

The other noteworthy observation is the inconsistency between Section 12A and Section 5 of the Mediation Act, 2023. Whilst one law imposes mediation, the other encourages free consent and withdrawal[17]. Practically, this causes confusion. Parties that feel coerced during mediation usually resist the mediator. Consequently, mediation turns out to be useless and mechanical instead of being solution-focused.

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COMPARATIVE PERSPECTIVES: GLOBAL MODELS OF ENGAGEMENT

Findings from the UK Model: Indirect Coercion via the Costs

High non-participation is not a reason to change commercial mediation to a completely voluntary form. Past evidence indicates that voluntary mediation establishments yielded non-starter rates of up to 90-98 per cent in several jurisdictions, meaning that party autonomy is insufficient to produce engagement. Compulsory mediation has enhanced attendance and not results, whereas voluntary mediation did not manage to attract participation at all[18]. This confirms that non-participation has been a behavioural and institutional issue, and not a legal one, and that repealing compulsion would only continue to undermine mediation uptake, rather than enhance it.

The UK has a voluntary mediation with cost penalties[19]. In this model, parties are not compelled to mediate, but in case they decline to mediate without justifiable reasons, courts can impose legal costs. Halsey v Milton Keynes was a case where courts were able to impose penalties on unreasonable refusal to mediate[20]. The most important observation of this model is that indirect pressure is more effective than direct force. According to studies of the UK Ministry of Justice, about 65-70 percent of commercial mediations lead to settlement when they are voluntary, and the parties are conscious of potential cost implications[21]. This model maintains party autonomy and, at the same time, encourages participation. However, the success of this system is due primarily to the high level of legal consciousness and professional mediation culture. Cost sanctions might not be sufficient to alter behaviour in India, where litigation is commonly perceived as the default. Most Indian litigants are happy to take a lawsuit to trial rather than settle the cases through negotiation, even at a greater cost.

[18] Chambers and Partners. (2025). *Territorial jurisdiction for pre-institution mediation under the Commercial Courts Act, 2015*. https://chambers.com/articles/territorial-jurisdiction-for-pre-institution-mediation-under-the-commercial-courts-act-2015

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Findings from the Italian Model: The 'Opt-Out' System

Italy has a compulsory first mediation meeting on some classes of disputes[22]. The parties must be present in the initial session, however, after the initial session, they are at liberty to quit. This model is a balance between compulsion and choice. According to the statistics provided by the Italian Ministry of Justice, the rates of settlements rose by approximately 20 to almost 45 per cent in five years following the implementation of mandatory initial mediation[23]. More to the point, parties had higher chances of remaining involved after the initial session. This implies that willingness to settle is more likely in situations in which the mediation has been exposed, although the initial move is compulsory. The Italian model also has institutional assistance, like trained mediators, fixed terms, and legal assistance[24]. These are the reasons why mediation is more organised and reliable. In Italy, the mediation infrastructure is more successful than in India, which is uneven. The role of institutional capacity is important.

Italian experience shows that moderate compulsion mixed with voluntary continuation is far more successful than others. Compulsory attendance at a first session puts parties to mediation without imposing settlement, which gives them the freedom to choose and not to be pressurised into negotiation[25]. This scaffolded structure transforms preliminary resistance into informed engagement, backed up by professionalised mediators, established timelines, and procedural understanding. In contrast to the Indian structure, the compulsion at Italy is not open-ended and instead, it is purpose-specific, thus the reason behind higher settlement retention following the initial session.

Overall Findings

The aggregate findings indicate no significant settlements at pure mandatory mediation and low participation at pure voluntary mediation. The UK model is effective in the developed legal cultures, whereas the Italian model demonstrates superior performance in the mixed systems. In the case of India, the results indicate that a moderated compulsory style is more appropriate.

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Making it mandatory to attend at least one of the sessions may boost awareness and lessen the resistance, although the continuation should be voluntary. In the absence of this balance, mediation would either be rendered ineffective or unfair. Overall, the findings prove that the existing system in India is not clear and consistent. The law system must be reformed not to enhance coercion, but to raise participation through organised and informed involvement.

DISCUSSION: TOWARDS A 'GRADED MANDATORY' FRAMEWORK

This section explains the meaning of the research findings and links them to wider legal and policy issues. The findings indicate that compulsory mediation fails to produce significant settlements in India, whereas voluntary mediation does not work at all since parties are not actively involved. This indicates that the existing legal system fails to meet the primary objectives of mediation, which are efficiency, fairness, and access to justice.

One of the criticisms often raised about mandatory mediation is that it violates access to justice, as it delays court access[26]. However, according to the findings, delay is not specific to mediation, but it occurs due to inadequately structured and open-ended mediation processes. Mediations where the mediation is restricted to a specified and time-limited stage of the first step do not preclude access to court but rather sieve out cases not warranting a complete judicial proceeding.

Theoretical Analysis: Voluntariness vs. Coercion

The central theoretical issue is the contradiction between voluntariness and coercion. The mediation process is developed as something in which the parties decide to negotiate. The results reveal that in cases where mediation is compelled under Section 12A, it will be mechanical. Parties do not resolve disputes at all but simply participate in sessions to meet legal requirements[27]. This declines trust and diminishes the importance of mediation as a tool of cooperation. Regarding the ADR philosophy, mediation is expected to establish a room to negotiate and solve problems[28]. Compulsory mediation, however, alters this role. Parties are

[26] Kamilovska, T. Z., & Rakočević, M. (2025). Mandatory initial mediation session: Evaluating the effects of compulsion in dispute resolution—the case of North Macedonia. In European Union and its neighbours in a globalized world (p. 193). Springer. https://link.springer.com/chapter/10.1007/978-3-031-76345-8_12
[27] Acuity Law. (2024, September 26). *Pre-institution mediation mandatory for counterclaim under the Commercial Courts Act*. https://acuitylaw.co.in/pre-institution-mediation-mandatory-for-counterclaim-under-the-commercial-courts-act/
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not cooperative but defensive, and they are oriented towards legal strategy. This makes mediation a procedural process as opposed to an alternative dispute mechanism. The findings show that mediation becomes deprived of its fundamental meaning in the absence of a free choice.

Another frequent objection is that any compulsion will compromise the philosophical background of ADR. This assumption is criticised in the findings, which indicated that voluntariness is exaggerated during the pre-litigation stage. In business cases, litigants do not engage in mediation at will because of tactical procrastination, distrust or ignorance. The presence of limited compulsion at the entry stage does not thus kill consent but facilitates informed choice by introducing parties to the mediation process before commencing the litigation process.

Practical Challenges in India and the Delay Paradox

Low involvement in meaningful mediation is one of the key discoveries. Although the mediation process is mandatory, the rate of settlement is low. A great number of parties leave after the initial session or do not want to negotiate seriously. This indicates that legal pressure is not enough to alter behaviour.

It is more about attitude than legal regulations. Institutional capacity is another area of concern. India lacks a powerful and consistent system of mediation[29]. There are a lot of centres that do not have trained mediators, standard procedures and proper infrastructure. This diminishes the quality of mediation and discourages good participation. Mediation is ineffective without professional assistance, whether it is legally required or not.

The resistance by lawyers also undermines mediation. Litigation is favoured by many lawyers due to its extended engagement with the profession[30]. The danger is often seen in mediation, which encourages rapid settlement. Consequently, the lawyers might not be so willing to promote mediation and might instruct others to view it as a formality. This is what renders a

https://www.researchgate.net/publication/389390725_Paper_Title_The_Importance_of_Mediation_as_an_Alternative_Dispute_Resolution_Method

[29] Chihaavi, E. (2021, November 29). *Decoding India's draft Mediation Bill 2021*. Jurist. https://www.jurist.org/commentary/2021/11/khushi-dua-decoding-mediation-bill-2021/

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disconnect between legal policy and legal practise. Another important finding is the delay paradox. The argument is that delay is inevitable in ADR processes.

The findings, however, show that delay is inevitable only in cases when mediation does not have pre-set timelines and exit ambiguity. One required session with withdrawal rights will not create delay, but will help in lessening avoidable litigation. This demonstrates that delay is an organisational issue, not an inevitable part of mediation. The introduction of mediation is aimed at minimising delay, yet in most instances it introduces one more step to the process[31]. In cases when the mediation fails, the parties lose months in court. This defeats the primary purpose of reform. Mandatory mediation does not save time, it occasionally adds to it.

Evaluating/Synthesis of the Reform Models

The UK model is based on cost sanctions to promote mediation. Parties have a free right to refuse, yet they will be subject to financial penalties in the case of unreasonable refusal[32]. This system has operated in the UK since litigants are aware of legal costs and behave strategically. Within the Indian context, however, most parties do not think about long-term financial impact. Thus, the effect of cost sanctions might not alter behaviour significantly.

The Italian model seems to be more appropriate. It obligates parties to spend a single initial time on a mediation session, though it grants them the option to withdraw[33]. Another criticism is that the Italian model is culturally specific and hence does not fit India. The results do not prove this opinion. The Italian model has been successful because of its guide and not its cultural background. Compulsory first attendance and voluntary subsequent attendance will deal with the issue of behavioural resistance, which is also a problem in India. This means that the Italian model is institutionally transferable if it is modified to fit the local conditions. This model presents mediation without coercion to settlement. It has been demonstrated that after parties visit the first session, a large number decide to go on with it.

Exposure to mediation leads to trust and less opposition. Nevertheless, the threats of over-

[31] McGuinness, C. (2020). *Alternative dispute resolution - mediation and conciliation*. CEJA Americas. https://biblioteca.cejamericas.org/handle/2015/720

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[33] Matteucci, G. (2025, April 2). *The trilogy of the Italian mandatory mediation law from the 7th Century BC to 2025, including artificial intelligence*. Mediate.com. https://mediate.com/italian-mandatory-mediation-law/

compulsion exist. The use of excessive force can amount to infringement of party autonomy and the prejudice of weaker parties. It can also pose constitutional issues. That is why any mandatory component should be restricted and well-constructed.

Thus, the debate is in favour of a moderated obligatory approach. It is found that neither complete compulsion nor complete voluntariness is very effective. The most feasible solution for India would be a balanced system whereby parties have to attempt mediation once and have the liberty to proceed or withdraw.

CONCLUSION

This study highlights a fundamental issue in the Indian mediation system, which is its contradictory approach to mediation that is both mandatory and voluntary. Section 12A of the Commercial Courts Act renders mediation a legal requirement, while the Mediation Act, 2023, Section 5, encourages the right to participate in mediation and withdraw. This two-sided strategy has brought about legal doubts and undermined the viability of mediation practise. These results indicate that mandatory mediation has failed to lead to significant settlement results. Most parties come to mediation just to comply with the law, and they fail to negotiate in good faith. Meanwhile, voluntary mediation fails because there is a lack of awareness, institutional support, and lawyer resistance. The findings also confirm that the absence of participation is not the reason to adopt a purely voluntary regime since voluntary mediation systems have traditionally demonstrated a very low level of involvement in business conflicts. This shows that dispute resolution behaviour cannot be transformed with legal compulsion.

A comparison to the UK and Italian models would imply that a moderate system is more effective than an extreme system. The UK model indirectly motivates participation using cost sanctions, whereas the Italian model involves an initial mediation session without compelling settlement. Both systems demonstrate that mediation and incentive behaviour exposure are more effective than legal coercion. Based on these findings, the paper concludes that India needs to pursue a moderate compulsory model. One formal mediation session should be mandatory, and the rest of the process should be voluntary. Such a calibrated framework is efficient and effective, grants parties independence, and provides miraculous access to justice, without the rigidity and equity issues of open-ended compulsory mediation. It is a system that can enhance awareness, minimise resistance, and safeguard access to justice. In the absence of this balance, mediation in India can be rendered either ineffective or unfair, which is counterproductive to the goal of legal reform.

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