INDIA'S TRYST WITH PRE-LITIGATION MEDIATION: GLOBAL INSIGHTS AND DOMESTIC PERSPECTIVES

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Abstract

With the advent of methods of alternative dispute as a viable alternative to litigation, mediation has come to the forefront. With this in mind, India recently introduced the Draft Mediation Bill, 2021. This bill reiterates a concept known as pre-litigation mediation, which is already prevalent in Indian legislature through enactments such as the Commercial Courts Act. In this paper, the author presents an indepth analysis of the various aspects of pre- litigation. First, the paper looks at what pre-litigation mediation means and its different types. Second, the interaction between pre-litigation mediation and existing statutes like the Commercial Courts Act, Motor Vehicles Act, etc., is seen. Third, a global view of pre litigation mediation is considered, through which the paper explores how other countries have implemented the model. Last, problems of implementing the procedure and solutions for the same are divulged.

Keywords: Alternative Dispute, Draft Mediation Bill, Commercial Courts Act, Pre- Litigation, Mediation

A. Mandatory Mediation: Origin and Definition

Mandatory mediation is a category of mediation where parties are bound to enter into a mediation proceeding either through the mandate of a statute or through judicial reference[1]. However, it is important to note that mandatory mediation does not mean compelling parties to settle their issues through the process of mediation, but rather mandating parties to make an attempt to amicably resolve the disputes through mediation. Scholars thus define mandatory mediation as 'coercion into and not within' the process of mediation.[2]

1. Categories of Mandatory Mediation

There are three kinds of mandatory mediation which have been practiced in different jurisdictions. In the first case, there are schemes of mandatory mediation which gives authority to the judges to refer parties to mediation which can happen with or without the consent of the

[1]Quek, D., Mandatory Mediation: An Oxymoron-examining The Feasibility of Implementing a Court-Mandated Mediation Program, 11 Cardozo Journal of Conflict Resolution, 479 (2009).
[2]*Id.*

parties on a case-to-case basis.[3] In the second case, we have a group of mandatory mediation schemes which do not necessitate the commencement of mediation proceedings but compel parties of potential adverse costs orders if the parties do not partake in a mediation proceeding before commencing a litigation trial. Such mediation schemes are called quasi-mandatory pre-litigation schemes.[4] In the last case, there are some schemes, generally in the form of legislative provisions, mandating the party to go through a mediation proceeding as a prerequisite to commence the filing of a suit in a court of law which is known as pre-litigation mediation.[5]

2. Need for Mediation in India

India is one of the most litigious countries in the world, but the overburdening of the justice system, along with the cost, both, in time and money, causes an adverse impact on the litigant, society and nation at large.[6] According to a statement made by the Minister for Law and Justice in May 2022, more than 4.7 crore cases are pending before the judiciary with 70,154 cases pending before the Supreme Court.[7] Of them, 87.4% are pending in subordinate courts, 12.4% in High Courts, while nearly 1,82,000 cases have been pending for over 30 years.[8] The statistics presented here show an uneasy picture of not only the quantum of the cases that the judicial system is burdened with but also the time taken for adjudication. At the moment, 8,63,232 appeals are pending before the High courts and the Supreme Court in India, which also raises an important question as to how satisfactorily these cases are adjudicated.[9] The approaches that have been taken with regards to reducing the burden on the judicial system in the realm of litigation have been twofold. The first approach is internal reforms within the judicatory mechanisms itself while the second approach involves the development of non-judicial or alternative dispute resolution mechanisms for the speedy disposal of cases as well as

[3] De Palo and Ors., Sleeping - Comatose - Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union, 16(3) CARDOZO JOURNAL OF CONFLICT RESOLUTION 16 713,723-730. (2014-2015).
[4] Hanks, Melissa., *Perspectives on Mandatory Mediation*, 35(3) UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL, 929-952 (2012).
[5] Wissler, Roselle L., "The Effects Of Mandatory Mediation: Empirical Research On The Experience Of Small Claims And Common Pleas Courts" 33 WILLAMETTE L. REV , 55 (1997).
[6] De, R., The Republic of Writs: Litigious Citizens, Constitutional Law and Everyday Life in India (1947-1964), Princeton University (2013).
[7] National Judicial Data Grind- Supreme Court, National Judicial Data Grid, https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard.
[8] Sumedha, *The Clogged State Of The Indian Judiciary*, THE HINDU, (May 10 2022), https://www.thehindu.com/news/national/indian-judiciary-pendency-data-courts-statistics-explain-judges-ramana-chief.
[9] National Judicial Data Grid - High Courts, *Ministry of Law and Justice* (20 June 2022), ecourts.gov.in..

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dispensation of justice.[10] Thus, at this juncture, the need of dispute resolution mechanisms like mediation becomes critical for the progress of the settlement of disputes in the Indian legal framework.

Although India does not have a comprehensive legislative model for mediation particularly, tracing the building blocks of certain legislations which have provided India with some kind of an alternative dispute resolution mechanism framework is worthy of being discussed.[11] Mandatory pre-litigation mediation has existed in India and the Mediation Bill, 2021, has not introduced a novel concept. However, mandatory pre-litigation mediation was not placed as a requirement for a lot of civil cases and was restricted to the list of items coming under the purview of The Commercial Courts Act, 2015[12].

B. COMMERCIAL COURTS ACT

India's courts have a huge caseload and approximately 4.5 crore pending cases.[13] In the cases that do get heard, the time taken up in litigation is so excessive that it causes huge losses in commercial matters. Moreover, with the evolution of society and trade, it becomes imperative to have specialized tribunals or courts who can deal with field specific matters swiftly and efficiently. With this problem in mind, the government brought in the Commercial Courts Act, 2015 as a panacea for these ills.[14] This Act aimed to set up a system of commercial courts which would handle 'commercial' matters of 'specified value'.[15] An understanding of these two words (commercial and specified), as will be discussed subsequently, becomes important to grasp the aim of this act.

1. Commercial Disputes and Specified value

The Commercial Courts act, 2015 ["the Act"] has been prudent in listing out what qualifies as a commercial matter under Section 2 (1) c[16], by providing that matters involving financiers, trade and commerce along with joint ventures, shareholder agreements or agreements related

[10] Kinhal, Deepika., *Mandatory Mediation in India-Resolving to Resolve*, 2(2) INDIAN PUBLIC POLICY REVIEW, 49,69 (Apr. 2021).
[11] *Id.*
[12] The Commercial Courts Act, No. 4 of 2016, Acts of Parliament (2016).
[13] Roshni Sinha, *Vital Stats Pendency of cases in the judiciary*, PRS LEGISLATIVE RESEARCH (July 25, 2018),https://prsindia.org/files/policy/policy_vital_state/Vital%20Stats%20-%20Pendency%20and%20Vacancies%20-Roshni%20-%20250718For%20Upload.pdf
[14] Ashita, *India: The Commercial Courts Act 2015 And Jurisdiction*, MONDAQ.COM (April 13, 2022), https://www.mondaq.com/india/contracts-and-commercial-law/1183066/the-commercial-courts-act-2015.
[15] The Commercial Courts Act, No. 4 of 2016, Preamble, Acts of Parliament (2016).
[16] The Commercial Courts Act, No. 4 of 2016, 2 (1) (c), Acts of Parliament (2016).

to trade, commerce, intellectual property rights and insurance qualify as commercial matters. It also delegates certain powers to the central government and permits the government to notify and classify any other matter as a commercial matter.

The Act under Section 2[17] provides that the term 'specified value' would constitute the value of the suit as calculated under Section 12 of the Act, but must not be under Rs. 3 Lakh, which implies that all cases coming before the commercial courts would have a suit value higher than the aforesaid amount. This clause acts as a gamechanger as it enables the differentiation between a regular commercial dispute and a matter under the purview of the act.

With all this in mind, the Act can be understood to be a piece of legislation which was made with the purpose of introducing a system of special courts that would decide commercial disputes (as provided under Section 2) with a 'specified value' (as calculated under Section 12 of the Act) of not less than Rs. 3 Lakh.

2. Mandatory Pre-litigation Mediation under Commercial Courts Act

Section 12A of the Act ["Section 12A"][18] was brought into the act by the insertion of Chapter IIIA in 2018 which is dedicated to "Pre-Institution Mediation and Settlement". Section 12A lays down that if a suit initiated under the Act does not require *"urgent interim relief"*[19], then the suit will not be tried in the commercial court before exhausting the remedy of pre-institution mediation. Section 12A (2) further empowers the government to authorize a body formed under the Legal Services Authorities Act, 1987 to carry out this mediation process. However, Clause (3) provides for a time limit of 3 months for these proceedings which can be extended by 2 months with the consent of the parties.

Section 12A sets out to provide for mandatory pre-litigation mediation but this mandatory nature of the section is contested and has been interpreted differently by different high courts.

The Bombay High court, led by a single judge bench of Justice B.P Colabawalla, examined this question in the case of *Ganga Taro Vazirani vs Deepak Raheja*.[20] In this case, Ganga Taro Vazirani ("Plaintiff") filed a Commercial Summary Suit against Deepak Raheja ("Defendant")

[17] The Commercial Courts Act, No. 4 of 2016, 2 (1) (i), Acts of Parliament (2016).
[18] The Commercial Courts Act, No. 4 of 2016, 12A, Acts of Parliament (2016).
[19] The Commercial Courts Act, No. 4 of 2016, 12A (1), Acts of Parliament (2016).
[20] Ganga Taro Vazirani vs Deepak Raheja, 2021 SCC OnLine Bom 195

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seeking a decree for Rs. 5,54,00,000 against the Defendant along with a summons for Judgment. However, the plaintiff had not asked for any urgent reliefs.[21]

The defendant argued that the suit was not maintainable on the grounds, inter alia, that the suit did not request any urgent reliefs and therefore, was in contravention of the Act as no mediation process was taken up as required under Section 12A. For this the appellant relied on orders and judgements by the other high courts which upheld this mandatory nature of the section. These included an order dated 30th September, 2020 by the Delhi High Court in the case of *Anil Gupta Vs. Babu Ram Singla*[22], an order dated 3rd September, 2020 by the Calcutta High Court in the case of *Terai Overseas Pvt. Ltd. Vs. Kejriwal Sugar Agencies Pvt Ltd. & Ors*[23] and the judgement given by the Madhya Pradesh High Court in the case of GSD *Constructions Pvt. Ltd. Vs. Balaji Febtech Engineering Pvt. Ltd.*[24]

However, Justice B.P. Colabawalla did not agree with this contention and referred to the 253rd Report of the Law Commission of India.[25] He said that the aim of the Act was to make the process speedy. Furthermore, the court is also not barred from having inherent jurisdiction in the cases as the section itself carves out an exception for suits seeking "urgent relief". The section was to be seen only as a procedural section as it specifies details about the mediation process and invites the application of the doctrine of 'substantial compliance' making the section non-mandatory and not needing strict compliance.[26]

Thus, as long as the main aim of the legislation is met, the court will not ask for a very strict compliance with the sections. Therefore, Section 12A is only there to motivate parties to try and settle matters out of the court.[27]

This judgement was challenged in front of a division bench of the Madras High Court in the case of *Deepak Raheja v. Ganga Taro Vazirani*[28] and the findings of the single judge bench were overturned. The division bench comprising of Justice Nitin Jamdar and C.V. Bhadang

[21] Chakrapani Misra & Yuvraj Choksy, *Mediation Under The Commercial Courts Act, 2015: The Legislative Intent And The Interpretation Conundrum*, MONDAQ.COM (NOV. 16, 2021)
[22] Anil Gupta vs Mr. Babu Ram Singla Proprietor- Singla Sweets & Anr., CS(OS) 201/2020 (DEL HC. March 12, 2021).
[23] Terai Overseas Pvt. Ltd. Vs. Kejriwal Sugar Agencies Pvt Ltd. & Ors 2020 SCC OnLine Cal 1591.
[24] *G*SD Constructions Pvt. Ltd. Vs. Balaji Febtech Engineering Pvt. Ltd*,* MANU/MP/0451/2019.
[25] MINISTRY OF LAW AND JUSTICE, GOV'T OF IND., LAW COMMISSION REPORT NO. 253 (29 January,2015), https://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf.
[26] *Id*.
[27] *Id*.
[28] Deepak Raheja v. Ganga Taro Vazirani 2021 SCC ONLINE BOM 3124.

took a look at Section 12A, which provides: "*A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of preinstitution mediation*"[29]

The bench further referred to the Statement of Objectives of the Act and held that a purposive interpretation of all the amendments made to the Act and the newly brought rules and regulations indicate that the provisions of the Act have to be strictly followed and the doctrine of substantial compliance would not apply.[30] It went back to the provision and after focussing on the word 'shall', it observed that a court may examine the purpose for which a statute was enacted and attempt to reconcile the interpretation with that goal if the plain sense of the language of a statute results in anomaly and absurdity. It held that when the word "*shall*" appears in a statute, there is typically an assumption that the provision is binding.[31]

This interpretation was not allowed to stand as the only interpretation for long and the Madras High Court in a single bench decision reached a very different conclusion in *Shahi Exports Pvt. Ltd v. Gold star Line Limited* [32].

The division bench of the Bombay High Court delivered its verdict on 16th February, 2021. A few months later, on 17th August, 2021, after reserving its order on the 9th of the same month, the Madras High Court gave a verdict in the case of *Shahi Exports Pvt. Ltd v. Gold star Line Limited* [33], which was opposite to the findings of the Bombay High Court.

The single judge bench comprising of Dr. Justice G. Jayachandran declared Section 12A to be non- mandatory by referring to Rule 3(1) and 3(7) of the Commercial Courts Act, 2015 [34] They are as follows:

3. Initiation of Mediation Process: -

"(*1). A party to a commercial dispute may make an application to the authority as per Form-1 specified in Schedule-I, either online or by post or by hand, for initiation of mediation process under the Act along with a fee or one thousand rupees payable to the Authority 16/20*

[29] The Commercial Courts Act, No. 4 of 2016, 12A, Acts of Parliament (2016).
[30] Deepak Raheja v. Ganga Taro Vazirani 2021 SCC ONLINE BOM 3124, para. 36.
[31] *Id.*, para. 16.
[32] Shahi Exports Pvt. Ltd v. Gold star Line Limited, MANU/TN/6125/2021.
[33] Shahi Exports Pvt. Ltd v. Gold star Line Limited, MANU/TN/6125/2021.
[34] Commercial Courts Act, 2015 (Pre-Institution Mediation and Settlement) Rules, 2018, The Gazette of India, pt. 2 sec. 3 (July 3, 2018).

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https://www.mhc.tn.gov.in/judis/ A.No.35 of 2021 in C.S.No.669 of 2019 either by way of demand draft or through online.

(7). Where both the parties to the commercial dispute appear before the Authority and give consent to participate in the mediation process, the Authority shall assign the commercial dispute to a Mediator and fix a date for their appearance before the said Mediator."

The bench held that the presence of the word '*may*' in Rule 3 (1) points towards the availability of a choice for the party to decide whether it wishes to go for mediation or not, however, the bench ignored the sentences that followed, which clearly point out that the choice pertains only to the method of making an application.[35]

The bench also interpreted Rule 7 in a way which presents a possibility wherein a party may not provide its consent to go into mediation. So, one of the parties could abstain from the proceedings and make the process, according to the court, a "*non – starter*".[36]

The bench then examined the constitutional right to justice and held that the alternative dispute resolution systems were substitutes of the courts and not the other way around because of which a litigant could not be turned away from doors of justice for the simple reason of not going to mediation first.[37] This was followed by the bench's final conclusion that Section 12A was not mandatory as it was subject to the urgency of matter and consent of parties and a denial of access to courts in this manner would affect constitutional rights of the citizens.[38]

In the authors opinion, this judgement has without any reason given rebirth to the uncertainty which was removed by the Bombay High Court. A challenge to constitutional rights is used to justify this position. However, where a litigant is mandated to go through mediation before approaching the court, they are not barred from approaching the court. A simple reading of the legislation would be enough to present a view that the legislators wished to make mediation mandatory. In order to find this legislative intent the Bombay High Court discussed the parliamentary debates at length[39] which had taken place while amending the Act to introduce Section 12A, and had concurred the same but the Madras High Court has ignored this intent and has arrived on a questionable conclusion.

[35] *Id.,* para. 24.
[36] *Id.*
[37] *Id.,* para. 25.
[38] *Id.*
[39] *Id.,* para. 32.

C. SECTION 6, DRAFT MEDIATION BILL, 2021

In *M.R. Krishna Murthi v. The New India Assurance Co. Ltd. and Ors*[40], the Supreme Court had requested the Union Executive to look into the feasibility of having a framework for mediation proceedings either through the enactment of a separate legislation or through special instructions in the already existing framework that has been created by the Arbitration and Conciliation Act, 1996. After almost 30 years of the passage of the statute which brought in a legal framework for arbitration in India, the Union Government came up with a Draft Mediation Bill which will provide for a framework exclusively to deal with the process of mediation.

With the increase in popularity of mediation and after noticing the benefits of mandatory pre-litigation mediation in other countries such as Italy, Brazil and Turkey, the government decided to come up with the Draft Mediation Bill, 2021 to oversee mediation in India, on the lines of the Singapore Convention on mediation. [41]

The Mediation (Draft) Bill, 2021 ["Bill"] was introduced in the Rajya Sabha on December 20, 2021 and was then referred to the Parliamentary Standing Committee on Law and Justice for further recommendations and suggestions. Despite the Bill being in its nascent stages, it contains certain prominent aspects that mandate further deliberation.

One of these aspects can be seen in Section 6, which mandates parties to go through the pre-litigation mediation process before initiating a civil suit in any tribunal or civil court, irrespective of whether there was a mediation agreement. While this section lists out the procedure to be followed, it explicitly abstains from infringing on the purview of Section 12A.[42] This implies that the legislature, while recognising the similarity between these two sections, believes that the procedure listed out in Section 12A is more suited to commercial disputes.

The Bill has spoken at length about the establishment of mediation institutes and a mediation council.[43] The intent of the Bill is to liberalise and bring into the mainstream the process of mediation, going as far as to allow mediators of other nationalities. The Bill also lists down the qualifications of a person who can be a mediator. These requirements include stipulations like

[40]M.R. Krishna Murthi v. The New India Assurance Co. Ltd. and Ors. 2016 SCC ONLINE DEL 3355.
[41] Draft Mediation Bill,2021, Ministry of Law and Justice, PRS Legislative Research (2021), https://prsindia.org/billtrack/the-mediation-bill-2021 .
[42] *Id.*
[43] *Supra* note 43, 33 –43.

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registration with the mediation council or empanelment under the legal services act of 1987 or under a court annexed mediation centre or under a recognized mediation service provider.[44]

However, following the precept of party autonomy, the Bill also allows the parties to enter into an agreement with each other to choose an individual who does not have any of these qualifications.[45] This acts as a double-edged sword as justiciable mediation in India has largely occurred under the court annexed mediation centres or with authorities under the Legal Services Act, 1987, and a liberalization of this process may very well bring problems and may even defeat the purpose of the Act.

An informal process could lead to parties choosing a mediator in bad faith with the intent to bypass the pre-litigation mediation process in favour of litigation through a false report by the "mediator" of their choice. Further, Section 26 of the Act allows parties to withdraw from the mediation process, provided they have attended at least one session. This could very easily be resorted to by the parties to move to court-based litigation.

Mediation itself is seen as a voluntary process and making it mandatory may become counter-productive if done without any support or supervision. If restrictions are placed on who can be a mediator and if the process of mediation between parties is within the supervision of the state, then it can be ensured that the pre-litigation mediation process does not become just a needless ritual which acts only as a procedural formality.

However, the supervision of state and the present establishment is not a panacea for this ailment. In district legal services authorities, mediaiton is done by mediators who are, in almost all cases, lawyers practicing in the same court in whose compound the district legal service authority's building is situated. This may give them a swift opportunity to get a new client by failing the mediation proceedings, as is already seen in a lot of cases.

Therefore, an unaltered continuation of the previous establishment will not be adequate and a focus on getting industry experts and retired judges rather than practicing advocates as mediators needs to be put to ensure that the mediator is not affected by his own personal interest. Making such guidelines would fall on the mediation council.[46] However, in doing so, the council would encounter the problem of finding adequate numbers of mediators.

[44] *Supra* note 43, 6 (3).
[45] *Id.*
[46] *Supra* note 43, 40.

A simple solution to make the mediator neutral while ensuring an adequate number of mediators would be to allow practicing advocates to mediate in matters in states other than the one in which they practice and such an interaction could be very well-facilitated by video conferencing. The goal of enhancing and expanding the mediation infrastructure is a necessity, but maintaining the sanctity of the process also becomes important and cannot be forgotten.

1. Interaction with section 149 The Motor vehicles act

Section 6 with the Motor Vehicles Act[47] stipulates that if settlement proceedings under Section 149 of the Motor Vehicles Act fail then the parties must go through another round of mediation before appearing in front of the court.[48]

According to Section 149 of the Motor Vehicles Act, on receiving information about an accident, an insurance company has to appoint an officer who would investigate the case and negotiate the claim amount with the claimant. If the offer is accepted by the claimant, then the claims tribunal will make a record of it, otherwise, the claimant can sue the insurance company.[49]

The Bill wishes to introduce another layer of proceedings which further lengthens this process. These matters are very time sensitive and introducing another layer of proceeding which is of a similar nature, will only make it harder for the claimant and would give the insurance company exploitative amounts of leverage. Motor vehicle accident victims depend on insurance claims to finance their medical bills and a delay caused by this extra layer could impair their access to medical care. In a bid to avoid such an impairment, claimants would be forced to accept low claim disbursements from the insurance companies.

The extra layer of mediation does not act as a source of clarity, as the previous round of negotiation between the officer and claimant is enough to bring out the will of the parties and the best way to insert mediation in this process would be to change this negotiation process into a mediation. In the authors opinion, bringing in an extra layer would do more harm than good.

[47] Motor Vehicle Act, No. 59 of 1988, Acts of Parliament (1988).
[48] *Supra* note 43, 6(6)
[49] Motor Vehicle Act, No. 59 of 1988, 149, Acts of Parliament (1988).

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2. Effects on other Statutes

As has already been explored, Section 6 affects all civil disputes and therefore has a special bearing on acts which involves such disputes.[50] The statute most affected would be the Act. As discussed above, Section 12 (A) of the Act tried to bring mandatory pre-litigation mediation in commercial disputes of a certain value. However, the courts interpreted the section in a manner which rendered it toothless.

Section 6 explicitly provides that any 'civil' or 'commercial' suit under any court would mandate the parties to go into pre-litigation mediation. This brings a sense of clarity to the confusion which had been created by the courts and will allow section 12 (A) to function in the manner in which it was meant to. Moreover, Section 6 would also affect matters of civil liability coming under the Companies Act, 2013,[51] and the Insolvency and Bankruptcy Code[52] as it would require parties to civil disputes under these acts to go through mediation first.

There is, however, a collision with Section 18 of the MSME Development Act, 2006[53]. Section 18 of the MSME Development Act, 2006, mandates conciliation when disputes arise on payments to MSMEs before initiating a suit with the MSME facilitation council.

Now, following Section 6 of the Bill would mean that, after the conciliation process is done another round of mediation would be required before approaching the council. This would make the process redundant and would employ two very similar alternative dispute resolution procedures. Having such inconsistencies in such a nascent stage of the Bill is expected but if these are ignored by the legislature before enacting the legislation, then there could be a level of redundancy.

3. Viability in India

Section 6 is a well-drafted piece of legislation and the deficiencies that have been pointed out can easily be taken into consideration and rectified by issuing guidelines . The legislation itself does not have any glaring defect. The Bill seeks to make mediation mandatory but the challenges it will face are not to be treated lightly. The bill envisions and provides for the setting up of a robust mediation infrastructure for the country and ensuring success in this

[50] *Supra* note 43.
[51] The Companies Act, No. 18 of 2013, Acts of Parliament (2013).
[52] Insolvency Bankruptcy Code, No. 31 of 2016, Acts of Parliament (2016).
[53] The Micro, Small and Medium Enterprises Development Act, No. 27 of 2006, Acts of Parliament (2006).

endeavour would be vital.[54] Without the presence of infrastructure, this section would be a dead law.

In order to evade these problems, India can introduce mandatory pre-litigation mediation in a phased manner by starting small pilot programmes, taking cues from Italy which introduced their mandatory pre-litigation legislation with a sunset clause, making the law inapplicable after 4 years if not extended by the legislature. Alternatively, the country could tackle the problem head-on and face the challenges as they come, a strategy which the Indian government seems to have decided to employ in this case.[55]

Thus, in the present situation, with the current condition and lack of mediation infrastructure, mandatory pre-litigation does not appear very viable. However, if the executive takes it in its stride and establishes the required infrastructure in a time-bound manner, then pre-litigation mediation could help revamp the Indian legal system for the better.

D. A Worldview on Pre-Litigation Mediation

Before discussing the lacunae or benefit of the models of pre-litigation mediation in the Indian context, it is important to look at similar models in other countries to understand their working so as to optimise are model based on their successes and failures.

1. European Union

In 2008, the European Union adopted Directive 2008/52 called the Mediation Directive in order to codify and provide guidance to member states enabling them to enact legislation relating to mediation in both civil and commercial matters.[56] Article 1 of the Directive pertains to mediation and judicial proceedings with its applicability limited to cross border civil and commercial disputes excluding any dispute instituted against the member states under Article 1.2.[57]Article 5.2 provides for a framework which allows member states to make mediation mandatory as long as the rights to access justice of the parties isn't curtailed.[58] The European

[54] *Supra* note 43, 42.
[55] Khusi Dua, *Decoding India's Draft Mediation Bill, 2021,* Jurist, (Nov. 29, 2021 12:30:11 AM) https://www.jurist.org/commentary/2021/11/khushi-dua-decoding-mediation-bill-2021/
[56] The EU Directive on Mediation 2008/53/EC was published in the official journal of the EU on May 24, 2008 and it took effect from June 11, 2008. Directive 2008/52/EC of the European Parliament and the Council on Certain Aspects of Mediation in Civil and Commercial Matters, with an implementation date of 21-05-2011, prescribes a set of minimum common rules on mediation for all EU member states with the exception of Denmark.
[57] Nolan-Haley, Jacqueline, *Evolving Paths To Justice: Assessing The EU Directive On Mediation,* Proceedings of the Sixth Annual Conference on International Arbitration and Mediation, Fordham University Law School (Oct. 11, 2011).
[58] Brogden J., Cooper, D.A., *EU Mediation Directive- A Positive Move To A Uniform Approach*, 2(7) BLOOMBERG EUROPEAN LAW JOURNAL, 36 (2008).

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Court of Justice in the case of *Menini and another vs. Banco Popolare Societa Cooperativa*[59] had ruled that national legislation which imposes mandatory mediation as one of the prerequisites to litigation is not excluded from the purview of the directive's framework as long as the rights of access to justice and judicial system of the parties is not infringed upon. In the Italian case of *Rosalba Alassini and Others v Telecom Italia SpA and Others*[60], The European Court of Justice ruled that the Italian law which mandated a telecom dispute to be referred for settlement outside the court before being tried was not violative of Article 6 of the European Convention on Human Rights. This gave momentum for some member states, like Romania, to include mandatory mediation as part of their Civil Procedure Code.[61] Slovenia is another country, which through the allotment of its Alternative Legal Dispute Resolution Act, has allowed for pre-litigation mediation framework from the year 2010.[62] However, despite clear jurisprudential literature on mandatory mediation not being violated of basic legal rights, purist mediators haven't been a big fan of this model of mediation in the European Union.[63] In order to study this aspect, the European Parliament in 2013 had commissioned a feasibility report to look into the implementation of the directive. The study reported that mediation was being used in fewer than one percent of the cases in the European Union and only in forty-sex percent of the EU member states, with less than 500 mediation sessions taking place every year.[64]A similar study was conducted by the renowned law firm, Linklaters, in 2020 in 28 member states where the mediation process is still voluntary. On a comparative analysis of the study commissioned by the European Union and the study of Linklaters, it is shown that that only by a limited degree does mandatory mediation generate more traction compared to voluntary mediation.[65] Thus, it was suggested by experts that despite pro-mediation regulatory features, only the opt-out mandatory mediation model would work for Europe.

[59] Menini v Banco Popolare - Societa Cooperativa EU:C:2017:132.
[60] C-317/08 - C-320/08, Rosalba Alsasinni and Others v Telecom Italia SpA and Others [2010] ECR I-2213.
[61] Dudouet, V., Eshaq, A., Basilaia, E. and Macharashvili, N., From Policy to Action: Assessing the European Union's Approach To Inclusive Mediation And Dialogue Support In Georgia And Yemen, 6(3) Peacebuilding, 183, 187-191 (Jul. 18,2018).
[62] Kovac, P., Mediation and settlement in administrative matters in Slovenia, 10 *Croat. Pub. Admin.*, 743 (2010).
[63] De Palo, Giuseppe, *A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs To Be More ...Directive,* European Parliament (Nov. 2018), https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf
[64] De Palo, Giuseppe and Ors. 2014. "'Rebooting' the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Legislative and Non-Legislative Measures to Increase the Number of Mediations in the EU", European Parliament, (Jan. 15,2014), https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET(2014)493042 .
[65] Bénédicte Deboeck and Ors., *The European Mediation Directive*, LINKLATERS., (May 24, 2022), https://www.linklaters.com/en/insights/publications/commercial-mediation-a-globalreview/commercial-mediation-a-global-review/eu-commercial-mediation.

2. Turkey

The idea of mediation had received legal backing in Turkey through the enactment of a law called Law Number 6325 or The Mediation Code in 2012 which aimed at not only reducing the overburdened workload in the field of litigation that prolonged judicial processes but also was needed to match Turkey's domestic laws with the European Union's mediation framework to allow a smooth transition of the ascension of Turkey into the EU.[66] Article 13 had allowed for voluntary mediation by parties to a dispute before the filing of lawsuit or during the court hearing.[67] Articles 4 and 15 which define the binding nature of decisions reached through a mediation settlement agreement clearly and explicitly state that the rendering of binding decisions can only be exercised by adjudicating authorities.[68] A recent study conducted shows that between January 2013 and September 2019, 191,624 disputes were resolved through voluntary mediation with an astounding success rate of 173,762 resulting in a mediation settlement agreement with less than four percent of the disputes ending without any settlement.[69]

However, a monumental shift was noticed in 2017 when an amendment was brought to the mediation code through the addition of Article 3(2) in Law Number 7036 which placed a mandate of pre-litigation mediation.[70] If the plaintiff does not attempt the prescribed mandatory mediation procedure and directly files a case against the respondents in a court of law, the court would be well within its rights to dismiss such a suit on account of due process not being followed.[71] The amendment also codified a framework of three weeks within which the mediation had to be completed and provided a leeway for an extra one week in exceptional circumstances.[72] However, this amendment does not bar the parties from seeking interim injunctions through the institution of a suit before a court of law and excludes disputes which arise due to workplace accidents, occupational hazards and diseases and declare rates by lawsuits. From 2018 to September 2019, more than 641, 965 disputes where registered for mandatory mediation out of which 392, 987 concluded with an agreement with 199, 679 being

[66]Ash Gurbuz Usluel, *Mandatory or Voluntary Mediation? Recent Turkish Mediation Legislation and a Comparative Analysis with the EU's Mediation Framework'*, JOURNAL ON DISPUTE RESOLUTION 445, 477 (2020).
[67]Code On Mediation in Legal Disputes No. 6325, Art. 13 (June 7, 2012).
[68]*Id* at Art. 4; *Id* at Art. 15.
[69]Idil Elveris, 'Turkey: Mandatory Mediation Is The New Game In Town', KLUWER ARBITRATION, (March 3, 2018), http://mediationblog.kluwerarbitration.com/2018/03/03/turkey-mandatory-mediation-new-game-town/.
[70]Code on Mediation in Legal Disputes, Law Number 7036, 2017, art. 3.2.
[71]Yenisey, D. K., and Seda Ergüneş Emrağ. "Mandatory mediation in labour law: A draft bill in Turkey", 1 Hungarian Labour Law, 30-39 (2017).
[72]*Supra* note 83, art. 3(9).

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unresolved as compared to 227, 499 disputes being fired as lawsuits in 2017 before the mandatory mediation provision was brought in.[73]

Mandatory mediation has been further empowered through the addition of a new provision through Law Number 7155 which brought in Article 5/A into the Turkish Commercial Code which made mediation a precondition for litigation in commercial disputes regarding compensation claims in the year 2019.[74] Since the Turkish Commercial Code includes disputes regarding complex disputes which entail subject matters like banking violations and intellectual and industrial property rights disputes (Article 4 of the Code), the time frame provided for the completion of such a mediation process has been increased from 3 weeks as seen in labour disputes to 6 weeks with an extension of 2 weeks in exceptional circumstances. Despite this law being only a year old, from January 2019 to October 2019, 119, 787 commercial disputes for file for mediation out of which fifty-seven percent concluded with an agreement and forty-three percent were referred further for litigation.[75] Another important metric to understand how the mandatory mediation model is functioning is that according to the 2019 Turkish Bar Association Report which states that over ten percent of the total number of lawyers working in Turkey comprise of the registered mediators which reaffirms the high success rate in the settlement of disputes through mediation as evidence from the statistics discussed above and shows the infrastructural competence that Turkey has developed to handle the high quantum of such mediations. [76]

3. Italy

Italy, one of the first countries to introduce mandatory pre-litigation mediation for civil matters[77], is a good example of the success of this process. The concept of pre-litigation mediation was added by Legislative Decree Number 28 which came out in 2010, and provided an "*obligation on parties to pursue mediation before filing a claim with any national court*

[73] Uyu~mazhklarda Dava art Arabuluculuk Istatistikler (02.01.2018-19.12.2019), http://www.adb.adalet.gov.tr/Sayfalar/istatistikler/istatistikler/davasarti.pdf.

[74]Abonelik Sozle mesinden Kaynaklanan Para Alacaklanna Iliskin Takibin Baslatilmasi Usulu Hakkinda Kanun, Resti Gazete (Dec. 19, 2018), http://www.resmigazete.gov.tr/eskiler/2018/12/20181 219-1.html

[75] ADR Isthanbul, 'Development of Mediation in Turkey', October 11, 2020, https://www.adristanbul.com/en/development-of-mediation-in-turkey/.

[76]Gizem Halis Kasap, '*Silver Bullet of Mediation? Turkey Implements Mandatory Pre-Litigation Mediation in Commercial Disputes'* (January 11, 2019), https://turkishlawblog.com/read/article/50/%22#_ftn1%22.

[77] Giovanni Matteucci, '*Compulsory Civil Mediation in Italy 2011/ 2021',* MEDIATE (May 24, 2022), https://mediate.com/compulsory-civil-mediation-in-italy-2011-2021/.

where the dispute relates to certain legal rights of a civil or commercial nature".[78] Failure to comply with this pre-litigation mediation process in stipulated civil matters directly affects the admissibility of the claim, and the parties may have to refer to the process before going on with litigation.[79] This process of pre-litigation mediation however was not lacking for impediments. Strikes by Italy's lawyers union and questions on the constitutionality of the process were two major problems that arose, both, before and after the decree was passed.[80] The previous wide scope of the pre-litigation mediation statute led to it being declared unconstitutional[81], and later narrowed down to fit the constitutional scheme in 2013[82].

This new law in regards to pre-litigation mediation provided for an "opt out", which allows the parties to opt out of the process if they feel that there is a low chance that a reasonable settlement will be reached. This bane to mediation however comes with its own antidote. If parties opt out, the mediator is still free to give a solution. If this solution is concurrent with the judgement procured through mediation, then the withdrawing party may be obligated to pay the mediation and litigation costs.[83] Further, the new law provided for the assistance of a lawyer during the mediation process, which went down well with the Italian Bar, who had previously protested.

The current situation in Italy is looking up, with a rise in disputes solved through mediation and a decrease in litigation caseload.[84]

4. International Conventions

International Mediation as a concept has only gained traction during recent years. However, its growth is undeniable and one of the instruments that clearly showcases this is the United Nations Convention on International Settlement Agreements resulting from Mediation

[78]Loris Bovo and Alessandro Vilani, *"Commercial mediation in Italy",*LINKLATERS https://www.linklaters.com/en-us/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/italy

[79] DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, https://www.europarl.europa.eu/RegData/etudes/note/join/2011/453175/IPOL-JURI_NT(2011)453175_EN.pdf.

[80]Rafal Morek, "*Mandatory Mediation in Italy- Reloaded",* KLUWER ARBITRATION, http://mediationblog.kluwerarbitration.com/2013/10/09/mandatory-mediation-in-italy-reloaded/

[81] Da Redazione, *Mediazione. Sentenza Corte Costituzionale n.272/2012* (December 6, 2012), https://www.leggioggi.it/allegati/sentenza-corte-di-cassazione-n-2722012/

[82] *Supra* note 82.

[83] *Id.*

[84] Donald L Swanson, *A History Of Mediation In Italy: Both Ancient (Including Bankruptcy) And Recent,* MEDIATBANKRY, https://mediatbankry.com/2021/09/14/a-history-of-mediation-in-italy-both-ancient-including-bankruptcy-and-recent/

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["Convention"] , popularly called the "Singapore Convention".[85] The Convention legitimises, or rather cements the already existing legitimacy of mediation by envisaging a situation where a mediation agreement can be enforced by the parties in the local courts of the countries who are a party to this convention.[86] It is pertinent to note that the mediation proceedings have to be as per due procedure, and the requisite attestations from the mediation and mediating institute have to be provided.[87] Further, the Convention only pertains to "International" parties (parties from different countries) where the issue is "commercial" in nature.

While India is a signatory to the Convention, it has still not ratified it. The question of how a mediation agreement under an international convention would play out in the Indian context becomes especially pertinent now that there is a proposed bill to institutionalise Mediation. This is answered in part by Section 28 of the Bill, which provides that mediated agreements will be binding and enforceable in a court of law.

When we see this aspect through the lens of pre-litigation mediation, the Convention does not expressly have an article that deals with this. However, considering that the Bill provides for compulsory pre-litigation mediation under Section 6[88], we will have to see what the stance of mediation settlements under the Convention. Considering that Chapter II(2) provides that international mediation also falls within the ambit of the Bill, then it logically follows that mediation under the Convention would be considered as valid pre -litigation mediation as long as it is conducted in India.

However, one key difference is that Section 6 provides for pre-litigation mediation in civil matters as well, whereas the Convention clearly specifies that issues relating to "family, inheritance or employment law" will not fall under its ambit.[89]

One other problem that is likely to arise is the lack of exposure of the Indian population to a stable mediation framework. The concept of mandatory pre-litigation mediation may be novel to many parties, and used only as a formality before they use the opt out clause that is provided

[85] https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements
[86] Jonathan C. Hamilton and Michelle Grando, *The Rise of Global Mediation: A New Treaty Portends Growth,* WHITE CASE, (June 28, 2021) https://www.whitecase.com/publications/alert/rise-global-mediation-new-treaty-portends-growth.
[87] *Id.*
[88] Draft Mediation Bill,2021, Ministry of Law and Justice, PRS Legislative Research (2021), https://prsindia.org/billtrack/the-mediation-bill-2021 .
[89] *Supra* note 10.

in the Bill.[90] This may not play well in an international context, where parties from developed countries who are privier to the process of mediation may see this as an act of non-cooperation and may be sceptical of handling matters in local courts. As mentioned already, Chapter II(2) of the Bill clearly provides that international mediation that is conducted in India falls within the ambit of this Bill, therefore a stable network or base[91] for commercial mediation will have to be set up before ratification of the Convention, and the Bill is a conduit towards achieving this.

E. Problems and Suggestions for Mandatory Pre- Litigation Mediation

Pre-litigation mediation is a double-edged sword. Mandatory pre-litigation mediation has numerous concerns associated with its implementation. Some of these include, but are not limited to, unconstitutionality (as seen in the Italian context), an involuntary approach and even denial of justice.[92] In this discussion, we will explore some of these concerns, especially in the Indian context.

One of the primary concerns in the Indian context is that, with mediation being a relatively novel concept, fear or misconceptions relating to the process may lead parties to opt-out after the conclusion of the mandatory sessions, irrespective of how they went.[93] This "bad faith"[94] mediation on part of Indian parties, where they are insincere in their approach,[95] will be a major hurdle to the effectiveness of institutionalised mediation. As has been seen in the previous section, this will be especially detrimental in the case of international mediation, where parties who are more used to the process may see this move as "non-cooperative" and making them apprehensive to litigate in local courts. A potential way to curb this apprehension of Indian parties regarding mediation is to provide a nudge towards the right path, or rather a thorn on the wrong one. This can be done by implementing the Italian model of the opt -out mechanism,

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[90] *Mandatory pre-litigation mediation needs lot of ground work before rollout,* THE HINDU BUSINESS LINE, https://www.thehindubusinessline.com/business-laws/mandatory-pre-litigation-mediation-needs-lot-of-ground-work-before-rollout/article38204536.ece.

[91] *Id.*

[92] Deepak Kinhala and Apporva, *Mandatory Mediation in India - Resolving to Resolve,* VIDHI CENTRE FOR LEGAL POLICY (March 2021),https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India-Resolving-to-Resolve.pdf.

[93] Maulik Vyas, *Mediation Bill Allows Mediation On Par With Arbitration And Litigation: Centre For Advanced Mediation Practice Founder*, https://economictimes.indiatimes.com/news/india/mediation-bill-allows-mediation-on-par-with-arbitration-and-litigation-centre-for-advanced-mediation-practice-founder/articleshow/89781107.cms?from=mdr

[94] ABA Section of Dispute Resolution, R*esolution On Good Faith Requirements For Mediators And Mediation Advocates In Court-mandated Mediation Programs*, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/draftres2.pdf

[95] *Id.*

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in its entirety. In the section on mediation in Italy, we have already seen how the party who opts out may be required to pay the entire mediation and litigation costs if the solution given by the mediator after the parties opt out, concurs with the judgement procured via litigation.

A modified version of this clause can be incorporated into the Bill, so that parties think twice before withdrawing from the mediation process. However, one very important facet to take into account is that the clause should only work towards deterring preconceived notions on mediation and not act as a threat that precludes parties from withdrawing even where there is a genuine concern with the process. This can be done by making the language of such a clause unambiguous.

Another major concern in the Indian arena is the sheer number of civil cases that come before the court every day, and those that are already pending.[96] Considering that pre-mediation of applicable civil and commercial matters is compulsory under the Bill, bringing such a huge number of cases under the mediation process will be especially hard. What exacerbates this problem is the lack of an adequate number of skilled mediators and mediation institutions.[97] Further, given that the qualifications for being enlisted as a mediator are high,[98] relevant skills need to be taught to the candidates[99] and this is not an easy fix. While Section 21 of the Bill does provide for a timeframe of 180 days, this period starts "*from the date fixed for the first appearance before the mediator*".

On the flip side, the Bill provides a provision for the creation of the Mediation Council of India, with the aim of promoting mediation and training mediators. Further, with mediation being introduced as a compulsory course in the Indian legal education system,[100] the path has been set for the normalisation and acceptance of this process.

In the context of analysing the mandatory mediation frameworks of different countries as well as India's own tryst with previous mandatory mediation models embedded in the special acts,

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[96]Jyotika Sood, *Pendency In Indian Courts Rising by 2.8% Annually: Report By Delhi-Based Non-Profit,* OUTLOOK INDI(October 20, 2021), https://www.outlookindia.com/website/story/pendency-in-indian-courts-rising-by-28-annually-claims-report-by-delhi-based-non-profit/398219.

[97]Mridul Godha, *A Renewed Interest in Mediation in India,* KLUWER ARBITRATION, http://mediationblog.kluwerarbitration.com/2019/03/30/a-renewed-interest-in-mediation-in-india/.

[98]Who can be a mediator: Rules, https://viamediationcentre.org/readnews/MzY3/Who-Can-be-a-Mediator-Qualifications-or-Disqualifications

[99] *Roadblocks and Challenges to Mediation in India,* ttps://www.sharadasc.com/wp-content/uploads/2018/12/Roadblocks-and-challenges-to-Mediation-SCSA.pdf

[100]Rintu Mariam Biju, *Mediation with Conciliation to be a compulsory subject in Law Colleges from academic year 2020-2021: BCI,* BAR AND BENCH, https://www.barandbench.com/news/lawschools/bci-mediation-with-conciliation-compulsory-subject-law-colleges-academic-year-2020-2021

it is in India's imperative to learn from these experiences to fulfil the mandate of Section 6 of the Bill both in letter as well as in spirit. Through our article, we have explored such instances, and they can be summarised in the form of certain suggestions which may be incorporated:

As has been elaborated upon in the article, India should consider implementing Italy's opt-out in its entirety.[101] This includes allowing the parties to exit the mediation process if they feel it to be ineffective, while providing a stipulation that would discourage the parties from leaving the process for non-legitimate concerns. The effect of this stipulation can be achieved through two ways:

I. A clause should be provided for in the Bill that provides that the parties give a reason for leaving the mediation process even if it is after the conclusion of the mandatory two session period. It can then be examined if the concern is legitimate, or the party wants to withdraw because of bad faith or misplaced apprehension. If the party wants to withdraw because the process is new to him and he is not privy to it, efforts can be made to make the party comfortable so that he may continue.

II. The Italian deterrent to opting out can be added by way of a clause in the Bill, which will provide that the party who opts-out will have to cover partial litigation costs for the other party if the result reached by litigation is similar to the advice that would have been given by the mediator. This can be done by asking the mediator to propose a solution after the parties have withdrawn.

Coming to the contents of the bill, Section 6 of the Bill mandates mediation before institution of civil and commercial suits, but in order to mandate this, the provision uses the word '*shall'*. The word '*shall'* is a widely and commonly accepted imperative term in legal circles around the world and is mandatory in nature.[102] However, the meaning is not absolute and may be interpreted according to legislative intent,[103] something which the high courts have done quite liberally while interpreting Section 12A of the Act as mentioned above. The word in itself changes its colour and meaning like a chameleon in distinct settings and using it as the base of the provision would not be a prudent idea.[104]

[101] *Supra* note 31.
[102] W. Wis. R. Co. v. Foley (1876) 94 U.S. 100, 103.
[103] State Of U.P. vs Manbodhan Lal Srivastava, AIR 1957 SC 912 para. 12.
[104] Jyoti Sagar, *"Shall" Shocked: The Use Of Shall In Legal Documents* (June 19, 2021), https://www.barandbench.com/columns/shall-shocked-the-use-of-shall-in-legal-documents.

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Section 12A of the Act, on the face of it appears mandatory and a different interpretation of the provision proves that the use of the word "*shall"* is definitely not an airtight manner of wording mandatory provisions. It is therefore, advised that a use of the word "mandatory" should be done while designing the section or an explanation clause which spells out the same. Sticking to this legalese is only bound to invite more litigation and the current standing of the courts in matters of Section 12A could also impair the effectiveness of the new legislation as both the provisions are very connected. It is therefore, also suggested that changes are made in the Act are made to make it in consonance with the Bill in order to ensure that both these acts can perform in tandem in the future while reducing all the clutter and the uncertainty.

Another idea that we can get from the mandatory mediation model of Italy as seen in Legislative Decree No. 69/2013, is the provision of a sunset clause for a period of four years which can essentially act as a trial and error period for analyzing the feasibility of a pre litigation mediation model in all commercial disputes.

The Turkish experience as envisaged in Law No. 7036 of 2017 which had enlarged the scope of mandatory mediation in commercial disputes involving question of intellectual property rights and insolvency-bankruptcy matters which also deal with questions of law is to be noted. The First Schedule of The Draft Mediation Bill 2021 does not provide for an exemption of such disputes which includes complex questions of law as seen in Section 2(c) of the Act. Thus, though the Turkish experience of referring such disputes for mediation may not have been successful, inserting a four-year sunset clause for such disputes will provide a cushion to understand the practical feasibility.

Another important element that the Bill should include, in order to implement both the letter and the spirit of the Section 6(1) of the Bill, is to incorporate the litigation cost provision as encoded in art 18A (11) of the Turkish law of 2017. Though Section 20 (2) of the Bill does provide for reimbursement of litigation cost by penalizing the party who refuses to participate in the mediation proceedings. However, the use of the word '*may*' leaves it at the court's discretion to impose such costs when one of the parties to the dispute fails to attend the first two sessions of the mandatory mediation proceedings. Making this a discretion of the court defeats the entire objective of Section 6(1) and does not provide for a solid disincentive to the parties which do not attend the mandatory mediation session unlike the Turkish law.

F. Conclusion- Benefits and the way forward

Making mediation mandatory has the obvious benefit of helping parties resolve matters before proceeding to trial, which would otherwise have been the first step that they would have taken. It is possible that the parties did not even think about mediation as a possible course of action in their ongoing conflict and because of a law mandating mediation, they may find this method of dispute resolution surprisingly successful. Alternatively, they might have given mediation some thought but ultimately decided against it because it would be a waste of time, money, and effort. It can be eye-opening to have the parties consider mediation and go through the process of using a neutral third party to assess their genuine needs and interests.[105]

The rising awareness that would be a result of this exposure, can help the legal systems in a multitude of ways. The first thing would be that the caseload in courts would come down as according to experienced mediators, a majority of cases are bound to get solved through mediation if it is made mandatory.[106] The reduction in litigation costs and increase in liquidity for the traders, firms etc. also would surely have a sizeable beneficial impact on the economy. Indian companies spent a whopping 5.6 billion dollars (Rs 38,660 crore) on litigation costs in FY19 with a fourteen percent increase compared to the previous financial year.[107] Even if a fraction of that money is saved every year and injected into the economy, the positive impact it would have on the lives of people around the country and the world would be enormous.

One more benefit that can come from making mediation mandatory is the reduced cost and increased infrastructure that comes from the economies of scale. Economies of scale is a basic economic concept that believes, that there will be an increase in productivity and reduced average cost if there is an increase in the factors of production.[108] When mediation is made mandatory before litigation, the demand for mediators and mediation institutes and centres is bound to rise. When demand for a service or product rises, the quantity supplied is also bound to rise.[109] In order to increase the supply, factors of production will have to be increased which

[105]Ruwena Khan, *Is Mandatory Mediation The Future?,* https://phoenixdisputesolutions.com/gb/news/mandatory-mediation-future.
[106] Donald L. Swanson, *Pros and Cons for Mandated Mediation: From Civil Justice Council for England and Wales,* https://mediatbankry.com/2018/02/06/a-list-of-pros-and-cons-for-mandated-mediation-from-the-civil-justice-council-for-england-and-wales/
[107]Maulik Vyas and Shailesh Kadam, *India Inc Spent 14% More On Legal Fees In FY19*,https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-spent-14-more-on-legal-fees-in-fy19/articleshow/71121319.cms
[108]Nordhaus, W.D., 2006. Paul Samuelson and global public goods. *Samuelsonian Economics*, pp.660.
[109] Mankiw, N. Gregory, Ronald D. Kneebone, Kenneth James McKenzie, and Nicholas Rowe. "Principles of macroeconomics." (2007).

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in this case would mean an increase in mediation centres and mediators. Such increase would lead to a development of infrastructure and reduced costs and could make mediation a process available for the common man and could motivate even parties seeking urgent relief, to try mediation once before going to the court.