



Facilitating dispute resolution: The imperative of Pre-litigation mediation in India

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Abstract

Alternate Dispute Redressal (ADR) mechanisms play a vital role in ensuring access to justice to everyone irrespective of various social or financial constraints. One such notable mechanism is mediation, wherein, a neutral third party or the mediator through negotiation and facilitation helps disputing parties amicably arrive at a settlement. Recently, steps have been taken in India to create a strong framework that will encourage and popularise mediation. Such initiatives also include the introduction of mandatory pre-litigation mediation. However attempts at mandating mediation have been vehemently opposed to prevent depletion of the voluntariness of parties, which could render the very essence of mediation being a mutual proceeding futile. The paper thus will analyse the need and scope of mandatory mediation in India. A comparative study of mandatory mediation models in different countries will be made to see how far they can be implemented in the Indian system.

Keywords: Alternative dispute resolution, mediation, Pre-litigation, supreme-court

Introduction

Mediation is method of Alternative dispute resolution wherein a neutral third party helps the disputant parties to reach a settlement. This neutral third party acts as a mere facilitator with the aim to allow parties to reach a middle ground. The mediator is expected to remain value neutral thereby serving as a channel between the parties ^[1]. Mediation is preferred mainly in those cases which do not involve complex questions of laws and evidence and which at the same time hold potential for amicable resolution. One of the most significant value and benefit of mediation is that it provides an opportunity to the parties to converse, negotiate and arrive at an amicable settlement which is acceptable to all the parties. ^[2] Besides this, the agreements arising out of mediation are more likely to be complied with by the parties. Currently mediation in India can be initiated either by providing for it in a dispute resolution clause in a contract or by way of a reference by a court under section 89 of the civil procedure code or under special legislations.

Problems with current Mediation Model in India

The existing Indian mediation paradigm has numerous problems that have contributed to its failure. In the *Afcons case* ^[3], the Supreme Court while examining Section 89 of the Code of Civil Procedure (CPC), 1908, which gives the court the authority to refer matters to Alternate Dispute Resolution (hereinafter, "ADR"), held that all civil cases, with some exceptions, must be referred to an ADR process. There is little to no data on the impact of this decision on referrals to ADR processes, which demonstrates how hostile the Indian judicial system has been to ADR mechanisms. Additionally, mediation in India does not have an umbrella legislation, however, there are different sets of laws that refer to mediation such as Section 89 of CPC, Section 12A of Commercial Courts Act, 2015, Section 37 of Consumer Protection Act, 2019, and Section 442 of the Companies Act, 2013, lack of enforceability of a unified law within India has led to a decrease in the effectiveness and seriousness accorded to mediation, which poses a challenge. Inadequate laws and inadequate training of

judges/lawyers/mediators have also hampered mediation's success in India ^[4]. Furthermore, due to the prevalence of litigation and a lack of information, lawyers and clients view mediation with scepticism, as there is a common misconception that the party proposing or initiating mediation has a weaker case ^[5]. Another common misconception is that successful mediation results in a compromised form of justice and is thus less fruitful than successful litigation ^[6]. Lawyers who lack faith in their profession may purposefully disrupt a mediation procedure ^[7].

India is short on both the amount and quality of mediators; also, judges/lawyers are not incentivized to reap the benefits of mediation ^[8]. The petitioner in *Daramic Battery* ^[9] Case approached the Delhi High Court when the National Legal Services Authority was unable to locate an eligible mediator from their list of mediators. Such flaws undercut statutes such as Section-12A of the Commercial Courts Act, 2015, since when the quality and quantity of mediators is inadequate, the pre-litigation mediation system as a whole collapses. In addition, India requires capacity building and cutting-edge infrastructure. The profession of mediation should be promoted and made more lucrative in order to attract more people to the profession, hence resolving the issue of dearth of mediators.

Mandatory Pre-litigation Mediation

Mandatory mediation in simple terms means mandating parties to attempt mediation. It doesn't mean forcing parties to settle their disputes through mediation only. It has been understood as coercion into and not within the process ^[10]. Under mandatory mediation all that is required from parties is to give mediation a shot. There are various ways in which this can be accomplished. For instance, a statute may be enacted which makes it mandatory to refer certain type of disputes to mediation either before or after institution of the suit. If the statute makes it mandatory to refer certain disputes to mediation prior to the institution of proceedings it is referred to as mandatory pre-litigation mediation. Domestic factors such as the time it takes for cases to reach

trial, the cost of litigation, the prevailing legal culture and political climate, and the attitudes of the legal profession, judiciary, and general public are extremely important when deciding whether to implement mandatory mediation in a jurisdiction ^[11]. Despite substantial judicial delays, voluntary mediation has failed to flourish in India as a popular dispute resolution technique necessitates a reconsideration of how mediation has been done in the past. So far in the country Alternative technique that removes the initial discretion in choosing mediation, could provide the illusive solution. One of the primary benefits of mandatory mediation is that it might help dispel some of the myths surrounding mediation. In terms of the 'first to blink' syndrome, since the law requires parties to at least seek mediation, the burden of suggesting mediation is alleviated. Parties or their lawyers do not have to risk appearing weak by requesting mediation as now the law mandates it. The second misconception is that mediation merely gives second-hand justice. This myth is debunked by the legitimacy that mediation gains once it is mandated by law. Thus, mandated mediation can assist in bringing parties into the fold of mediation by assisting them in overcoming the initial inertia associated with voluntary mediation. Often, a party is eager to litigate because they believe that forcing the other side to go through the lengthy and arduous process of litigation would be a type of punishment for the opposing party. The client's 'make them pay' mentality puts even the most well-intentioned lawyer in a bind, as he may be unwilling to recommend mediation as an alternative to the client. By shifting the burden of referring a dispute for mediation to the law or the court, mandatory mediation relieves the lawyer of this dilemma ^[12]. Similarly, by creating massive demand for people and institutions providing mediation services, mandatory mediation offers an opportunity to mainstream mediation and create capacity at scale.

Mandatory Mediation: International Position

Different nations have adopted different models of mediation in their jurisdictions. This part highlights the mediation models of four such countries that have successfully adopted mediation as an alternative form of dispute resolution.

1. European Union

In 2008, the European Union (EU) adopted Directive 2008/52 (Mediation Directive) to provide EU Member States with guidance on developing legislation on mediation in civil and commercial matters. The stated aim of the Mediation Guidelines was to encourage the use of mediation and to achieve a balance between mediation and litigation. According to Article 1 of the Directive, it only applies to cross-border civil and commercial matters and provides a common set of rules for mediation practice in the European Union ^[13]. Article 1.2 further provides that it does not extend to tax, customs or administrative matters or to State liability for acts and omissions in the exercise of State authority. The Mediation Directive sets the minimum regulatory standards for mediation legislation to be transposed by member states into their national legal systems ^[14]. Article 5.2 of the Mediation Directive allows Member States to make mediation mandatory, without obliging them to do so, provided the parties' right of access to justice has not been violated. The Court of Justice of the European Union in *Menini and Others v. Banco Popolare*

Societ Cooperativa concluded that national legislation imposing mandatory mediation as a condition of litigation is not protected by the EU legal framework for ADR are excluded, provided that the parties are not prevented from exercising their rights of access to judicial system ^[15].

Italy

In 2013, Italy introduced the opt-out form of mandatory mediation, which became its most successful attempt at creating a mediation system. In 2013, the Italian Parliament passed a law requiring an attempt at conciliation in certain cases ^[16]. Under this law, the parties must meet the mediator at the first meeting, which would carry a small fee, but skipping would incur a penalty. The parties can then choose to proceed with the mediation, in which case the government would provide a tax credit for the first 500 of the fees, or choose not to. Data collected over time indicates the success of the opt-out model in increasing compulsory and voluntary mediation ^[17]. In addition, lawyers must inform their clients in writing about the mediation, otherwise they would be barred from representing their clients ^[18]. This contributes to raising awareness, support and willingness to mediate. The result of such awareness can be seen in the American and Canadian models of mediation.

United States of America

The USA does not have a country-wide law/policy on mediation; however, its public policy strongly supports ADR ^[19]. Mandatory mediation is gaining popularity and is currently the most popular of all ADR procedures ^[20]. Statistics show that mediation enjoys a success rate of around 70%, as of 2020 ^[21]. This has been made possible mainly due to the strong support of USA's courts, and the legal fraternity ^[22]. As a result, mediation has been implemented in multiple aspects of civil law throughout the country, especially family disputes' settlements.

Australia

Australia's mandatory mediation model differs from Italy because it is a federal country with different states having their own models. Nonetheless, mandatory mediation is widely used in the Australian civil justice system and the areas in which mandatory mediation is used are constantly expanding ^[23]. Contrary to opposition from the legal profession in Italy, Australia witnessed the judiciary and legal professions adopting mandatory mediation to deal with the enormous pendency of cases ^[24]. Currently, ADR is mandated by the provisions of the Native Title Act, 1993 (Cth), the Administrative Appeals Tribunal Act, 1975 (Cth), and the Civil Procedure Act, 2005 ^[25]. Apart from state legislation, the Civil Dispute Resolution Act, 2011 (Cth) requires applicants commencing civil proceedings in the Federal Court of Australia or the Federal Circuit Court of Australia to file a statement explaining the actual steps they have taken to resolve their dispute, or the reasons why no such steps have been taken with a procedural motion ^[26]. Section 4 of this Act provides a non-exhaustive list of examples of real steps, including considering whether the dispute could be resolved through a mechanism assisted by another person, including an alternative dispute resolution mechanism. While the legislation does not specifically require arbitration before action, it is understood that this will inevitably be one of the most common mechanisms to demonstrate that genuine steps have been taken to resolve a civil dispute ^[27].

Canada

Canada also has an inspiring mediation model. The Ontario Superior Court of Justice in Canada established a mandatory mediation program for certain civil matters by enacting Rule 24.1 for Toronto, Ottawa and Windsor^[28]. This rule made it mandatory for all parties to attend the mediation session early in the trial. However, if that doesn't work, the parties could go through with the process. Similar to US courts, Canadian courts actively encourage and refer cases to mediation^[29]. In addition, if a party unreasonably refuses to participate in mediation, the court may reduce the party's reimbursement of costs^[30]. It has been found that not only has this helped to significantly reduce the time required to complete cases, but also that the lawyers and litigants have shown considerable satisfaction with this program due to the appropriate training in mediation^[31]. About 90% of disputes are settled before the actual trial, with mediation playing a role in it.

Turkey

In 2017, Turkey's Arbitration Law was amended by Law No. 7036 which mandates pre-trial arbitration in labor disputes^[32]. It also ordered that before filing a claim for relief, parties must sign an affidavit certifying an attempt at conciliation, or else their claim may be dismissed on procedural grounds^[33]. In addition, the conciliation procedure had to be completed within three weeks, with a one-week extension being granted in exceptional cases^[34]. In the first year after said model was introduced, the Turkish Ministry of Justice stated that 67% of the cases that went to mediation reached an agreement^[35]. Turkey Bar Association statistics from 2019 show that more than 10% of all Turkish lawyers were registered as mediators^[36]. In 2018, the Code of Arbitration was amended to bring commercial disputes under the pre-litigation mediation scheme.

Mandatory Pre-Litigation Model for India

The 129th Law Commission of India weighed in favour of expanding the role of mandatory mediation^[37]. A bold and defining step in this direction was the amendment of The Commercial Courts Act 2015^[38] whereby new Section 12A was added in 2018 which made it obligatory for parties to explore mediation before approaching to court. Under subsection 3 of Section 12A of the Commercial Courts Act, the mediation process must be completed within the 3 months of the application. This can be further extended for a period of 2 months with the consent of the parties. This saves the time and cost of both the parties as in most proceedings a lot more time and money is exhausted. However, there are various lacunas in the law itself. For instance, under Section 12A, the plaintiff has the mandatory obligation to initiate the mediation process. But, as per the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, the opposing party has the right to refuse to participate in the mediation process. The non-appearance of the opposing party in the mediation session results in a non-starter of the mediation process which leaves the aggrieved party remediless. This defeats the purpose of Section 12A. Similarly, section 12A carves out an "urgent interim relief" suit from a compulsory pre-institution mediation. However, the Act does not define what constitutes an "urgent" interim relief. This is often

misused by the lawyers or the parties to cause a delay or harass the opposing party.

In *M.R. Krishna Murthi v. The New India Assurance Co. Ltd. and Ors*^[39], the Supreme Court asked the government to consider the feasibility of enacting the Indian Mediation Act to take care of various aspects of mediation in general. Accordingly, the Mediation bill, 2021 was introduced in the Rajya Sabha which makes participation in pre-litigation mediation mandatory in civil and commercial disputes^[40]. However, a party may withdraw from mediation after two mediation sessions. The bill was not passed in the Rajya Sabha and instead was referred to Parliamentary Standing Committee on Law and Justice which has recommended against making pre-litigation mediation mandatory. The committee has recommended that pre-litigation mediation should be made optional and should be introduced in a phased manner^[41].

Conclusions

In conclusion it can be said that laws similar to those in Turkey are required in India in order to develop a quality control system for mediators. Similar to the Turkish model, India could enact legislation to penalise parties who unduly refuse to attend mandated mediation sessions. India must allow cases that have not gone through mediation proceedings to be rejected on procedural grounds. This would encourage parties to diligently pursue mediation proceedings. A three-week time limit on mediation sessions, like in Turkey, could substantially benefit Indians who are concerned that mediation will unwittingly waste their time. This, however, should be introduced in phased manner given the infrastructural challenges that Mediation in India faces. Although India has various mediation regulations, inconsistencies among them limit mediation's overall success. From Italy's and Turkey's models, it is obvious that unified laws would contribute to the legal sanctity and overall success of mediation in India. Hence, the mediation bill should be re-introduced in the Parliament after incorporating changes recommended by the committee so that the urgent need for umbrella legislation for mediation is mitigated.

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