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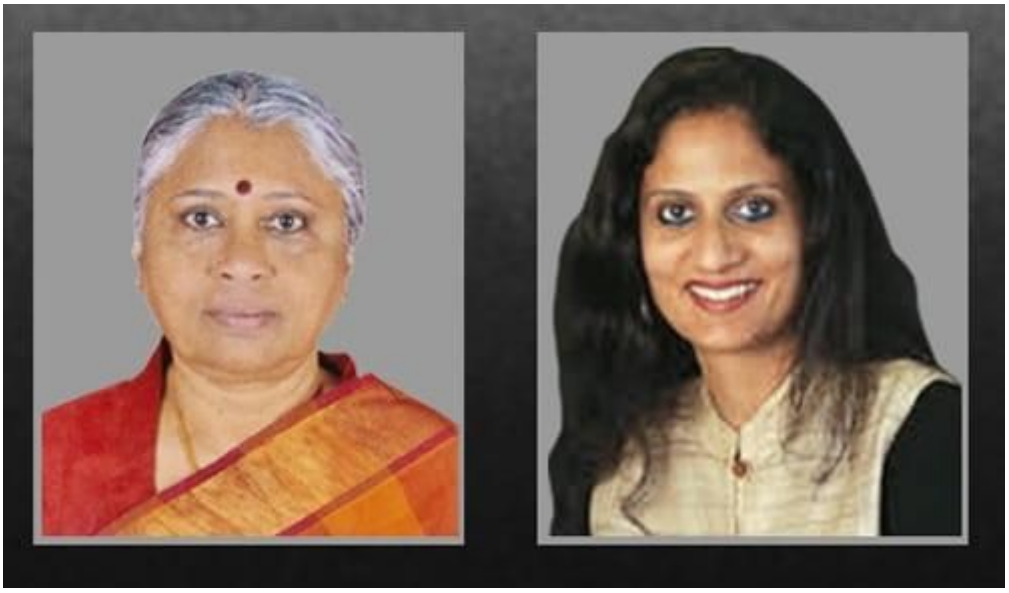
Mandatory Mediation under **Commercial Courts Act** – A Boost to *Effective and Efficient Dispute Resolution* in India



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Mediation Ordinance under the Commercial Courts Act

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Court (Amendment) Ordinance of 2018, dated May 03, 2018, has inserted section 12A to the Commercial Courts Act, 2015,

contemplating pre-institution mediation and settlement, before the filing of any commercial disputes.

Specifically, Section 12A (1) states that "a suit which does not contemplate any urgent relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation and settlement in accordance with such manner and procedure as may be prescribed by rules made by the central government".

The model contemplated by the ordinance is similar to the most successful opt-out model widely used in Italy in limited civil and commercial cases since September 2013, wherein litigants will not have direct access to the Italian courts if they cannot prove that they have attended an initial mediation meeting. Lithuania, Luxembourg, United Kingdom, Ireland also use this model for a certain category of disputes.

This mandatory mediation meeting is an opportunity for parties and their legal counsels to meet with a professional neutral mediator at a neutral place to learn about the process and decide whether they would like to give themselves the opportunity to collaboratively settle the dispute. If after this mandated initial session, the parties are amenable to try and settle their dispute through mediation, the process can start right away. If the parties, however, decide not to proceed with mediation, they are deemed to have fulfilled the requirements of the law.

Mandatory mediation with an easy opt-out has proven to generate a substantial number of mediations in several jurisdictions. Italy, the poster child for this model resolved 200,000 disputes through mediation in 2017 alone – 90% of the mediations came through the mandatory opt-out requirement. Greece and Turkey have also used this model with great success. Turkey went from 0 to 30,828 Mediations in just one Month.

Creating an enabling environment for Mandatory Mediation under the Ordinance

A. Addressing the Limitations of the Legal Services Authorities Act, 1987

To ensure the success of such an initiative, an effective mediation policy should be administered to ensure that parties are not burdened and unnecessarily delayed from accessing the courts. An enabling environment for mediation must be created to ensure a good percentage of mediations will result in an amicable settlement.

The mode by which the Commercial Court Ordinance contemplates the conduct of pre-litigation Mediation is uncertain on whether it will create such an enabling environment. The law contemplates authorizing the authorities constituted under the Legal Services Authorities Act of 1987 (hereinafter the LSA) for the purposes of pre-institution mediation under section 12A(2).

The LSA has been constituted to provide 'free and competent legal services to weaker sections of society'. The authorities under the LSA such as National Legal Services Authority, State Legal Services Authority and District Legal Services Authority are heavily burdened with implementing the ambitious objectives of providing free legal aid to those who need it. Extending their reach to commercial mediations is hardly appropriate and suitable. Commercial disputes contemplated under the Commercial Courts Act will require a focus and skill set that is very different from that envisioned under the LSA.

Additionally, under chapter VIA section 22A, the LSA contemplates pre litigation conciliation and settlement through Permanent Lok Adalat. The said provision is mainly meant for public utility services. Members of the permanent Adalat are one judge and 2 members with minimal commercial experience. The process of dispute resolution followed by the permanent Lok adalats under the LSA is vastly different from the mediation process. Permanent Lok Adalats formulate terms of the settlement, after hearing the Parties, which is then given to the parties concerned for observation. If the parties do not arrive at a settlement, the Permanent Lok Adalat proceeds to decide the dispute by the majority. The process of 'mediation' followed by the Lok Adalats under the LSA compromises the self-determination and voluntary elements of mediation.

The authorities under the LSA are not the appropriate forum to implement pre-mediation services envisioned by this Commercial Court Act ordinance. Ensuring experienced and trained mediation professionals who can

effectively manage commercial disputes is a critical element to ensure the success of this Ordinance.

B. Expand the scope of mediation service providers under the Ordinance

The Ministry of Law and Justice must recognise outside institutions such as mediation centres run by Bar Associations, Professional Associations, Chambers of Commerce and other recognised bodies to be able to effectively sustain such an initiative. In fact, the Ministry of Law & Justice has recognised certain private institutions for conducting Mediations[1]. For starters, this list must be included under Section 12 A (2) to expand the scope of mediation service providers under this Ordinance.

It must be noted that the Italian Law that successfully executed the mandatory "opt-out" model for a certain category of commercial cases authorised a large number of service providers including Chambers of Commerce as institutions where parties can access mediation services. The Italian Model has proven to be highly effective with 50% of the mediations that were mandated under the Law resulting in a settlement. 1800,000 cases were referred to mediation in 2017 under the Opt-out Category.

Additional Recommendations to promote Mandatory Mediation

While making rules under section 12A the Central Government must consider the following:

a. The parties (or one of the litigants) submit a written mediation request to an "independent qualified professional ADR provider accredited by the Ministry of Law & Justice". Ministry must ensure that there is an adequate group of experienced and well trained professional mediators who can meet the demand that results from the mandatory "opt-out" requirement of the ordinance ;

b. The parties and lawyers must be present for this initial meeting with the mediator.

c. The mediation session must be held within a short period after the mediation request is made to the service provider. The ordinance must explicitly state the time frame within which the mediation must be scheduled to ensure this does not prove to be a barrier to accessing justice.

d. The ordinance must stipulate a sanction that Judges can impose on Parties in case they do not appear for this initial mediation meeting.

e. Parties will pay a nominal fee for this Mandatory Mediation meeting to ensure minimum barriers to access this requirement of the law. If after this initial mandatory mediation meeting, parties choose to proceed with the mediation, the mediator should be free to charge a reasonable professional fee.

f. If the parties are able to reach an agreement in mediation, the settlement agreement is drafted and once signed by the Parties, is binding and enforceable as an Arbitral award on agreed terms under section 30 of the Arbitration and Conciliation Act of 2015. If need be, the agreement can be filed before the court for legal scrutiny and acceptance within a specified If no agreement is reached among all the participating parties, the parties are free to commence a lawsuit in Court, with only the fact that parties tried mediation recorded.

Conclusion

Italy executed a “Required Initial Mediation Session’ for limited civil and commercial matter in September 2013. Four years later, Italy has seen a huge increase in the number of mediations and a drastic decrease in matters clogging their courts. A thought out Step-by-step approach allowed for a much-needed reformation of the Italian legal system – it must be noted that Italy has jumped 49 places in the Ease of Doing Business Index over the past year – credit can be given to the effective use of ADR in Italy with the implementation of the mandatory Opt-out mediation model.

The recent ordinance of the Commercial Court Act is a step in the right direction. We must ensure that this well-intentioned ordinance may truly make a difference in ensuring commercial cases find quick, cost-effective and appropriate resolutions.

[1] See http://doj.gov.in/page/online-dispute-resolution-through-mediation-arbitration-conciliation-etc

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