

**PRE-INSTITUTION MEDIATION FOR SPEEDIER RESOLUTION OF  
COMMERCIAL DISPUTES: A COMPARATIVE ANALYSIS OF INDIA,  
ITALY AND TURKEY**

*Vikas Gahlot\**

*Ritika\*\**

**ABSTRACT**

*One of the innovative reforms introduced by the Commercial Courts (Amendment) Act, 2018 is Pre-Institution Mediation (PIM) under Section 12A of the Act. It requires that before a party can file a suit before the Commercial Court, it has to undertake a mandatory mediation exercise and try to resolve the dispute with the defendant. This exercise can be skipped if the party is claiming an urgent interim relief. The data from various high court websites show that PIM has not been successful in India. The present article analyses issues and challenges in successful implementation of PIM. It undertakes a comparative analysis with of Pre-Institution Mediation with India, Italy and Turkey.*

---

\* Teaching Associate, Centre for Environmental Law, Education, Research & Advocacy (CEERA), National Law School of India University (NLSIU), Bengaluru.

\*\* Advocate, Delhi High Court

## **INTRODUCTION**

Contract Enforcement parameter has always been a throne in India's effort to improve the Ease of Doing Business Ranking.<sup>1</sup> The improvement of this parameter required not only radical changes in both legislative provisions and litigation culture, but also required establishment of a specialised commercial dispute adjudication machinery. After a continuous pursuit to take legislative action upon the recommendation of the Law Commission's 188th Report<sup>2</sup> and 253rd Report,<sup>3</sup> the Parliament of India enacted the Commercial Courts Act, 2015.<sup>4</sup> This Act established specialised commercial courts at the district level and commercial division of the high courts.<sup>5</sup> To further strengthen this new commercial dispute resolution system the Act was amended in the year 2018<sup>6</sup> in order to increase its jurisdiction and provide some other additional reforms.

One of the remarkable highlights of the 2018 Amendment of the Commercial Courts Act was the introduction of the provision of Pre-Institution Mediation<sup>7</sup> by insertion of section 12A and chapter IIIA in the Act. This new mandatory mediation mechanism provides that a party cannot file a suit in the commercial courts unless and until he has exhausted the remedy of the pre-institution mediation.<sup>8</sup> To conduct the PIM process, the plaintiff has to approach the District or State Legal Services authority (who are the authorised authorities under the Act), as the case may be.<sup>9</sup> The time period of completion of the PIM process is 3 months which is extendable up to a further period of two months.<sup>10</sup> This period of mediation is excluded for computing the period of limitation.<sup>11</sup> The settlement arrived at, which should be written down and signed by the parties and the mediator, is enforceable as an arbitral award under section 30(4) of the Arbitration and Conciliation Act, 1996.<sup>12</sup> The statutory provisions of the Pre-

---

<sup>1</sup> Ease of Doing Business Rankings, DOING BUSINESS, <https://www.doingbusiness.org/en/rankings> (last visited Dec. 03, 2022).

<sup>2</sup> LAW COMMISSION OF INDIA, REP. NO. 188, PROPOSAL FOR CONSTITUTION OF HI-TECH FAST-TRACK COMMERCIAL DIVISIONS IN HIGH COURT (2003), <https://lawcommissionofindia.nic.in/reports/188th%20report.pdf>.

<sup>3</sup> LAW COMMISSION OF INDIA, REP. NO. 253, COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION OF HIGH COURTS AND COMMERCIAL COURTS BILL, 2015 (2015), [https://lawcommissionofindia.nic.in/reports/Report\\_No.253\\_Commercial\\_Division\\_and\\_Commercial\\_Appellate\\_Division\\_of\\_High\\_Courts\\_and\\_Commercial\\_Courts\\_Bill\\_2015.pdf](https://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and_Commercial_Courts_Bill_2015.pdf).

<sup>4</sup> The Commercial Court Act, 2015.

<sup>5</sup> The Commercial Court Act, 2015 § 3-5.

<sup>6</sup> The Commercial Court (Amendment) Act, 2018.

<sup>7</sup> The Commercial Courts Act, 2015 § 12A.

<sup>8</sup> The Commercial Courts Act, 2015 § 12A(1).

<sup>9</sup> The Commercial Courts Act, 2015 § 12A(3).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> The Commercial Courts Act, 2015 § 12A(4)-(5).

Institution Mediation are supplemented by The Commercial Courts (Pre Institution Mediation and Settlement) Rules, 2018.<sup>13</sup> The Rules lay down the procedure to be followed by mediator and the parties during the PIM. The fees for the mediation process is prescribed in a graded manner ranging from Rs.15,000 to Rs.75,000 on the basis of the quantum of the claim.<sup>14</sup>

The concept of Pre-Institution Mediation as an alternative means for speedier resolution of commercial disputes was adopted in India after its success in Italy and Turkey, who were the first countries to adopt such a mechanism. However, in comparison to Italy and Turkey counterparts, PIM has not been successful in India. Hence, the authors in this article undertake a comparative study of India, Italy and Turkey to understand and analyse the factors that have contributed to PIM's success in those countries. To this end, the present article firstly, tries to understand the factors that have led to PIM failure in India. This is done by analysing the data on Pre-Institution Mediation from Delhi, Maharashtra and Karnataka. Secondly, the authors undertake a comparative study of the PIM provisions of Italy and Turkey and compare them with India to analyse the factors that had led to success of PIM in those countries. Lastly, the authors provide a few recommendations that can strengthen the PIM mechanism in India.

## **ISSUES WITH PRE-INSTITUTION MEDIATION IN INDIA**

The data obtained from the official websites in Delhi,<sup>15</sup> Maharashtra<sup>16</sup> and Karnataka<sup>17</sup> reflects failure of the Pre-Institution Mediation in India. In Delhi, in the month of August 2022, PIM was successful in only 13 cases out of the 1868 cases that were pending before the commercial courts (*See* Figure 1).<sup>18</sup> Further, in 936 cases mediation resulted in “non-starter” i.e. non-appearance of the parties. In the City Civil Court of Mumbai, only 12 cases were

---

<sup>13</sup> The Commercial Courts (Pre Institution Mediation and Settlement) Rules, 2018 (made by the Central Government under the statutory rule making powers granted under Section 21A read with section 12(A)(1) of the Commercial Courts Act, 2015).

<sup>14</sup> The Commercial Courts (Pre Institution Mediation and Settlement) Rules, 2018 Schedule II (Prescribing Mediation Fee).

<sup>15</sup> *Data of Pre-Institution Mediation*, DELHI STATE LEGAL SERVICES AUTHORITY, [https://dlsa.org/hrf\\_faq/data-of-pre-institution-mediation-in-commercial-matters/](https://dlsa.org/hrf_faq/data-of-pre-institution-mediation-in-commercial-matters/) (last visited Dec. 03, 2022).

<sup>16</sup> *Statists, Mumbai City Civil Court*, E-COURTS MISSION MODE PROJECT, <https://districts.ecourts.gov.in/india/maharashtra/mumbai-citycivil-court/statistics> (last visited Dec. 03, 2022).

<sup>17</sup> *Pre-Institution Mediation in Commercial Courts*, KARNATAKA STATE LEGAL SERVICES AUTHORITY, <https://kslsa.kar.nic.in/pims.html> (last visited Dec. 03, 2022).

<sup>18</sup> *See* Pre Institution Mediation Data (Delhi) - August 2022, <https://drive.google.com/file/d/12kA0me0y1vhnc-86KPHCL64fBNawGsFk/view> (last visited Dec. 03, 2022) (Figure 1).

settled through Pre-Institution Mediation in the month of October 2022 (*See* Figure 2).<sup>19</sup> Whereas in Karnataka, where we only have statistics up to March 2021), only 8 out of 535 pending cases were successfully resolved through Pre-Institution Mediation, and 242 cases were non-starters (*See* Figure 3).<sup>20</sup>

The status of the PIM corroborates an earlier empirical study carried out by the authors during a two-year project under the Department of Justice, Ministry of Law & Justice, Government of India on “Strengthening Contract Enforcement and Ease of Doing Business in India”.<sup>21</sup> During this study, visits to Commercial Courts and Mediation centres were made and the authors carried out interview and discussion with the experts working in this area, including Judges of the commercial court and advocates having 3 or more year of experience in the field of commercial courts. The results of this study have been published in the Report *Contract Enforcement and Ease of Doing Business in India*.<sup>22</sup>

Based on the above official data, personal observation and interview, it can be stated that the failure of Pre-Institution Mediation under the Commercial Court is attributable to:

1. Non-starter of the PIM process due to non-appearance of the defendant. In most of the cases the PIM has failed primarily due to non-appearance of the party’s primality being defendant. The defendant under the Commercial Court Act has no liability, no duty, no compulsion, and no incentive to participate in the Pre-Institution Mediation Process. This results in one-sided burden on the plaintiff to fruitlessly undergo pre-institution process.
2. Lack of Incentives and Dis-incentives to participate in the PIM Process: The plaintiff and the defendant have no incentives to undertake the PIM Process. Further, they also do not have to face any stiff consequences for their non-appearance or lack of proper participation in the proceedings. This reduces the PIM process to a mere formality which must be complied by the plaintiff before institution of the suit.

---

<sup>19</sup> *See* Pre Institution Mediation Data (October 2022), <https://districts.ecourts.gov.in/sites/default/files/Form%206%20%28I%29%20Pre%20Instituion%20Mediation%20Report%20October-2022.pdf> (last visited Dec. 03, 2022).

<sup>20</sup> *See* Pre Institution Mediation Data (March 2021), Karnataka. Source: [https://kslsa.kar.nic.in/pdfs/PIMS\\_data.pdf](https://kslsa.kar.nic.in/pdfs/PIMS_data.pdf) (last visited Dec. 03, 2022).

<sup>21</sup> *Strengthening Legal Provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial Matters in India*, CEERA PUB (Dec. 28, 2020), <https://ceerapub.nls.ac.in/strengthening-legal-provisions-for-the-enforcement-of-contracts-reassessing-the-quality-and-efficiency-of-dispute-resolution-of-commercial-matters-in-india/>.

<sup>22</sup> CEERA-NLSIU, CONTRACT ENFORCEMENT AND EASE OF DOING BUSINESS IN INDIA (2021), <https://ceerapub.nls.ac.in/report-on-contract-enforcement-and-ease-of-doing-business-in-india/>.

Form 6(i):- Mediation Data of Pre-institution mediation in Commercial matters on monthly basis

Name of Authority:- Delhi State Legal Services Authority (DSLISA)

List of cases received for Pre-Institution Mediation and Settlement during the month of **August-2022**

S.No.	Name of Mediation Centre (For example, DLSA or Main Mediation Centre Mumbai)	Total Number of applications pending on 1 <sup>st</sup> day of the month	Total No. of applications received during the month	Total No. of cases settled during the month	Total number of non-starter cases during the month	Total number of applications pending at the end of the month	Remarks (unsettled matters)
1	Central	322	196	0	145	370	3
2	West	278	111	1	122	264	2
3	East	35	60	0	34	61	0
4	North-East	17	7	0	16	8	0
5	Shahdara	84	70	0	68	86	0
6	South	132	67	0	51	146	2
7	South-East	346	121	5	215	241	6
8	New Delhi	187	68	5	62	182	6
9	North	153	107	0	68	192	0
10	North-West	108	81	0	82	107	0
11	South-West	123	75	0	63	135	0
	<b>Total</b>	<b>1785</b>	<b>963</b>	<b>11</b>	<b>926</b>	<b>1792</b>	<b>19</b>
12	DHCLSC	83	21	2	10	91	1
	<b>Overall Total</b>	<b>1868</b>	<b>984</b>	<b>13</b>	<b>936</b>	<b>1883</b>	<b>20</b>

## CITY CIVIL &amp; SESSIONS COURT, GREATER BOMBAY

## Form-6 (I)

List of cases received for Pre-Institution Mediation and Settlement during the month - October-2022

Sr. No.	Month	Name of Mediation Center (For example, DLSA or Main Mediation Centre, Mumbai)	Total number of applications pending on the 1 <sup>st</sup> day of the month	Total number of application received during the month	Total number of cases settled during the month	Total number of non-stater cases during the month	Total number of cases failed during the month	Total number of applications pending at the end of the month
1	October-2022	Main Branch	564	212	4	77	4	691
		Dindoshi Branch	972	163	8	142	6	979
<b>Total</b>			<b>1536</b>	<b>375</b>	<b>12</b>	<b>219</b>	<b>10</b>	<b>1670</b>

Note : This information is provided by the concern courts.

Date : 01<sup>st</sup> November, 2022.

## Pre-Institution Mediation Data (Karnataka State Legal Services Authority) for the Month of March 2021

Total Number of Applications	Total Number of applications	Total number of cases settled	Total number of non-starter	Total number of applications
------------------------------	------------------------------	-------------------------------	-----------------------------	------------------------------

pending on 1st day of the month	received during the month	during the month	cases during the month	pending at the end of the month
535	244	8	242	529

## **COMPARATIVE ANALYSIS**

In the following section, the authors undertake a comparative analysis of the provision of Pre-Institution Mediation in India, Italy and Turkey. Italy and Turkey are chosen for the specific reason that these two countries are the pioneers for introducing the mandatory mediation process. Further, the success of the mandatory mediation regime in these countries has been the inspiration and primary reason for India to introduce the PIM regime in the Indian legal system.

## **THE ITALIAN EXPERIENCE**

In furtherance to 2008 European Union's Directive on Civil and Commercial Mediation,<sup>23</sup> the Pre-Institution Mediation known as "the opt-out model" was introduced in Italy in 2010.<sup>24</sup> The legislation on mediation was introduced in order to reduce the vast amount of case load pending before the Italian courts as the courts have been witnessing case filings at a rate of 1 million new cases per year.<sup>25</sup> Another aim of the law was to improve the Ease of doing Business Rank of Italy by improving the contract enforcement parameter. Italy at that time ranked 157th on the contract enforcement parameter.<sup>26</sup> This law required the parties to a dispute to undertake mandatory mediation in a wide variety of 12 cases which included disputes relating to property rights, banking and financial contract, insurance matters, lease, loan, rental etc.<sup>27</sup> This Law provided a strong mandatory mediation regime with both incentives and penalty approach. On the incentive side, it made provisions for tax benefits,

<sup>23</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008, O.J (L 136) 3. (the directive prescribed for mediation as a dispute resolution mechanism in cross-border civil and commercial disputes).

<sup>24</sup> Implementation of Article 60 of Law no.69, on Mediation Aimed at the Conciliation of civil and Commercial Disputes, Legislative Decree 4 March 2010, n. 28, (Italy). <https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2010-03-05&atto.codiceRedazionale=010G0050&tipoDettaglio=multivigenza&qId=> (last visited Dec. 03, 2022).

<sup>25</sup> Luigi Corninelli, *The "To Do" Law Decree and the Return of Compulsory Mediation*, NCTM STUDIO LEGALE (2013).

<sup>26</sup> Laura Opilio et al, *Italy: Compulsory Mediation Procedure – Italian constitutional Court Rules Invalid*, CMS LAW TAX (2012)

<sup>27</sup> Decree Legis n. 28/2010, *supra* note 17, art. 5(1).

stamp duty exemptions etc for taking part in the mediation process and doubled these benefits if the mediation was successful.<sup>28</sup> On the other if the parties do not take part in the mediation process or do not take the mediation proceedings seriously (by improper participation), the law prescribed penalties that could range from inference of adverse evidence in the trial to paying of the cost of the opposite party even the party succeeds at the trial.<sup>29</sup>

This Italian law was highly successful. In the year 2017, the mandatory mediation process was able to resolve 50% of the cases that it received.<sup>30</sup> The following tables show a comparison of the provisions of India and Italy on the process of Pre-Institution Mediation.

<b>TABLE 1: Comparison of Italian and Indian Law on Pre-Institution Mediation</b>		
	<b>Italy</b>	<b>India</b>
Number of disputes subject to pre-Institution Mediation	12	22
Can the defendant challenge inadmissibility of the suit for not carrying out Pre-Institution Mediation	Yes	Yes (impliedly)
Exemption to mandatory mediation	Urgent and Precautionary measures, transcription of Judicial Request	Urgent Interim Relief
Duration of Mediation Process	3 months (starting from time of filing of mediation request)	3 months + 2 months
Mediation Process duration exempted from limitation law	Yes	Yes

<sup>28</sup> Decree Legis n. 28/2010, *supra* note 17, art. 17, 20-21.

<sup>29</sup> Decree Legis n. 28/2010, *supra* note 17, art. 13.

<sup>30</sup> See Anurag Tirpude, *A-Z of ADR: Pre-Institutional Mediation*, BIMACC (Sept. 15, 2020), <http://www.bimacc.org/a-z-of-adr-pre-institutional-mediation/>.

Consequences of non-participation in the mediation process	Judge can infer arguments of evidence in the subsequent trial. The judge can also penalise the party for non-participation for an amount “unified contribution due for the judgement”.	None
Consequence of refusal to accept mediator’s settlement proposal	If the Court’s judgement is similar to the settlement proposed by mediator’s, the party who refused the settlement, although successful in the judicial proceedings, shall be ordered to pay the opposite parties cost.	None
Who can conduct mediation	Public and Private entities	Legal Services Authority
Tax Exemptions	<p>Yes ( all deeds, documents and provisions relating to mediation proceedings are exempt from stamp duty and taxation)</p> <p>If Mediation is Successful: tax exemption up to 500 Euros on the indemnity paid. This amount can be claimed through tax returns</p> <p>If Failed: up to 250 Euros</p>	None



## **THE TURKISH EXPERIENCE**

Inspired by the Italian experience, Turkey also introduced mandatory pre-institution mediation regime by enactment of “Law on Starting Legal Proceedings for Monetary Receivable Arising from Subscription Agreements”, 2018<sup>31</sup> This law made amendments to the “Turkish Commercial Code No. 6102” (“TCC”) and “the Law on Mediation in Civil Disputes No. 6325” to pay the way for and to fine tune them for the introduction of mandatory mediation in Turkey.<sup>32</sup> The mandatory mediation regime has a very wide scope. It covers: (i) all the issues under the Turkish Commercial Code (TCC); (ii) Turkish Code of Obligations; (iii) Turkish Civil Code regarding Pawn Brokers; (iv) Intellectual Property, banks and financial Institutions.<sup>33</sup> Though primarily based on and inspired from the Italian law, it has stark difference including a shorter time period for mediation, difference in authorities empowered to conduct mediation, consequence of non-participation and improper participation and incentives for successful mediation. The Law was very successful in Turkey in bringing mediation at the forefront of commercial dispute resolution, and within a period of one month the country reported more than 30,000 mandatory mediation requests. Out of the them 6,423 were completed with 4,637 resulting in a successful agreement between the parties i.e. 72% successful mediation.<sup>34</sup> The following table below shows a comparison of the Turkish and Indian Law on Pre-Institution Mediation.

<b>TABLE 2: Comparison of Turkish and Indian Law on Pre-Institution Mediation</b>		
	<b>Turkey</b>	<b>India</b>
Number of disputes subject to pre-Institution Mediation	4 Broad heads covering major Private Law Matters except matters that are required to be solely settled by judges	22

<sup>31</sup> Law on Starting Legal Proceedings for Monetary Receivable Arising from Subscription Agreements, 2018, No. 7155, Official Gazette No. 30630.

<sup>32</sup> Orcun Cetinkaya & Burak Baydar, *Turkey Introduces New Legislation Regarding Mandatory Mediation for Commercial Disputes*, Eurofenix, Spring 2019, at 38.

<sup>33</sup> *Id.*

<sup>34</sup> Leonardo D’Urso, *How Turkey Went from Virtually Zero to 30,828 Mediation in Just One Month*, MEDIATE INDIA (Feb. 2018), <https://www.mediate.com/articles/depalog20180222.cfm>.

Can the defendant challenge inadmissibility of the suit for not carrying out Pre-Institution Mediation	Yes, if cases are filed without applying to mediation first, courts are mandated to dismiss the case on the grounds of absence of pre-requisite without any further examination.	Yes (impliedly)
Exemption to mandatory mediation	Provisional remedies, interim injunction, interim attachments, pending cases	Urgent Interim Relief
Duration of Mediation Process	6 weeks (from the appointment of the mediator) extendable to 2 more weeks	3 months + 2 months
Mediation Process duration exempted from limitation law	Yes	Yes
Consequences of non-participation in the mediation process	If the mediation fails due to one party's non-participation, the such party will bear the total cost of the proceedings even if they get a favourable decision from the court	None
Consequence of refusal to accept mediator's settlement proposal	None	None
Who can conduct mediation	Mediation Bureau	Legal Service Authorities
Tax Exemptions	None	None

## **RECOMMENDATIONS & CONCLUSION**

Success of the Pre-Institution Mediation holds the key for the achieving the objective of Commercial Courts Act, 2015. It also holds the key for reducing the judicial workload and backlog in the country. It will help in shifting the Indian legal culture from an adjudicatory and litigation intensive to ADR intensive. If the PIM process is successful in Commercial Courts, it can be replicated in other disputes also. Further, With the Supreme Court judgement in *M/s Patil Automation Pvt. Ltd. v. Rakheja Engineers*,<sup>35</sup> expressly upholding that the PIM process is mandatory and not discretionary, it is time to strengthen the provisions of PIM to ensure its success.

Hence, the authors, on the basis of the above analysis, make the following recommendations for strengthening the PIM in India by amending Section 12A of Commercial Courts Act. In India, the prime cause of failure of PIM process is non-appearance of the parties (primarily defendant). To address the same, India should follow the Italian model and strengthen its PIM regime by using “carrot and stick” approach. Section 12A should introduce “Incentives” in the form of tax exemptions, stamp duty exemptions, and provide other form of monetary benefits to the parties to make the PIM process lucrative to both the parties in comparison to litigation process. Further, Section 12A should also introduce “Dis-Incentives” in the form of: adverse evidence inference against the non-participating party; imposition of costs on the non-participating party in the PIM, even if the party succeeds in the subsequent trial; imposing cost, if the judgement of the court is similar to the mediator, on the party who refused mediator’s offer. These are some of the dis-incentives that can be imposed on the parties who do not turn up for mediation or do not make sincere efforts in the mediation process. Lastly, the incentives and disincentive approach proposed can also be graded i.e. Full exemption from cost if the PIM process results in a successful settlement. 50% exemption from costs if the parties appear and participate in the mediation process can be adopted to further strengthen the mandatory mediation regime.

It is hoped that the above recommendations made in this short research work through a comparative study of India, turkey and Italy, will provide a roadmap to make the Pre-Institution Mediation successful in India and strengthen the implementation of the Commercial Courts Act. The study highlights the stark differences in the Indian regimes vis-à-vis Italy and Turkey especially with respect to the collateral support offered to PIM. The

---

<sup>35</sup> *M/s Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt. Ltd.*, (2022) LiveLaw (SC) 678.

recommendations in this paper, in essence, aims to ensure that a similar type of collateral support is also required in India to make Pre-Institution Mediation a successful regime.