Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2025 – ISSN 2582-7820

Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

The Challenges of Mandating Pre-Litigation Mediation in Commercial Cases

Om Rajan Shetty[a] Purnima Rathi[b]

[a]Symbiosis Law School, Pune, India [b]Symbiosis Law School, Pune, India

Received 07 May 2025; *Accepted* 09 June 2025; *Published* 12 June 2025

The paper critically examines the legal and policy evolution of pre-litigation mediation in India, particularly focusing on its intersection with commercial and shareholder disputes under Section 12A of the Commercial Courts Act 2015[1] and the Mediation Act 2023[2]. The significance of this study is India's overburdened judiciary and the urgent need to institutionalise effective alternative dispute resolution (ADR) mechanisms. The objectives are to evaluate the constitutional and practical viability of compulsory mediation, understand its efficiency through empirical data, and analyse its suitability for commercial and corporate disputes. The methodology adopted is doctrinal, supported by qualitative analysis of primary legislation, judicial interpretations, and academic literature. The findings suggest that while mediation offers a valuable non-adversarial avenue for dispute resolution, mandating it often undermines its core principle, party autonomy. The paper makes a case for a calibrated, incentivised model of mediation that derives legitimacy through outcomes and trust, rather than coercion.

Keywords: *pre-litigation mediation, commercial courts, mediation, mandatory mediation.*

[1] Commercial Courts Act 2015, s 12A

[2] Mediation Act 2023

INTRODUCTION

The Introduction of the Mediation Act 2023 signals a significant milestone in India's court system by establishing mediation as an autonomous and formal process in the overall justice system. The legislation showcases an ongoing government-wide policy response to the overwhelming court system, where millions of magistrates, city civil courts, high courts, etc., may adjudicate over 50 million pending cases.[3][4] More particularly, as part of that policy, pre-litigation mediation has been promoted as a mechanism to slow down the influx of cases and help resolve commercial disputes amicably under Section 12A of the Commercial Courts Act, 2015.

That said, the implementation of pre-litigation mediation does raise several questions as both legal and policy issues. For example, Section 12A provides that a commercial suit must be mediated before proceeding, unless emergency distress relief is sought, and it includes a threshold for the monetary value of matters.

The mandatory nature of Section 12A is contrary to the essence of mediation, which is designed to be voluntary and controlled by the parties to the mediation in directing their outcomes.[5] Section 12A, while intended to flow cases and reduce the burden on courts, has shown that 98% of pre-litigation mediation applications have been suspended in the district commercial courts (DCCs) in Mumbai from 2020 to 2023 due to the inability of parties to appear, and only 1% have settled.[6]

In practice, however, legislative intent is often frustrated by practical issues, including a lack of public awareness, weak infrastructure, and a lack of organisational capacity. Pre-litigation mediation has not achieved broad resolution of disputes, and appears instead to reflect a procedural barrier to access for minimal benefit, calling into question whether it is a useful form of compulsory intervention.

---

[3] Urvashi Mishra, 'With 50 million pending cases, India's judicial data gaps are scaring investors' *Fortune India* (28 April 2025) <https://www.fortuneindia.com/business-news/with-50-million-pending-cases-indias-judicial-data-gaps-are-scaring-investors/122518> accessed 05 May 2025

[4] Mohit Mokal, 'Enabling ODR and Mediation in India' (Thesis, Queen Mary University of London 2021)

[5] *Yamini Manohar v T K D Keerthi* (2023) SCC OnLine Bom 292

[6] 'Mandatory Mediation In Commercial Dispute Resolution Has Low Success Rate, Should Be Made Voluntary: Sanjeev Sanyal' (*Swarajya*, 15 November 2023) <https://swarajyamag.com/news-brief/mandatory-mediation-in-commercial-dispute-resolution-has-low-success-rate-should-be-made-voluntary-sanjeev-sanyal> accessed 05 May 2025

Further complicating the framework is the expansion of mandatory mediation into domains like shareholder disputes, where trust breakdowns are deeply personal and resolution requires more than procedural compulsion.[7] The proposed amendments under the Mediation Act, 2023, to empower tribunals to refer such disputes to mediation are seen by some as progressive but risk being undermined if implemented through a rigid, mandatory model.

This research seeks to explore whether the current framework balances judicial efficiency with litigants' autonomy, especially in sensitive commercial contexts.[8]. It asks whether mandatory pre-litigation mediation is a step forward in reform or a procedural checkbox that adds delay without impact. By evaluating legislative intent, judicial interpretation, and comparative practices, such as Italy's structured model of mandatory mediation, this paper critically engages with whether India's mediation strategy truly serves justice or merely appears to.[9]

LITERATURE REVIEW

The following literature review outlines what scholars and academicians have written about Pre-Institution Mediation (PIM) under Section 12A of the Commercial Courts Act 2015. It assesses both positive and negative interpretations of the design and execution of mandatory commercial mediation in India, as well as the experience of similar models as applied to mediation in other countries, such as Italy and Turkey. The review seeks to identify system-wide problems engaging, such as non-involvement of litigants, a lack of clarity around urgency exemptions, infrastructure and stakeholders and a lack of primary data, sector-level data, and cross-border enforcement mechanisms.

Vikas Gahlot and Ritika:[10] The paper presents a review of Pre-Institution Mediation (PIM) in India, under the Commercial Courts Act (2015), and comparisons with the models in Italy and Turkey. The paper identifies gaps with respect to India (non-participation, lack of enforcement, absence of incentives), using empirical data and expert discussions.

---

[7] *Rakesh Malhotra v Rajinder Malhotra* (2014) SCC OnLine Bom 114
[8] *K Srinivas Rao v D A Deepa* (2013) 5 SCC 226
[9] Felix Steffek et al., *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart 2013)
[10] Vikas Gahlot and Ritika, 'Pre-Institution Mediation for Speedier Resolution of Commercial Disputes: A Comparative Analysis of India, Italy and Turkey' (2022) 2(2) Vishwakarma University Law Journal <https://vulj.vupune.ac.in/archives3/02.pdf> accessed 05 May 2025

The study did not contain quantitative impact data, and impact studies in Italy, Turkey, and stakeholder perception data, evaluating institutional capacity in India. PIM initiatives are equally constrained by regional communication mechanisms (e.g., delay of public outreach, legal culture, informal mediation) and mediator quality. Finally, behavioural factors surrounding mediators and participants were not identified.

Sanjeev Sanyal and Apurv Kumar Mishra:[11] This paper critiques the mandatory pre-litigation mediation, found in Section 12A of the Commercial Courts Act 2015, using data provided from Mumbai courts (2020-2023) to show failures in the system. The study mentions that the affiliate cases had nine hundred ninety-seven to nine hundred ninety-nine per cent of cases were non-starters, and only one per cent were settled.

The paper argues that the mandatory mediation delays then make the proceedings last in four to five months, increase financial pressure, and encourage defendants to misuse the urgent interim relief loophole. The authors compare this to the Mediation Act 2023, making civil mediation voluntary, and suggest reform is needed in a similar way for commercial disputes. In such the study is framed around mediation being voluntary and being supplied for by the stakeholders, and requested concrete findings that could be adopted instead of being coerced.

The study does not indicate why parties won't use mediation (for example, distrust, lack of awareness, strategic litigator to enforce risk-disclosure, will wistful words constitute enforceable promises in contract law, etc.). The authors do not indicate any greater regional examination of data outside of Mumbai or the specific challenges to particular sectors to integrate (for instance, IP disputes compared to breaches of an actionable promise or tort).

Sahil Kanuga & Shraddha Bhosale:[12] This NLUJ article reviews the legal regime surrounding commercial mediation in India, namely examining the Singapore Convention, CPC Section 89, and the MSMED Act. The article identifies low settlement rates (1-4% in Maharashtra/Karnataka) and conduct complexities (e.g., conflicts with Med-Arb under the MSMED Act) and promotes Italy's Required Initial Mediation Session model of mediation

[11] Mandatory Mediation In Commercial Dispute Resolution Has Low Success Rate, Should Be Made Voluntary: Sanjeev Sanyal (n 6)
[12] Sahil Kanuga and Shraddha Bhosale, 'Mediation of Commercial Disputes in India' (2021) 7(2) NLUJ Law Review

since it captures mandatory and voluntary practice. In this article, the authors established the promise of mediation while qualifying its current strengths as being underpinned by infrastructural limitations, untrained mediators, and low public awareness. They recommend a mediation-specific legislation framework, standardised mediation training programs, and additional advertisements to improve mediation effectiveness.

The research does not include empirical analysis of why mediation fails in different sectors (e.g., SME v large corporations) and did not measure any economic effects of the delays, or compare India's commercial mediation framework against other signatories to the Singapore Convention. It also has not addressed the concept of online mediation/digital transformations, nor can we assess how stakeholders view mediation (e.g., corporate counsel).

Akash Hogade:[13] The article explores the Delhi High Court ruling (Aditya Birla v Saroj Tandon) that counterclaims under the Commercial Courts Act must undergo pre-institution mediation. The article contended that this ruling increases delay through (and highlighted studies) that 98% of mediations fail due to a lack of participation. The authors also raised concerns about the lack of infrastructure (e.g., not enough mediators) and cautioned against an approach that treats mediation simply as a procedural box to tick. Nevertheless, they confirmed the ruling aligns with the enabling statute, but they were advocating for voluntary mediation, trained professionals, and timelines that do not allow for abuse of process.

The authors' analysis did not offer any empirical data on the impact of mediation for counterclaims on case timelines or litigant satisfaction. The ruling also did not examine the discretion judges have in determining what is 'urgent,' or whether there are inherent trends in urgency based on, for example, types of disputes (real estate versus IP).

Purvi Doctor, Richa Phulwani, and Prachi Tandon:[14] This article in Bar & Bench argues that pre-institution mediation (PIMS) is self-defeating, mentioning factors such as forced participation, vagueness over 'urgent interim relief' standards, and processes where

[13] Akash Hogade, 'Pre-Institution Mediation Settlement: Roadblock or Resolution?' *Bar & Bench* (27 September 2024) <https://www.barandbench.com/apprentice-lawyer/pims-a-roadblock-or-a-resolution> accessed 05 May 2025

[14] 'Pre-Institution Mediation Mandatory for Counterclaim Under the Commercial Courts Act' (*Acuity Law*, 26 September 2024) <https://acuitylaw.co.in/pre-institution-mediation-mandatory-for-counterclaim-under-the-commercial-courts-act/> accessed 05 May 2025

plaintiffs' cases could be dismissed under a mandatory Order VII Rule 11 (plaint rejection). The article goes on to suggest that compulsion erodes the voluntary character of mediation with references to judgments in Patil Automation and Aditya Birla. The author argues for PIMS to adopt a commercial spirit by way of exceptions, including mutual litigation agreements, definitive tests for urgency, and the return (not rejection) of the plaintiffs' document in a mandatory setting. The article draws the librarians' attention to the need for educating PIMS stakeholders and the application of Italy's initial session model to encourage voluntary mediation processes and participation rates.

The underlying paper does not provide empirical research about how subjective urgency assessments by judges influence case outcomes or litigants' behaviours. It does not look for insights from comparative studies around other jurisdictions that effectively balance mandatory vs voluntary mediation.

Bhavesh H Bharad and Sandeepkumar Pandya:[15] This article explores pre-institution methods (negotiation, arbitration) and mediation as proactive avocations of consumer dispute management. Bharad and Pandya view these as more cost-effective, reputationally desirable, and adding to consumer satisfaction, in the way of empirical case studies. What was omitted from this article is an analysis of sector-specific implementation barriers, as well as cultural variations affecting mediation in practice. The paper lacks understanding industry industry-specific limitations/barriers, and cross-cultural applications of these methods.

Lalan Gupta, Atika Vaz, and Anuj Loya:[16] This analysis underscores the mandatory nature of pre-institution mediation under Section 12A of the Commercial Courts Act, 2015, citing Patil Automation v Rakheja Engineers. It highlights judicial emphasis on reducing case backlogs but identifies gaps in mediator training, infrastructure, and potential misuse of 'urgent relief' exceptions.

---

[15] *Ibid*

[16] Lalan Gupta et al., 'Pre-Institution Mediation: A Stepping Stone Towards Amicable Dispute Resolution' (*Shardul Amarchand Mangaldas & Co*, 01 May 2023) <https://www.amsshardul.com/insight/pre-institution-mediation-a-stepping-stone-towards-amicable-dispute-resolution/> accessed 05 May 2025

Research is needed on procedural safeguards to prevent abuse and improve institutional capacity.

Aravind Sundar:[17] Sundar provides an insightful critique of conflicting judicial perspectives (pleading, justification, antecedent conduct) to determine urgency, under Section 12A. Although Sundar is advocating for judicial rigour, the article lacks reflection on the systemic imbalances of power as they exist in commercial disputes. The gap relates to a more equitable framework of values to preclude more powerful disputing parties able to voiding mediation.

Shrey Patnaik:[18] Patnaik claims that mandatory mediation serves an important function in maintaining family and business relationships during disputes, especially about shareholder disputes in family businesses. Mediation provides a less confrontational, coach-like approach where relationships can build trust and peace during times when continuity in personal and professional relationships is important. While there is little research comparing the success rates of mediation and litigation in the Indian context, more empirical evidence will strengthen the justification supporting mediation mandatory sufficiency. Future empirical research should be quantitative to provide an effective evaluation.

Soumya Gulati, Shweta Sahu, and Sahil Kanuga:[19] The Author offers a comprehensive assessment of the Mediated Settlement Agreement (MSA), and the declarations would steer India toward more formal and better-regulated mechanisms of mediation. It is certainly a step in a positive direction, as well as the appropriate treatment of mediation as an alternative dispute resolution, institutional mediation will positively bring additional credibility to the process. On the other hand, the authors observe one notable shortcoming that has general application, particularly instead of the Seine Convention on Mediation, i.e., the current Act does not provide for the enforcement of cross-border mediated settlement agreements. Hence, India presently cannot take advantage of the evolving global mechanism for alternative dispute resolution, which would seem inevitable given the recent trajectory of

[17] Aravind Sundar, 'Determining Urgency in Compulsory Pre-Litigation Commercial Mediation' (2024) 13(2) NLIU Law Review <https://nliulawreview.nliu.ac.in/wp-content/uploads/2024/06/NLIU-Law-Review_Volume-XIII-Issue-2-64-85.pdf> accessed 05 May 2025

[18] Shrey Patnaik, 'The Case for Mandatory Pre-Institution Mediation for Indian Shareholder Disputes' (*Kluwer Mediation Blog*, 29 July 2024) <https://mediationblog.kluwerarbitration.com/2024/07/29/the-case-for-mandatory-pre-institution-mediation-for-indian-shareholder-disputes/> accessed 05 May 2025

[19] Soumya Gulati et al., 'Decoding the Mediation Act, 2023' (*Nishith Desai Associates*, 04 September 2023) <https://www.nishithdesai.com/SectionCategory/33/Research_and_Articles/12/57/57/10748/5.html> accessed 05 May 2025

international commercial transactions. While commercial transactions continue to evolve, the significant issue of enforceability in cross-lateral contexts becomes increasingly pressing. Highlights India's applicability number being clad with the shine as a robust stop en route dispute resolution hub, and what this should mean for the current, but also future outlook of commercial mediation in India. By allowing domestic mediation laws to align with instruments such as the Singapore Convention, it would have improved and reintegrated the validity of India's legal boundaries, options, and offered it some depth relative to the mainstays of cross-border mediation.

Akashdeep Sengupta:[20] Sengupta provides a critical perspective regarding compulsory mediation for tackling India's rising judicial backlog, weighing the need for judicial efficiency against the need to ensure litigants can exercise their autonomy. The piece identifies practical issues with implementing compulsory mediation, including that the legal profession views it as just another hurdle to deal with and worries about a limited pool of properly trained mediators. All of these issues engender scepticism about whether compulsory mediation will even work in the context of legal practice. While the paper does a solid job of outlining the hurdles that must be overcome in order for compulsory mediation to work, it does not offer practical suggestions to overcome the hurdles. In particular, the paper does not present any evidence to suggest how mediators can be incentivised to become accredited or how a scheme can be developed to ensure mediators are receiving training of adequate quality.

Gungun Agrawal:[21] Agrawal provides a historical account of mediation in India, making a case for its historicity, with mediation historically existing in the form of traditional dispute resolution mechanisms, like village Panchayats. The paper applauds the Mediation Act, 2023, which updated the historicity of mediation from a traditional viewpoint to a technology-led format, including online mediation. It noted the availability a digital mediation could have for access to justice, the quicker resolution mediation can provide as opposed to an adversarial court process, which can be lengthy, as well as the affordability aspect of mediation through a digital solution, especially amid the pandemic, where remote solutions

[20] Akashdeep Sengupta, 'Pre-Institution Mediation: A Rule or a Law?' (2023) 3(4) Indian Journal of Integrated Research in Law <https://ijirl.com/wp-content/uploads/2023/08/PRE-INSTITUTION-MEDIATION-A-RULE-OR-A-LAW.pdf> accessed 05 May 2025

[21] Gungun Agrawal, 'From Conflict to Collaboration: Pre-Litigation Mediation After the Mediation Act 2023' (*NLR Law Blog,* 12 November 2024) <https://nliulawreview.nliu.ac.in/blog/from-conflict-to-collaboration-pre-litigation-mediation-after-the-mediation-act-2023/> accessed 05 May 2025

have become more normal. The paper does not go as far as to identify the benefits of adopting new emergent technologies, including artificial intelligence, into the mediation process. Research must develop potentially AI-based tools for case management, as well as performance measurement benchmarks, so mediators can get better at their performance and, importantly, their outcomes for parties in mediation.

RESEARCH METHODOLOGY

The authors have adopted both doctrinal and non-doctrinal research methodologies to broaden the scope and depth of this study. The paper primarily relies on secondary data sourced from peer-reviewed journals, legal reports, academic blogs, official policy documents, and legislative texts to enable a comprehensive exploration of India's mediation landscape.

Doctrinal analysis has involved interpreting statutory texts, judicial precedents, and parliamentary debates. In terms of data collection and analysis, empirical trends were drawn from Mumbai commercial courts, especially court-reported outcomes of settled, failed, and non-starter cases.

The research further incorporates case studies concerning shareholder disputes and pre-litigation behaviour in family-run businesses and joint family companies. Legal databases, including HeinOnline, LexisNexis, SCC Online, and the Kluwer Mediation Blog, have been extensively used for sourcing legal literature and case law.

A comparative dimension is introduced by studying the Italian model under Legislative Decree 28/2010 and the European Union Mediation Directive (2008). Additionally, key policy documents such as the Standing Committee Report on the Mediation Bill (2022), Law Commission Reports (188th and 253rd), and the World Bank's Ease of Doing Business indicators on contract enforcement have been evaluated. This extensive and multi-faceted approach enables a robust assessment of India's mediation strategy, essential for addressing the broader research problem identified in this study.

CRITICAL ANALYSIS

Practical Efficacy of Mandatory Pre-Institution Mediation: Despite the legislative intent behind Section 12A of the Commercial Courts Act 2015, the on-ground implementation of

mandatory pre-institution mediation (PIM) has proven largely ineffective. While the framework was envisioned to streamline commercial dispute resolution and reduce the burden on courts, empirical evidence suggests that the mechanism, in its current form, is more symbolic than functional.[22]

A comprehensive analysis of Mumbai's commercial courts from 2020 to 2023 reveals a concerning trend. Approximately 98% of the applications for PIM were non-starters, meaning the opposite party refused to participate in the mediation process altogether. Only 1% of cases led to settlements, with another 1% resulting in failed mediations.[23] This stark mismatch between policy intent and ground reality underscores a systemic disconnect. Instead of serving as a meaningful gateway to dispute resolution, PIM often becomes a procedural hurdle, adding an average of 3–5 months to litigation timelines and escalating legal costs.[24]

The inefficacy of this model is further echoed in Sengupta's research. The paper outlines that, under the 2018 Rules, when the opposing party refuses to engage, the mediation is marked as a non-starter, a loophole frequently exploited. In such cases, the process fails not due to an absence of legal framework but a lack of willingness and accountability on the part of parties to genuinely participate.[25] The author rightly questions whether this legislative push is solving any real problem or merely shifting the burden from courts to under-resourced mediation channels. Moreover, the rigid imposition of PIM paradoxically undermines the very essence of mediation, voluntary participation and mutual consent. Compulsory mediation, as argued by both Sanyal and Sengupta, transforms a consensual dialogue mechanism into a checkbox exercise. This not only burdens litigants but also erodes faith in mediation as a credible alternative dispute resolution (ADR) tool.

---

[22] Standing Committee, *Report on the Mediation Bill, 2021–22* (2022)
[23] Deepika Kinhal and Apoorva, 'Mandatory Mediation in India – Resolving to Resolve' (2020) 2(2) Indian Public Policy Review <https://doi.org/10.55763/ippr.2021.02.02.004> accessed 05 May 2025
[24] Umakanth Varottil, 'Supreme Court on Mandatory Pre-Litigation Mediation in Commercial Court Cases' (*IndiaCorpLaw Blog*, 05 September 2022) <https://indiacorplaw.in/2022/09/05/supreme-court-on-mandatory-pre-litigation-mediation-in-commercial-court-cases/> accessed 05 May 2025
[25] Roselle Wissler, 'The Effectiveness of Court-Connected Dispute Resolution in Civil Cases' (2004) 22 Conflict Resolution Quarterly <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723283> accessed 05 May 2025

To be effective, pre-litigation mediation must be approached not as a legal compulsion but as a strategic and cultural shift in the way commercial disputes are handled. The revised Mediation Act 2023, which restores voluntariness for civil disputes (but not for commercial ones), acknowledges this contradiction, raising a valid policy question: If forced mediation doesn't work in civil matters, why should it in commercial ones?

Contradiction with the Principle of Party Autonomy: Mediation, by its very nature, is rooted in party autonomy and the willingness to engage in dialogue.[26] It is intended to be a consensual, non-adversarial mechanism aimed at fostering mutual understanding and preserving relationships. However, the legislative attempt to make pre-institution mediation (PIM) mandatory, especially under Section 12A of the Commercial Courts Act 2015, strikes at the heart of this foundational principle. This contradiction is not just philosophical but also practical.

The EACPM candidly labels this mandate 'paradoxical', arguing that coercing parties into a process designed to be voluntary defeats its very essence.[27] Mediation, in essence, requires the active participation and honest engagement of both sides, something that cannot be legislated into existence. By turning it into a statutory precondition, it risks becoming a mere formality rather than a genuine effort to resolve disputes.[28] The Mediation Act 2023 seems to acknowledge this contradiction.[29] It reversed the mandatory provision proposed under the 2021 Mediation Bill for civil cases, allowing parties to choose whether or not to engage in PIM voluntarily.[30] The rationale is straightforward: a process reliant on cooperation should not be imposed through coercion. And yet, the same voluntariness has not been extended to commercial disputes, leading to an inconsistent legal landscape.

This inconsistency was further critiqued in Kluwer[31], which highlighted how mandatory mediation undermines trust in the process and hampers party autonomy. The blog

[26] *Ibid*
[27] Expert Advisory Committee on Pre-Mediation (EACPM), *Report on Section 12A and Voluntariness in Mediation* (2023)
[28] Akshat Pande and Chirag Gupta, 'The Mediation Bill 2021' *Bar & Bench* (31 July 2023) <https://www.barandbench.com/law-firms/view-point/the-mediation-bill-2021-a-primer> accessed 05 May 2025
[29] Mediation Act 2023
[30] *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* (2010) 8 SCC 24
[31] Kanuga (n 12)

emphasised that while the judiciary and legislature aim to reduce case backlogs through mediation, imposing it without party consent can backfire, leading to procedural delays, increased costs, and superficial participation that dilutes the process's value.

Mediation is most successful when parties come to the table out of choice, not compulsion. As the law currently stands, the coercive framework surrounding commercial PIM stands at odds with the very principles that make mediation work. A voluntary framework that encourages, educates, and incentivises genuine participation is far more aligned with both the spirit of mediation and the practical goal of reducing judicial backlog.

Legal Mandate Versus Commercial Reality -

Whether the blanket implementation of pre-institution mediation (PIM) under Section 12A aligns with the operational and strategic needs of business, or disregards the intricacies of commercial transactions. We will discuss the issue in two discrete sub-issues:

Judicial Interpretation of Section 12A: The fact that the Indian judiciary is rigidly applying Section 12A of the Commercial Courts Act, 2015, which requires pre-institution mediation (PIM) in all commercial disputes if urgent interim relief is not being sought, raises troubling questions when viewed from a business perspective. While it has been argued that this is simply a necessary gatekeeping function of the courts, the practical consequences for businesses suggest that there is an increasing mismatch in the application of judicial formalism and the fundamental requirement that disputes must be resolved swiftly and predictably.

The historic Supreme Court decision in Patil Automation Pvt. Ltd. v Rakheja Engineers Pvt. Ltd[32] is a key development in this discourse. In its judgment, the court[33] held that Section 12A is not simply procedural but instead a mandatory precondition, and non-compliance means the suit would be liable to be dismissed under Order VII Rule 11 of the CPC[34].

The judgment received praise for providing consistency in procedural rules but was criticised for failing to appreciate the realities businesses face, especially in industries such as

[32] *Patil Automation Pvt Ltd v Rakheja Engineers Pvt Ltd* (2022) 10 SCC 1
[33] *M/S Shahi Exports Pvt Ltd v M/S Gold Star Line Ltd* (2023) SCC OnLine SC 750
[34] Code of Civil Procedure 1908

technology and intellectual property, where even small amounts of delay can produce large commercial losses.[35]

A study shows the real-world consequences of this orthodox interpretation. The original goal was to facilitate ADR, but businesses now find themselves in a morass of procedural requirements that cost more time and money instead of rewarding a successful amicable resolution. In another paper, the author criticises the judgment for missing the structural limitations of India's mediation infrastructure. With a population lacking an adequate pool of qualified mediators and an inadequate institutional framework, businesses are effectively being compelled to undertake a process that cannot serve their needs.

Even more revealing is the way courts interpret the exception for 'urgent interim relief.' The ambiguity about what constitutes 'urgent' has created an avenue for litigants and has resulted in a body of inconsistent jurisprudence.[36] A paper notes that courts like the Bombay and Calcutta High Courts have taken a strict view, while others like the Madras High Court have acknowledged that mandatory mediation may infringe upon access to justice in some cases.[37]

The question then remains: Does rigid enforcement promote meaningful resolution, or does it delay the inevitable litigation businesses were prepared to undertake? For commercial entities, time is money, and predictability, not procedural detours, is key. In prioritising statutory compliance over commercial intent, judicial interpretation of Section 12A may be unintentionally hampering the very efficiency the Act set out to achieve.

Sector-Specific Sensitivities in Commercial Disputes: While Section 12A of the Commercial Courts Act 2015[38] mandates pre-institution mediation (PIM) for all commercial disputes, this blanket approach neglects the diverse nature of disputes that arise within the corporate and commercial landscape. To treat high-stakes shareholder disputes and fast-moving intellectual property (IP) litigation as if they are merely breaches of contract is to impose a one-size-fits-all solution that is likely to cause more harm than good.

[35] Sengupta (n 20)
[36] *Ambalal Sarabhai Enterprises Ltd v KS Infraspace LLP* (2020) 15 SCC 585
[37] Sengupta (n 20)
[38] Commercial Courts Act 2015, s 12A

It is worth raising an important caveat: shareholder and governance disputes are often fueled by a history of eroded trust, emotion, and long-standing relationships.[39] Mediation in such situations can be very effective when voluntarily begun, and when the parties indicate a sincerity in finding a solution. When mediation is forced upon them, especially where one party is unwilling or role-playing for bad faith positions, the mediation process can easily lapse into performance art rather than a productive exercise.

In addition, disputes such as IP infringements/contraventions or breach of fintech contracts often necessitate--or benefit from--immediate judicial intervention.[40] These categories of cases are low in time tolerance because the very essence of the legal protection, the commercial value of the IP or contract, decays with time. Forcing a required PIM process, even if it allows a party to opt out for urgent interim relief, allows the parties to waste valuable time. In many cases, the warrants laid on the time at Esprit lead to irreparable commercial injury or loss of competitive advantage.

Comparative experiences suggest it could build a more nuanced framework. If we think about models such as Italy's to promote mediation through mechanisms of contract incentives (for example, the maximum cap for Court costs is considerably raised) and sectoral carve-outs during compulsory mediation instead of compulsory mediation for all matters, it makes it a hybrid form of mediation.[41], perhaps allowing mediation to take place in places where mediation is culturally and contextually suitable, and avoid delaying access to Courts in those sectors that require decisiveness.

The sector-sensitive approach would help uphold mediation's credibility while ensuring parties do not feel compelled to partake in an unsuitable or ineffective process. For example, while disputing contractual terms within a PYMA prescribed cap may be justified to be routed through PIM, higher stakes M&A, IP, and regulatory matters could have used the expedited process of litigation or Arbitration.

[39] Patnaik (n 18)
[40] *Ibid*
[41] EU Commission, *Evaluation of the Mediation Directive* SWD (2016)

COMPARATIVE ANALYSIS

Italy: The mediation regime in Italy, established via Legislative Decree No. 28/2010[42], is widely regarded as the motivation behind the development of India's PIM scheme. Nevertheless, in consideration of the expansive benefits of the Italian system, the results of the mediation scheme in Italy are attributable not only to the legislation but also to how Italian mediators and the Italian judicial system rely on both incentives and punishments in their operational context – something that India has yet to emulate. Unlike adhesion to PIM in India through Section 12A[43], where participation by defendants is either mandated or improper controls, the Italian system is governed by both positive incentives and prohibitive negative consequences. With the Italian system, there are tax benefits, enjoyed exemptions for stamp duty, and other monetary incentives for voluntary participation as a means of encouragement.

Conversely, for non-participation, the Italian system has penalties of imposed sanctions, including costs for the entire duration of the litigation, even if the party that did not participate in mediation was successful in the case.[44] Also, courts may apply negative inferences against the non-participating parties. It becomes apparent how significant shifts in the mediation risk and reward balance become when parties recognise that genuine participation has a larger potential reward than risk.

Additionally, and again contrasting with India, Italy's mediation scheme maintains a fixed number of 12 categories of dispute types eligible for mediation, as well as empowering the judiciary to review credibility and honesty. Considering section 12A in India presents practice questions, it covers 22 categories of commercial dispute types without being business sector unique or sector-focused, without enforcement mechanisms contributing to inadequate procedural delivery of PIM in India, combined with poor incidences of necessitated settlements. The Italian perspective indicates that mediation should not be imposed, but rather that support and incentives (structural and behavioural) should be created – a significant gap in India's current model.

[42] Legislative Decree No 28/2010
[43] Commercial Courts Act 2015, s 12A
[44] Ana Ubilava, *Mediation as a Mandatory Pre-condition to Arbitration* (Brill 2023)

European Union: The EU's Directive 2008/52/EC[45] on mediation recommends mediation use for cross-border civil and commercial disputes, but it does not mandate it. The EU has taken a party and voluntary-based approach, relying on the institutional trustworthiness and cultural acceptance of mediation. The EU model has ensured access, quality, and consistency, but has not made mediation mandatory.[46] The EU member states can create their national framework, and the EU encourages the parties to take advantage of the institutional mediation centre with trust and reliability through transparent processes and robust quality protocols, a lack of means or rudimentary means in the Indian model.

India's mandatory PIM is suffering from top-down pressures to create a process we have not yet matured at the institutional level, regardless of low uptake and success rates (as noted from Mumbai and Karnataka) and frequent failures to start. EU jurisdictions concentrate on trust in the process and competence of the mediator, and these elements were visible in various jurisdictions, even for voluntary models. The contrast reveals a key insight: India's premature mandate may be bypassing foundational groundwork, such as creating trust, building professional mediator networks, and educating stakeholders, all of which the EU has emphasised from the start.

CONCLUSION & SUGGESTIONS

In its current form, mandatory pre-institution mediation *(PIM)* under Section 12A[47] of the Commercial Courts Act risks becoming more of a procedural speed bump than a genuine dispute resolution mechanism. While well-intentioned, the system falls short because it is coercive, not collaborative. India's mediation framework is still maturing, and compelling parties into mediation, especially without sectoral nuance, institutional readiness, or adequate mediator training, compromises both efficacy and party autonomy, the very principle that underpins the success of mediation.

What India needs is a decisive shift from coercion to incentive, one that encourages parties to engage in mediation not because they must, but because they see value in doing so. A hybrid model requiring at least one session, tangible incentives like reduced court fees or

[45] Directive 2008/52/EC of the European Parliament and of the Council 2008
[46] European Parliament, *Report on the Implementation of the Mediation Directive* (2021)
[47] Commercial Courts Act 2015, s 12A

faster litigation for good-faith participants, and robust training and technology ecosystems would help foster this shift. These reforms must be grounded in trust-building, institutional investment, and consistent national standards. Ultimately, mediation should not be viewed as a procedural hurdle, but as a legitimate first destination for resolving commercial conflict. To realise this vision, India must align its legislative framework, judicial approach, and public understanding around the idea that meaningful mediation cannot be mandated, but it can be made attractive, effective, and trusted. The time is ripe for India to lead not through compulsion, but through innovation and incentive.

SUGGESTIONS

Hybrid Approach: India should consider the requirements for at least one session approach from Italy. This allows parties to present for at least one structured session before deciding to abandon the process. This at least respects the parties' autonomy and reduces the dilatory effect on the courts.

Incentivization: Tax deductions, reduced court fees, or fast-tracked litigation for parties undertaking mediation in good faith, regardless of settlement.

Mediator Training & Accreditation: A national certification model for mediators, incorporating baseline quality standards and evaluating mediators regularly on these expectations for competence and accountability.[48]

Public Awareness Campaigns: Institutional mediation can only be effective in the long run if litigants trust the process. The government (central and state), judiciary, and legal education institutions must collaborate and invest in a complementary public awareness campaign, utilising seminars, media, and law schools.

Technology & AI: India can pilot ODR platforms modelled after Singapore's AI-assisted mediation system, featuring automated scheduling, documentation, and performance tracking. Domestic platforms like SAMA and ODR India have shown that tech-enabled

[48] Law Commission, *Report No. 253: Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill* (2015)

mediation can scale efficiently. Integrating such tools into PIM would enhance transparency, speed, and trust in the process.[49]

In conclusion, pre-litigation mediation should be reimagined, not as a hurdle, but as a meaningful alternative. For that to happen, India must invest in the trust, tools, and training necessary to let mediation stand on its merit.

[49] *Designing the Future of Dispute Resolution: The ODR Policy Plan for India* (2021)