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“CHALLENGES AND OPPORTUNITIES: HARMONIZING THE COMMERCIAL COURTS ACT AND MEDIATION ACT, 2023”

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ABSTRACT

Understanding the intersection of mandatory pre-litigation mediation through Section 12A of the Commercial Courts Act, 2015, and the philosophical underpinnings of agreement in the Mediation Act, 2023, creates one of the most stimulating intellectual tensions in modern Indian Law surrounding dispute resolution. In 2018, when the Indian Parliament introduced pre-institutional mediation, which was implemented, requiring parties to mediate before filing a commercial suit, there was a significant shift in court procedures. The purpose of this necessitating mediation was to reduce the backlog of cases in the courts and to promote settlement between the parties. In 2023, with the passage of the Mediation Act, a legislative framework for mediation was established. The foundation of this legislation is the inherent position that mediation is and should remain a voluntary process.

These two varying frameworks create a conflict with several critical issues. Does mandatory mediation pre-litigation create a conflict with the voluntary basis for mediation in the Mediation Act of 2023? What statutory interpretation have the courts given to Section 12A? What are the unique structural challenges that continue to hinder the effectiveness of MPIM? How do we bring the two frameworks together? Using a doctrinal analysis of primary legislation, cases from the Supreme Court, and comparative law, this article will attempt to answer each of these questions. Ultimately, we conclude that under the legal rationale for the statutory provisions, the two statutes are able to co-exist with the caveat that there are both procedural and institutional reforms necessary to allow those statutes to exist in a complementary manner.

Keywords: *Pre-litigation mediation, Commercial Courts Act, Mediation Act 2023, Section 12A, Voluntary mediation, Mandatory mediation, Party autonomy, Dispute resolution.*

I. INTRODUCTION

The way disputes are resolved in India is changing. There has been such an increase in the number of cases in court (over 50 million cases pending) that parties are being pushed by legislators and courts to stop looking for ways to resolve their disputes through adversarial litigation (going to court) and to consider ways of resolving their disputes through consensual resolution (e.g., mediation). For many years, mediation has been a very little-used way of resolving disputes, but in recent times it has become a way in which many parties are resolving their disputes.

The introduction of the Commercial Courts Act in 2015 (amended 2018) required parties to use a mediation process before filing a lawsuit in a Commercial Court, as set out in Section 12A. Parties must use mediation before they can go to the Commercial Court unless they are seeking to have the Court order interim relief. The Commercial Courts Act is a creative way to divert parties that have a Commercial dispute into mediation prior to them going to the Commercial Court to resolve their dispute.

In addition to the Commercial Courts Act, the Mediation Act, 2023, is the first stand-alone legislation addressing mediation in India. Section 6 of the Mediation Act has a provision where, if a party wishes to engage in Mediation they may withdraw from the Mediation process at any time without affecting their legal rights. This is the philosophical basis of the Act and one that has been adopted by many other countries when developing their mediation laws. Mediation is a party-centred process.

This paper explores the conflict created by the contrasting statutory frameworks of mandatory participation under s. 12A¹ and voluntary participation under the Mediation Act.² To assist with this, four separate research objectives were used to answer the above questions and are addressed in each section of the paper.

II. STATEMENT OF PROBLEM

Statutory interpretation, process design, and constitutional values intersect to produce research gaps within this study area. While the Commercial Courts Act's section 12A mandates that parties must first attempt to mediate before commencing litigation, the Mediation Act of 2023 establishes that voluntary consent is the basis upon which mediation can take place. Consequently, Indian courts now struggle with the inconsistency between section 12A and the 2023 mediation act; for example, the Supreme Court's decision in *Patil Automation Pvt Ltd v. Rakheja Engineers Pvt Ltd* deemed section 12A to be a jurisdictional restriction on a party's ability to file a lawsuit without first having attempted mediation.³

However, the Mediation Act of 2023 provides definitions regarding the mediation process itself, such as confidentiality, mediator behaviour, and enforcement of settlement agreements.⁴, and reiterates the importance of parties' voluntary participation in mediation. Thus, several practical dilemmas arise from the tension produced by these two statutes: can a legal requirement that a party participate in mediation solely as a condition precedent to being able

¹ The Commercial Courts Act, 1949, § 12A, No. 4, Acts of Parliament, 2016 (India).

² The Mediation Act, 2023, § 6, No. 32, Acts of Parliament, 2023 (India).

³ *Patil Automation Pvt Ltd v. Rakheja Engineers Pvt Ltd*, (2022) 10 SCC 1.

⁴ The Mediation Act, 2023, § 5, No. 32, Acts of Parliament, 2023 (India).

to commence a legal proceeding be considered true mediation, given that the party would not otherwise voluntarily do so?, what do courts' interpretations of section 12A demonstrate about how MPIM will operate in practice?, what with respect to systemic deficiencies exist that may impede MPIMS effectiveness?. And will both statutes operate together without compromising the fundamental purpose of each?

Legal scholars and courts have failed to properly answer these questions. This paper will provide this doctrinal analysis in an organised manner applied to each of the four research questions presented below.

III. LITERATURE REVIEW

The relationship between the mandatory pre-institution mediation (PIM) process outlined in Section 12A of the Commercial Courts Act, 2015, and the voluntary ethos established under the Mediation Act, 2023, is a major subject of inquiry within the Indian dispute resolution literature. This review of existing literature combines doctrinal, empirical, and comparative research to identify methods for harmonising these statutory frameworks without compromising procedural justice, as well as to ascertain whether compelling parties to mediate is contrary to the nature of mediation itself.⁵

Individuals and scholars refer to the “Voluntariness Paradox” as a key area of contention, which is demonstrated through scholars' arguments that distinguish between “mandatory attendance” and “voluntary settlement.” Some scholars argue that the procedural requirements of Section 12A to compel parties to attend mediation do not compromise the integrity of the mediation process if the parties have complete autonomy as to the outcome of the process. Others argue that obligations of participation in the process jeopardise the voluntary, consensual nature of mediation. For example, Laila Ollapally concludes that the term “mandatory mediation” is inappropriate and that “mandatory pre-litigation information sessions” should be used instead of “mandatory mediation” to ensure that the virtues of voluntariness are maintained when introducing parties to mediation as a dispute resolution method.⁶ Furthermore, corporate law scholars such as Umakanth Varottil have expressed concerns that, without no strong and specialized infrastructure, the requirement for PIM will create a “procedural gatekeeper” for mediation by creating additional delays to obtain substantive justice and by creating shifted costs to the parties to the litigation, who will incur increased costs in obtaining mediation ultimately create an increased burden on litigants.⁷

⁵ Shirin Khajuria, Reimagining Justice Through Mediation – An analysis of The Mediation Act, 2023, LAW SCH. POL'Y REV. (Aug. 8, 2025), <https://lawschoolpolicyreview.com/2025/08/08/reimagining-justice-through-mediation-an-analysis-of-the-mediation-act-2023/>.

⁶ Laila Ollapally, Mandatory pre-litigation mediation: A missed opportunity in the Mediation Bill, 2023?, BAR & BENCH, <https://www.barandbench.com/columns/mandatory-pre-litigation-mediation-a-missed-opportunity>. (last visited April 4, 2026).

⁷ Sanjeev Sanyal & Apurv Kumar Mishra, *Why Commercial Mediation Should be Voluntary* (Econ. Advisory Council to the P.M., Working Paper No. 25, 2023), <https://eacpm.gov.in/wp-content/uploads/2023/10/EACPM-WP25-Why-Commercial-Mediation-Should-be-Voluntary.pdf>. (last visited April 4, 2026).

Jurisprudential Evolution

The Supreme Court's decision in *Patil Automation Pvt Ltd v Rakheja Engineers Pvt Ltd (2022)* has covered its status as the lead case when discussing the mandatory jurisdictional requirement of complying with section 12A. For many commentators, this ruling satisfied the intent of the original legislation to reduce congestion in the commercial courts and provided effective steps for affected parties to recover damages from defendants who were infringing their IP rights without having to go through mediation. The subsequent line of case law has, however, drawn considerable criticism from commentators, as, for instance, the Delhi High Court's decision in *Aditya Birla Fashion v Saroj Tandon (2024)* mandated that the parties would have to go through mediation even though they did so under duress.⁸

The literature also examines the different approaches taken by the High Courts to determining whether an urgent interim relief application can be justified under the exception for 'emergency relief', with commentary pointing to conflicting methodologies from a simple "Pleadings-Based" approach to a more elaborate "Justifying-Based" approach.⁹ The current discourse has focused on a ruling of the Supreme Court affecting *the Novenco Building* decision in relation to the Supreme Court ruling, which clarified that ongoing damage due to IP infringement creates ongoing damages, which justifies the need for urgent relief, such that the relief can be granted outside of the mandatory PIM requirement.¹⁰

Empirical Realities: The "Non-Starter" Epidemic

Research has shown numerous real-world examples of how statutory laws do not match their intended purpose. According to data compiled by the Ministry of Law and Justice (2025), there is an alarming level of "non-starter" issues relating to the implementation of the law throughout the country.

According to data from the Ministry of Law & Justice 2022–2023 reporting period indicates that there was a gradual increase in total applications & non-starters, whilst at the same time there was also a gradual decrease in the number of settlements achieved. In financial year 2022-23, there were 46,412 applications, of which 41,898 were not started & only 1,449 were settled. Then in financial year 2023-24, total applications increased again to 51,019; there were also more non-starters to 47,185; however, there was another decrease in settled to just 1,139. Lastly, the financial year 2024-25 had the highest level of activity with 59,568 total

⁸ Ambar Bhushan & Divyam Sharma, *Forced mediation for counterclaims counterproductive*, INDIA BUS. L.J., <https://law.asia/counterclaims-forced-mediation/>. (last visited April 4, 2026).

⁹ Aravind Sundar, *Determining Urgency in Compulsory Pre-Litigation Commercial Mediation*, 13 NLIU L. REV. 49 (2024).

¹⁰ *Supreme Court Interprets Urgent Interim Relief Under Section 12A in Novenco IP Infringement Case*, SUNS LEGAL, <https://sunslegal.com/2025/11/05/supreme-court-interprets-urgent-interim-relief-under-section-12a-in-novenco-ip-infringement-case/>. (last visited April 4, 2026).

applications, of which 52,730 were not started, but there was again another large decrease in achieving settlement at just 877.

Much of the literature regarding these problems points to a large functional disparity between the institutions responsible for administering Section 12A mediation (i.e., the District Legal Services Authorities [DLSAs]) and the unique, specialised experience and knowledge necessary to successfully manage complex corporate disputes.¹¹

Harmonisation and Comparative Insights

To align both of these institutional frameworks, legal scholars are advocating a composite interpretation of the statutory provisions, which employs the use of Section 4(2) of the 2023 Mediation Act as a savings provision for both the Commercial Courts Act, which requires parties to refer their cases to mediation; and the Mediation Act, which provides the ethical standards of conduct during the mediation process and provides for enforcement of the parties' final resolution. In addition to this, scholars are exploring the potential for using comparative law to support reform efforts. The 2023 United Kingdom decision in *Churchill v Merthyr Tydfil* has been cited by a growing number of legal scholars in support of the compulsory mediation framework existing in India.¹² Additionally, scholars have recently begun to advocate for allowing Indian courts to implement the “carrots and sticks” method of imposing strict monetary penalties for those who engage in bad-faith participation in mandatory mediation proceedings, to deter frivolous participation while still ensuring that the parties meaningfully cooperate to resolve their differences.¹³

Judicial Consideration of CPC Section 89 and Traditional Mediation Methods

Justice Indu Malhotra's book, *O.P. Malhotra on Law and the Practice of Arbitration and Conciliation* (3rd ed., Thomson Reuters, 2014), provides an authoritative overview of how Indian courts have evolved in their approach to referring disputes to alternative dispute resolution (ADR). This work also discusses the Supreme Court's landmark decision in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*¹⁴ Regarding how the referral process under CPC Section 89 has been streamlined, how parties should be given autonomy when they are referred to ADR by the court, and how these principles apply to the second question of the research paper regarding the judiciary's interpretation of mandatory mediation provisions. As such, the interpretive benchmark established through *Afcons* must be used to

¹¹ Shubhi, *PIMS After Six Years: Law Ministry Updates Parliament on Commercial Disputes Settled Through Pre-Institution Mediation*, SCC TIMES <https://www.sconline.com/blog/post/2026/02/01/law-ministry-informs-parliament-about-pre-institution-mediation-commercial-courts/>. (last visited April 4, 2026).

¹² James Levy & Louise Duffy, *Mandate to Mediate: Compelled Alternative Dispute Resolution in England*, ASHURST, <https://www.ashurst.com/en/insights/mandate-to-mediate-compelled-alternative-dispute-resolution-in-england/>. (last visited April 4, 2026).

¹³ Anandi Katiyar, *Meditari, Meditatio, Mediation: Tackling Non-Starter Cases—Lessons from the Italian Model*, NICKLED & DIMED, <https://nickledanddimed.com/2025/03/17/meditari-meditatio-mediation-tackling-non-starter-cases-lessons-from-the-italian-model/>. (last visited April 4, 2026).

¹⁴ *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd*, (2010) 8 SCC 24.

evaluate jurisprudence relating to CPC Section 12A. Malhotra provides a reliable mixture of Supreme Court case law and comparative materials from within the Commonwealth.

Law Commission of India's Report on Section 89 of the CPC

In a 2011 law commission report (LCR 238), there were many recommendations to improve upon section 89 of the Code of Civil Procedure (CPC).¹⁵ These included enhancing clarity around judicial powers relative to Alternative Dispute Resolution (ADR) methods, as well as instating pre-litigation mediation. The law commission has identified various conceptual defects with the then-current framework, whereby mediation, conciliation, and judicial settlement are being confused with one another. This report serves to provide critical information regarding two of four distinct research questions, i.e., judicial interpretation and harmonisation, and it indicates to parliament what was originally intended with respect to pre-litigation mediation requirements and warns against provisions that would violate the concept of voluntariness. The Commission compiled both quantitative and qualitative data from High and subordinate courts across the jurisdiction to validate its conclusions as to the reliability of the report.

IV. RESEARCH QUESTIONS

The objective of this study is to examine the following four questions:

1. Does Section 12A of the Commercial Courts Act, 2015 require mandatory pre-litigation mediation for all commercial disputes and if not, why?
2. What have Indian Courts interpreted to be the meaning of mandatory pre-litigation mediation under Section 12A, and how does this understanding inform how parties will use mediation to settle their disputes?
3. What systemic issues delay the successful implementation of pre-litigation mediation under Indian law?
4. How can the pre-litigation mediation statutory scheme established by the Commercial Courts Act be harmonised with the provisions of the Mediations Act, 2023, to enhance the effectiveness of both laws?

V. RESEARCH METHODOLOGY

The study will take a doctrinal approach towards the four research questions with an analysis of the primary sources of law (e.g., statutes, constitutions, and case law) and the secondary sources of law (e.g., academic commentaries, law commission reports, and international literature).

Primary sources of law analysed include The Commercial Courts Act (2015) (as amended 2018), The Mediation Act (2023), The Code of Civil Procedure (1908), notably s. 89 & O. 10,

¹⁵ LAW COMM'N, GOV'T OF IND., REPORT NO. 238, AMENDMENT OF SECTION 89 OF THE CODE OF CIVIL PROCEDURE 1908 AND ALLIED PROVISIONS, 12–14 (2011).

and relevant precedential Supreme and High Court case law. Secondary materials that were used included articles published in peer-reviewed journals, law commission reports, policy documents, and case comparative literature from the UK, Singapore and the EU, which have established systems of compulsory mediation.

A doctrinal methodology is appropriate for this enquiry because the ultimate objective is a normative legal question concerning how to interpret and reconcile two statutes rather than conducting empirical analyses of what litigants do. Therefore, this research does not include surveying or interviewing; rather, the research builds an interpretive argument based upon legal texts, judicial reasoning and academic commentary. Each section in the main body of the paper addresses one of the four research questions, and each section contains a statement of findings at the conclusion of that section.

VI. ANALYSIS

6.1 Research Question 1: Is Section 12A Consistent with the Voluntary Ethos of the Mediation Act, 2023?

6.1.1 The Architecture of Section 12A

Section 12A (Mandatory Pre-Institution Mediation) stipulates that a plaintiff must exhaust all pre-institution mediation avenues before commencing an action for a commercial suit with a value equal to or greater than the amount specified on the court's approved list, unless an immediate interim remedy is sought.¹⁶ This provision is absolute and has a jurisdictional basis; a suit filed in violation of Section 12A is subject to being returned or dismissed at the threshold.

In contrast, at the initial level, it appears that the requirement for mandatory attendance at mediation creates a conflict with the Mediation Act 2023, in that the foundation upon which the Mediation Act stands is based on the concept of voluntary participation. As stated in Section 5 of the Mediation Act, the process of mediation is a voluntary process, while Section 6 of the Mediation Act provides that parties have the right to withdraw from the mediation process at any time without being prejudiced with respect to their legal rights.

6.1.2 Mandatory Referral, Voluntary Outcome- Reconciling the Discrepancy

The apparent conflict between the two pieces of legislation is ultimately resolved by properly identifying the level at which the concept of voluntariness applies. Section 12A requires *attendance* at mediation, not agreement through mediation; and the Mediation Act, 2023, safeguards the concept of *voluntariness of outcome*, not of referral. Although they both relate to mediation, they apply to different aspects of the process and are not, in principle, inconsistent.

Section 4(2) of the Mediation Act preserves the applicability of other legislation providing for mediation as such; it is clear that the statute was meant to include current mediation statutes.

¹⁷including s.12A, while enacting it. Review those statutes together and determine how they interact with one another: Commercial Court's Statute mandates the MPIM process, which will

¹⁶ The Commercial Courts Act, 1949, § 12A (1), No. 4, Acts of Parliament, 2016 (India).

¹⁷ The Mediation Act, 2023, § 4 (2), No. 32, Acts of Parliament, 2023 (India).

govern the way this referral occurs, while the Mediation Act governs parties when they get to the table in terms of quality, conduct and enforceability of that process.

The Mediation Directive (2008/52/EC) from the European Union and the Mediation Framework established in Singapore both create statutory authority for making referrals to mediation mandatory, but keep settlement voluntary. In both instances, there is a clear recognition of the difference between a mandatory process with a voluntary outcome, and therefore, there is clarity in comparing what has been proposed here with the other two models.

Thus, even though the MPIM is a mandatory process, it does not violate the voluntary principles of the Mediation Act, 2023, because it is understood as requiring attendance (not acquiescing to agreement). Furthermore, a party is fully free to leave the pre-litigation mediation having settled nothing whatsoever after obtaining its non-settlement report and pursuing litigation.

Finding relating to Research Question 1: The requirement for mandatory attendance under Section 12A does not conflict with the voluntary nature of mediation established by the Mediation Act, 2023. Two acts are in place; one sets out the requirement for a mediation process to begin, and the other provides for the process's resultant outcome being voluntary. Thus, the two acts can be worked together positively and in a way that is permitted by Section 4(2) of the Mediation Act.

6.2 Research Question 2: How Have Indian Courts Interpreted Section 12A, and What Does This Jurisprudence Reveal?

6.2.1 The Mandatory Character: Patil Automation

The Supreme Court's judgment in *Patil Automation Pvt Ltd v Rakheja Engineers Pvt Ltd*. held that Section 12A of the Code is mandatory. If a plaint does not comply with this requirement, then it will not be maintainable. This section was given prospective effect and thus will apply to all commercial suits (other than those with interim relief) filed on or after 20th August 2022 if they are preceded by documentation showing that there has been an attempt to mediate the dispute in question before engaging the litigation process.

The court also reasoned that legislative intent was the basis for this ruling, as Section 12A was added to reduce the burden on commercial courts through the diversion of disputes to mediation rather than using the court system to resolve these disputes. If Section 12A were treated as directory rather than mandatory, then the purpose of this amendment would be defeated.

6.2.2 The Reach of the Jurisdictional Bar

Several subsequent decisions from high courts have scrutinised how far they can go from the criteria established in the Patil Automation ruling. The earlier decision of the Supreme Court in *M.R. Krishna Murthi v. The New India Assurance Company Limited*¹⁸ distinguished

¹⁸ M.R. Krishna Murthi v The New India Assurance Co Ltd, (2020) 15 SCC 493.

situations where plaintiffs were able to prove that the opposing party had rejected participation in a micro-mediate, or where trying mediation was not an option due to the absence of appropriate facilities. In other words, the bar will not be applied strictly if a plaintiff has demonstrated that the other party acted unreasonably regarding their offer to micro-mediate, or has participated in a similar unreasonable manner.

In *Yamini Jippu and Arun Shankar Jippu* (1930) 5 M.L.J. 167, the Madras High Court, on appeal, held that a Mediation(PIM) should be done under section 12A of the Mediation Act 2023 as per its spirit. They conclude that if a plaintiff has made extensive efforts to start a mediation and has met with resistance from the other party, the court cannot use non-compliance to deny the plaintiff their recovery as a remedy.

6.2.3 What the Jurisprudence Reveals

In the case of *Vikram Bakshi v Sonia Khosla*, the current legal landscape has provided a large degree of judicial flexibility while simultaneously requiring that litigants comply with MPIM requirements (in terms of the disputes) once an opportunity to participate has been presented.¹⁹

Recent decisions by Indian courts have seen them view the MPIM process as an important substantive means of resolving disputes between parties rather than viewing it merely as an opportunity for “procedural gaming.” However, there are instances where courts have refused to allow the MPIM process to serve as a vehicle for litigants to ambush each other procedurally.

As discussed above, an important gap exists in the current system because Legal Services Authorities (which administer MPIM) are often slow, under-resourced, and not sufficiently familiar with commercial disputes. Consequently, mandatory MPIM processes often occur in name only; if a party engages in a referral to MPIM, they are frequently issued a non-settlement certificate by the Authority after engaging in very limited dialogue with each other before filing their suit.

Conclusion on Research Question 2 – Indian courts treat Section 12A as a mandatorily-imposed condition precedent that carries a jurisdictional component to it, but they also apply the Section purposively to prevent procedural injustice. While the underlying legal framework regarding MPIM is good, the overall institutional framework in place to administer MPIM is inadequate to achieve the MPIM’s goals for resolving disputes between parties.

6.3 Research Question 3: What Are the Structural Challenges Limiting Pre-Litigation Mediation’s Effectiveness?

6.3.1 Bad Faith and Nominal Participation

A significant weakness in the MPIM is the prevalence of simply nominal participation. Section 12A only requires mediation to be “attempted”, which means that a party has no intention to settle, could attend the mediation for a very short time, then wait for the Authority not to

¹⁹ *Vikram Bakshi v Sonia Khosla*, (2014) 15 SCC 80.

produce a report stating that they will not settle, and thereafter commence suit with the appearance of complying with the statute while completely undermining the statute's purpose. Bad-faith participants operate in this way because neither the Commercial Courts Act nor the Mediation Act currently has any meaningful consequences for bad-faith participation during the MPIM stage.

While there is a provision in Section 26 of the Mediation Act 2023 that enables a mediator to terminate mediation where the parties are not participating in good faith,²⁰ That power is seldom exercised in the MPIM environment, where the presiding Authority is the Authority under the Legal Services Authorities Act, not a trained commercial mediator. Consequently, there is no mechanism for the commercial court to infer adversely or impose costs based upon a finding of a bad faith MPIM participant.

6.3.2 Institutional Mismatch

The MPIM process is routed through the Legal Service Authority. These agencies were created to provide free legal services to those who cannot afford them; these agencies are not designed, capable or have any relevant resources to facilitate professional commercial mediation.²¹ In contrast to the MPIM process through the LSA, the 2023 Mediation Act envisions a specially constructed institutional infrastructure for mediation, i.e., the Mediation Council of India, accredited mediation service providers, and a directory of accredited mediators with speciality skills for various subjects. The current vehicle for MPIM vs. the process envisioned by the 2023 Mediation Act is incompatible.

The fallout of this incompatibility is real. LSA-administered mediation sessions are typically short, routine and predictable. Mediators generally lack any reasonable level of training in commercial disputes, negotiation of business term sheets or the laws of contract, intellectual property, or banking, the three major classes of types of commercial litigation. Therefore, people appearing at an MPIM mediation often have little to no confidence that an MPIM will create a beneficial outcome; therefore, they are disincentivised and will likely not participate in good faith.

6.3.3 Absence of a Robust Enforcement Culture

Although there can be uncertainty surrounding enforceability by parties about settlements produced by the MPIM under the established history and precedents of the open mediations process, the Mediation Act of 2023 goes a little way towards addressing that issue through Section 31's express provisions for mediated settlement agreements to be enforced as decreed by the courts²², as well as the fact that India's involvement with the Singapore Convention on

²⁰ United Nations Convention on International Settlement Agreements Resulting from Mediation, G.A. Res. 73/198 (Dec. 20, 2018).

²¹ The Mediation Act, 2023, § 27-30, No. 32, Acts of Parliament, 2023 (India).

²² The Mediation Act, 2023, § 31, No. 32, Acts of Parliament, 2023 (India).

Mediation assists with respect to international commercial agreements²³; however, the level of awareness by parties and their representatives regarding these provisions is still low, thus undermining any incentive that parties may have to genuinely invest in the MPIM process.

6.3.4 Limitations of time and location

The MPIM must take place within no longer than three months, and with the agreement of the parties, can be extended to five months.²⁴ Although this avoids MPIM being a potential barrier to accessing the courts indefinitely, it also puts pressure on the parties not to explore all possible settlement options through mediation because the parties will want to settle the dispute before they go to court. In addition to this, the infrastructure for mediation is disproportionately weighted towards the metropolitan centre, making it difficult for parties outside of the larger Tier II and Tier III cities to access the infrastructure necessary to commence an MPIM process.

Finding on the research question 3: The challenges faced by the MPIM process in pre-litigation mediation are fourfold, being, i) No deterrence mechanism for bad faith and nominal participation; ii) There is no institutional compatibility between the MPIM framework administered by the LSA and the commercially based mediation framework developed by the Mediation Act; iii) The parties do not know about the enforcement component of the Mediation Act; and iv) There are limitations imposed on time and location by the presence of only a limited number of mediation facilities.

6.4 Research Question 4: How Can the Two Frameworks Be Harmonised Without Undermining Either Statute?

6.4.1 A Composite Statutory Reading

The composite statutory method is the first step in harmonising: Section 12A of the Commercial Courts Act provides the mandatory trigger for referral, while the provisions of the Mediation Act (2023) on how mediation is conducted through the requirements governing the conduct of mediators (including confidentiality, good faith, and enforceability of settlements). The composite statutory reading provides for the intended operation of both statutes without either statute cannibalising the operation of the other statute. This composite statutory reading is made available textually by the savings clause in s 4(2) of the Mediation Act, but it is up to the courts and the executive to consistently apply the composite statutory reading.

6.4.2 Harmonised Reading: Constitutional Compatibility

The harmonised reading of the Commercial Courts Act and the Mediation Act also addresses the constitutional dimension. In *Salem Advocate Bar Assn v Union of India*²⁵ The Supreme Court held the constitutional validity of pre-litigation ADR mandates, stating that the right to access to the courts under Article 21 is not absolute and can be subject to proportionate procedural conditions. The MPIM circuit scheme (a time-limited, urgent relief carve-out scheme with guaranteed access to litigation for failure) satisfies the proportionality test. The addition of the prerequisite of voluntarily choosing mediation as a prerequisite for obtaining

²³ Singapore Convention, *Supra* note 20.

²⁴ The Commercial Courts Act, 1949, § 12A (3), No. 4, Acts of Parliament, 2016 (India).

²⁵ *Salem Advocate Bar Association v. Union of India*, (2005) 6 SCC 344.

the right to mediation, as opposed to requiring that the outcome of mediation be mandatory (only the process of mediation is mandatory, not the outcome of mediation), supports, not detracts from, the constitutional validity of the MPIM scheme.

6.4.3 Courts should interpret legislation based on its purpose, which would help facilitate better cooperation between courts. When the court is faced with a procedural issue, the court could adopt a purposive interpretation as demonstrated in cases like *Yamini Jippu* by viewing s 12A not as a procedural hurdle, but rather seeing s 12A as being intended to give parties a genuine opportunity to resolve their disputes, and further, the Mediation Act creates a good faith standard, which should apply in all proceedings under the MPIM Act as well. Courts' exercise of their inherent jurisdiction to impose costs where parties have bad faith participation would serve to indicate to parties that MPIM is not just a procedural exercise that can be carried out and then forgotten about.

6.4.4 The Way Forward: Institutional and Legislative Reform

While doctrinal harmonisation is definitely useful, it will not be sufficient to close the structural gap. Institutional and legislative reform also have to be made in order to close that gap completely. Functionally integrating the two statutes rather than merely coexisting can be accomplished through the following suggestions, which also form the basis for the recommendations made in this paper:

VII. CONCLUSION AND SUGGESTIONS

In this paper, we examined through four specific research questions the relationship between the mandatory pre-institutional mediation (PIM) regime established by Section 12A of the Commercial Courts Act, 2015 (CCA) and the voluntary mediation principles enshrined in the Mediation Act, 2023 (MA).

This paper demonstrates four findings. Firstly, the mandatory attendance required by Section 12A is not fundamentally incompatible with the voluntary ethos of the mediation process contained within the Mediation Act, because these two statutes operate at two different places in the mediation process; Section 12A is a precondition to initiating mediation, while the Mediation Act governs the outcomes of mediation. Secondly, the Indian courts have interpreted Section 12A as a mandatory condition precedent while still applying that requirement in a flexible purposive manner, demonstrating that while the legal framework is sound, the institutional mechanisms designed to implement it are not. Thirdly, there are four structural impediments to pre-litigation mediation in place today: bad faith participation, institutional mismatch, limited enforcement awareness, and geographic concentration. Fourthly, a composite statutory interpretation, purposive constitutional analysis, and the institutional reforms outlined below will create the necessary harmonisation of both statutes.

The suggestions listed below are a response to the structural issues related to the Research Questions 2, 3 and 4. They are structured around how to implement the harmonisation outlined by Research Question 1. Here are those suggestions:

1. Firstly, Transfer of jurisdiction(Sec 12A) to Mediation Service Providers, it is suggested that the MPIM process out of Legal Services Authority(s) to accredited mediation service providers that fall under the Mediation Act 2023; the function of MPIM will be more appropriately aligned to the quality and competency standards of institutional vehicular path identified in the mediation Act, as it relates to the adjudication of complex commercial matters.
2. Secondly, that commercial courts adjudicating on subsequent matters will have expressed powers, through Practice Directions, to impose costs against any party that has been found, through a proper process, to have participated in bad faith. The prescriptive framework is intended to create a strong deterrent against such actions and will not add any delay for these parties in the procedural layers of the legal framework.
3. Thirdly, to provide automatic authentication of MPIM settlements pursuant to section 31 of the Mediation Act 2023, by way of rule or notification, will allow for automatic registration of MPIM Settlement Agreements under the Mediation Act, making them enforceable as court decrees without the necessity of further proceedings.
4. To promote a skilled workforce prepared to use meaningful ways with pre-litigated mediation, the Bar Council of India and Universities must add compulsion to the training on commercial mediation in their curricula for legal education; therefore, adding modules about Commercial Mediation. Commercial Mediation training will include the MPIM framework created by the Bar Council and the Mediation Act enacted in 2023.
5. It is important that the Mediation Council of India develop an oversight of MPIM under the Commercial Courts Act so that the Mediation Council of India can supervise MPIM to establish standards for the quality of the mediator, the accreditation of the mediator, and collect data needed for periodic legislative review.

In conclusion, a framework for compulsory pre-litigation mediation and an optional framework outlined in the Mediation Act of 2023 can exist as a unit. With the proper interpretation and institutional support, both frameworks exist to establish two pillars of a modern commercial alternative dispute resolution system that meet the needs of the parties involved. India has significant potential for the creation of commercial mediation because the legal infrastructure is established; the remaining component necessary for the success of commercial mediation will be the institutional commitment to provide statutory interpretations for the effective implementation of the Act's provisions.

