

# Mandatory Mediation in India - Resolving to Resolve

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## Abstract

This paper explores the concept of mandatory mediation as a solution for reducing pendency in the traditional court system. After discussing the concept of mediation and the existing regulatory framework governing it in India, this paper identifies the problems afflicting mediation in India. It proceeds to examine how many of these problems can be overcome by making mediation mandatory. It discusses the benefits of mandatory mediation and attempts to address some concerns surrounding it. To zero-in on the most appropriate model for introducing mandatory mediation in India, this paper looks at how mandatory mediation has fared in other jurisdictions like the European Union, Australia, the United States and Italy. This paper finally recommends that India should introduce a modified version of the Italian opt-out model of mandatory mediation in the country in a phased manner.

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## I. Introduction

Pendency in Indian courts is the first issue that comes to mind when one thinks about the problems facing the Indian judiciary. According to data obtained from the National Judicial Data Grid, the total pending cases (civil and criminal) across all courts in the country as of November 12, 2020 are 3,59,08,679. Out of these, civil cases number 98,01,986, which is a little over 27% of the total pending cases. According to the World Bank's Ease of Doing Business Rankings for 2020, even though India ranks 63 overall, it stands at a dismal 163 (out of 190 countries) as far as contract enforcement (mainly a judicial function) is concerned.<sup>2</sup>

There are two major approaches to deal with this judicial backlog. While the first seeks to reform processes and structures to make adjudication faster, the second tries to prevent disputes from reaching courts in the first place (Vidhi ODR Report 2020, 6). Alternative dispute resolution (ADR) mechanisms like arbitration, conciliation and mediation fall in the latter category. They can play a significant role in reducing the number of cases that enter the formal justice delivery system by providing redress outside it.

However, the time has perhaps come to reconsider the status of ADR mechanisms as 'alternatives'. Given the huge pendency in Indian courts, and more importantly, the suitability of ADR mechanisms to resolve certain categories of disputes, they should be treated at par with the public court system. In fact, in some categories, they should be the primary choice of dispute resolution. This paper delves into the manner in which mainstreaming of one of the alternative modes of dispute resolution - mediation, can be achieved.

## Mediation and the existing regulatory framework governing it

Mediation is an ADR mechanism in which a neutral third party helps disputing parties arrive at a settlement. The neutral third party, the mediator, serves as a facilitator of a process wherein the parties attempt to reach some middle ground. The mediator is expected to remain value-neutral, serving only as a conduit for the needs of the parties (Cohen 1991, 33). According to Rule 4 of the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003, ('Model Rules, 2003') the mediator facilitates discussion between the parties by assisting them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options. As opposed to arbitration, mediation is preferred for disputes which do not involve complex questions of law or evidence and hold potential for amicable resolution outside the formal and rigid procedures of the traditional legal system (Vidhi ODR Report 2020, 9).

The core value and benefit of mediation is that it provides an opportunity for the parties to converse, negotiate and arrive at an amicable compromise that is acceptable for all the concerned parties (Narain and Sankaranarayanan 2018, 82). An important benefit of agreements resulting from mediation is that they are more likely to be complied with voluntarily and more likely to preserve an amicable and sustainable relationship between the parties (Cutolo and Shalaby 2010, 137). Globally, mediation has come a long way since Frank Sander first proposed the idea of a 'Multi-door Courthouse' as a single establishment to provide alternative avenues for citizens to amicably resolve their disputes in an informal manner.<sup>3</sup> However, it is yet to realise its full potential in India.

At present, mediation in India can be initiated in three ways – first, by providing for it in a dispute resolution clause in contracts and resorting to it either through institutional or ad-hoc mediation; second,

by way of reference by the court under Section 89 of Code of Civil Procedure, 1908 ('CPC') or under special legislations such as Section 37 of Consumer Protection Act, 2019 after the case is filed in courts; and third, mandatory pre-litigation mediation as provided under Section 12A of Commercial Courts Act (Vidhi ODR Report 2020, 11).

While the first mode is self-explanatory, the following section gives an overview of the effectiveness of the other two modes of initiating mediation in India, and thereby assesses the need for mandatory mediation in India.

### **Reference to mediation under Section 89 of CPC, 1908**

Unlike arbitration and conciliation, which are governed by the Arbitration and Conciliation Act, 1996, there is no umbrella legislation governing mediation in the country. The enactment of Section 89 of the CPC, 1908 marked a major step towards institutionalising ADR through its incorporation in the civil procedure.<sup>4</sup> This provision empowers civil courts to refer civil disputes to, among other things, mediation, 'where it appears to the court that there exist elements of a settlement which may be acceptable to the parties.'

Mediation in India received an impetus due to the Supreme Court's judgment in the case of *Salem Advocate Bar Association v. Union of India* (AIR 2005 (SC) 3353). In this case, a Committee was constituted by the Apex Court in order to enable better implementation of Section 89 by ensuring quicker dispensation of justice. This Committee drafted the Model Rules, 2003 which served as the model for various High Courts in framing their own mediation rules.

In the landmark case of *Afcons Infrastructure Ltd. and Ors. v. Cherian Varkey Construction Co. (P) Ltd. and Ors.* (MANU/SC/0525/2010), while examining Section 89 of the CPC, 1908, the Apex Court held that having regard to the tenor of the provisions of Rule 1A of Order 10 of the CPC,<sup>5</sup> the civil court should invariably refer cases to the ADR process, except in certain recognised excluded categories of cases. It went on to state that where the case is unsuited for reference to any of the ADR processes, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89. Consequently, it is mandatory to have a hearing after completion of pleadings to consider recourse to an ADR process under Section 89, but actual reference to an ADR process in all cases is not mandatory.

To assess the impact of this judgment, one would have to examine the statistics pertaining to cases referred to ADR processes under Section 89. However, there is a lack of data on the number of cases referred to ADR processes across different jurisdictions under Section 89 and the final outcome of these disputes.<sup>6</sup> The limited data available for specific jurisdictions referred to below (Vidhi Mediation Report 2016) suggests that the *Afcons* judgment has failed to have the desired impact in making ADR mechanisms the first mode of resolution for most civil disputes.

In *K. Srinivas Rao v. D.A. Deepa* ((2013) 5 SCC 226), while dealing with a divorce matter, the Apex Court went to the extent of saying that criminal courts could also refer to mediation cases where a complaint has been filed under Section 498-A of the Indian Penal Code, 1860. The Supreme Court further directed all mediation centres to set up pre-litigation desks or clinics to settle matrimonial disputes at the pre-litigation stage.

The above case laws seem to indicate that the higher judiciary is by and large in favour of mediation and is keen on pushing all suitable matters to be resolved through mediation instead of adding to the court's burden. However, in reality, Section 89 of the CPC and the above judicial pronouncements have not had the desired impact due to the lack of adequate training given to the judges in the district judiciary,

who are empowered under Section 89 to refer matters to mediation. The discretion vested in them has not been used to reduce the court's burden in any noticeable manner. Apart from lack of training, there are several systemic issues that have prevented the adoption of mediation, as discussed in the coming section despite the clear mandate given by the judiciary in favour of mediation.

### **Mediation under Special legislations**

Mediation is increasingly being included as a dispute resolution mechanism in newer legislations. For instance, the Parliament included a provision for mediation of consumer disputes in the new Consumer Protection Act, 2019. Section 37 of this Act prescribes that at the first hearing of a complaint after its admission, or at any later stage, if it appears to the District Commission that there exist elements of a settlement which may be acceptable to the parties, it may refer the matter to mediation except in such cases as may be prescribed.

Chapter V of the Act provides detailed provisions pertaining to mediation of consumer disputes, including those concerning establishment of consumer mediation cells attached to each of the District Commissions and the State Commissions of a State (Section 74), empanelment of mediators (Section 75), the procedure for mediation (Section 79), etc.

The Consumer Protection (Mediation) Rules, 2020 came into force with effect from July 20, 2020. The Rules make it amply clear that the general rule is to refer all matters under the Consumer Protection Act, 2019 to mediation. However, they make an exception for certain categories of cases that may not be considered appropriate for mediation.<sup>7</sup> The proviso to Rule 4 further provides that in any case other than the ones mentioned in Rule 4, the Commission may choose not to refer it to mediation if it appears to the Commission that no elements of a settlement exist which may be acceptable to the parties or that mediation is otherwise not appropriate having regard to the circumstances of the case and the respective positions of the parties.

Section 442 of the Companies Act, 2013, provides for a Mediation and Conciliation Panel to be maintained by the Central Government for mediating proceedings before the Central Government or National Company Law Tribunal ('NCLT') or National Company Law Appellate Tribunal ('NCLAT'). This provision allows any of the parties to the proceedings to opt for mediation. The Central Government, the NCLT or the NCLAT may also refer a matter pending before it for mediation *suo motu*. The Mediation and Conciliation Panel shall dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the NCLT or the NCLAT, as the case may be.

### **Mandatory Pre-litigation Mediation under the Commercial Courts Act, 2015**

An example of an attempt to introduce mandatory mediation in the Indian context is the Commercial Courts Act, 2015, which was amended in 2018 to provide for pre-institution mediation and settlement. Section 12A of this Act makes it mandatory for the disputing parties to attempt mediation before initiating a suit. The only exception provided in the law is if there is a requirement of urgent relief from the court. The settlement agreement arrived at by the parties shall have the same legal force as an arbitral award mentioned under Section 30 of Arbitration and Conciliation Act, 1996. However, despite this provision having been in force for over two years, no data is readily available on its implementation.

## Problems with the existing framework governing mediation

Even though mediation is speedier, more cost-effective and offers greater possibility of preserving the relationship between disputing parties, the existing mediation framework in India has not allowed for reaping its full potential.

The Supreme Court highlighted some glaring drafting errors in Section 89 in its landmark judgment in the *Afcons Infrastructure Ltd.* case. These include the mixing up of definitions of the terms 'judicial settlement' and 'mediation' in Section 89 and the lack of clarity as to the procedure to be followed by the court while referring matters to mediation under Section 89. Section 89 was examined by the Law Commission of India in its 238th Report wherein it recommended substituting Section 89 with an amended provision that would bring it in line with the judgment in *Afcons Infrastructure Ltd.* The recommendations included specifying the stage at which the court should refer the matter to the various ADR processes mentioned in Section 89 and interchanging the definitions of mediation and judicial settlement. However, this Report has not been implemented so far.

According to data from the Bangalore Mediation Centre, between 2011-2015, 31441 cases were referred for mediation, which amounted to 4.29% of the cases freshly instituted in the Bangalore High Court (Vidhi Mediation Report 2016, 11). As per the Mediation and Conciliation Centre of the Delhi High Court, during the same period, 13646 were referred for mediation, which amounted to 2.66% of the total number of cases in the Delhi High Court (12). Finally, data for Allahabad High Court Mediation and Conciliation Centre reveals that during 2011-2015, 11618 cases were referred for mediation. These constituted 0.85% of the cases freshly instituted in the Allahabad High Court (13).

From this data, it is evident that judges are not using Section 89 to its full potential. There are a number of factors responsible for this. First and foremost, the fact that data on Section 89 referrals is not tracked for the National Judicial Data Grid or made a part of their assessment reports means that judges are not incentivised to refer cases to ADR processes. Further, referral judges are expected to be objective while determining the possibility of settlement between parties, but this objectivity may be hampered because judges may be more attuned to the adjudicatory processes (Vidhi Mediation Report 2016, 20). This is further aggravated by the fact that there is a lack of regular training sessions for judges to sensitise them about the benefits of mediation (2).

Another factor why mediation has failed to take off as hoped in India is the lack of clarity in the enforceability of its outcomes. Section 89 does not talk about how the outcome of mediation will be enforced. It took the Supreme Court in *Afcons Infrastructure* to clarify that where the reference is to a neutral third party on a court reference, even though it will be deemed to be reference to a Lok Adalat, the mediation settlement will be governed by Section 21 of the Legal Services Authorities Act, 1987 and will have to be placed before the court for recording the settlement and disposal. Consequently, in cases referred by courts to mediation, a settlement reached by the parties is not enforceable automatically. Even then, it is unclear how a settlement arrived during pre-litigation mediation or ad-hoc mediation would be enforced if one of the parties reneges on its promises. Applying the regular law of contract to such cases would only result in delays, defeating the entire purpose of resorting to mediation. With so much confusion around enforceability, lawyers hesitate to advise their clients to opt for mediation.

Further, even though the amendment to the Commercial Courts Act, 2015, held a lot of promise, it has not achieved its full potential. The limited implementation of this Act has faced certain challenges like the appointment of mediators through legal aid cells, lack of expertise in mediators to handle commercial cases and concerns raised regarding the report that the mediator needs to submit in the event of failure to

reach a settlement. The procedure for appointment of the mediator provided under the Act and the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 makes the Authorities constituted under the Legal Services Authorities Act, 1987 responsible for appointing mediators. This process is beset with challenges. First, the number of empanelled mediators with these Authorities is highly inadequate to meet the demands of the Act and second, there are issues with the quality of mediators as many of them may not have the required subject specific knowledge that would enable them to resolve commercial disputes effectively. It is imperative that any law providing for mandatory mediation stay clear of these pitfalls that have been experienced with the Commercial Courts Act.

Clarity is also lacking as far as the enforceability of cross border settlements is concerned. India is a signatory to the recent United Nations Convention on International Settlement Agreements resulting from Mediation (the Singapore Convention on Mediation), which applies to international settlement agreements resulting from mediation. It establishes a harmonised legal framework for the right to invoke settlement agreements as well as for their enforcement (UN Commission on International Trade Law). However, presently there is no statutory framework for implementing the provisions of this Convention.

Despite attempts to spread awareness about mediation and its inclusion as part of the legal education curriculum, knowledge of mediation is sorely lacking among the general public. Even where parties are aware about mediation, a major challenge is the lack of incentives for them to attempt mediation. In India, there are certain myths associated with mediation which make it difficult for lawyers and their clients to consider it as a viable dispute resolution mechanism. For instance, it is believed that suggesting or engaging in mediation demonstrates a kind of weakness and uncertainty of success at trial (Gupta 2018, 62). Due to this 'first to blink' syndrome, each party is waiting for the other to make the first move and does not want to be seen as weak (Hutchinson 1996, 89-90).

Another myth is that mediation yields a lesser form of justice and is only second to litigation (Gupta 2018, 62). These myths essentially stem from the fact that mediation continues to be an unfamiliar process that is often misunderstood by many lawyers leading to mistrust and hence avoidance. In some cases, a barrier to initiating mediation is the client's expressed desire to punish the opposition through litigation. In such cases, it becomes incredibly difficult for the lawyer to suggest mediation without appearing weak and risking loss of the client to another lawyer (Hutchinson 1996, 90).

This is where mandatory mediation comes into play. While some of the problems in the present mediation framework that have inhibited the growth of mediation in the country are institutional, a number of others can be addressed by introducing mandatory mediation in the country in a phased manner. For instance, the issues that can be addressed by introducing mandatory mediation are the ones stemming from lack of incentives for judges and lawyers to nudge parties towards mediation, hesitation amongst disputing parties to attempt mediation and the overall lack of mediation culture in India.

However, what will still be left unaddressed is the issue of lack of clarity in enforceability of mediation agreements. In this, the need of the hour is a dedicated legislative effort to recognise mediation and provide for a framework to govern all its facets, along the lines of the Arbitration and Conciliation Act, 1996. Such legislative framework becomes all the more important while introducing mandatory mediation, since easy enforceability of mediation agreements is one of the basic requirements for such an initiative to be adopted and welcomed. However, the details of a mediation legislation is beyond the scope of this article and hence the authors will restrict themselves to the manner in which mandatory mediation can be introduced in India, under the presumption that an umbrella mediation legislation will become a reality soon.

Before we proceed to further understand how mandatory mediation can help tackle some of the challenges faced in mainstreaming mediation, and how it can be introduced in India, it would be important to understand what the authors mean by the expression 'mandatory mediation'.

## Understanding mandatory mediation

As often misunderstood, 'mandatory mediation' does not mean mandating parties to *settle* their disputes through mediation. It simply means mandating parties to *attempt* mediation. It has been described as 'coercion into and not within' the process of mediation (Quek 2010, 485). All that is required from the parties is to give mediation a shot. This can be done in a number of ways. For instance, a law can make mediation mandatory for particular kinds of disputes prior to institution of proceedings in courts or even after cases have been brought before courts. If it is prior to the institution of proceedings, then it is in the nature of 'mandatory pre-litigation mediation'. There are instances of both forms of mandatory mediation - prior to and after institution of proceedings - present in other jurisdictions.

When considering whether to implement mandatory mediation in a jurisdiction, domestic factors like the time it takes for cases to reach trial, the cost of litigation, the prevailing legal culture and political climate, and the attitudes of the legal profession, judiciary and general public are extremely important (Hanks 2012, 929). In India, despite the long delays in courts, the failure of voluntary mediation to grow as a popular dispute resolution mechanism calls for a rethink on how mediation has been approached in the country so far. A different approach, which takes away the initial discretion in opting for mediation, may offer the elusive solution.

Mandatory mediation has been provided for in different jurisdictions through one or more of the following three modes (Hanks 2012, 930). First, some mandatory mediation schemes categorically provide for an automatic and compulsory referral of certain matters to mediation. Such schemes are generally legislative and often require parties to undertake mediation as a prerequisite to commencing proceedings in courts of law (930). A second type of mandatory mediation, often referred to as court-referred mediation, gives judges the power to refer parties to mediation with or without the parties' consent on a case-by-case basis. Third, some mandatory mediation schemes can be described as quasi-compulsory because even though they do not mandate mediation, it is effectively compelled in the form of potential adverse costs orders if mediation is not undertaken prior to commencing proceedings (931). Before we proceed to identify the suitability of one or a combination of these above modes in the Indian context, it is essential to examine the benefits and concerns associated with the very policy of mandatory mediation.

## Benefits of Mandatory Mediation

Multiple studies have clearly shown that the best way, if not the only one, to significantly increase the number of mediated disputes is to require that litigants make a serious and reasonable initial effort at mediation (De Palo 2018, 1). One of the major advantages of mandatory mediation is that it can help deal with some of the myths associated with mediation. As far as the 'first to blink' syndrome is concerned, when the law mandates that parties at least attempt mediation, the burden of suggesting mediation is alleviated. Because the law mandates it, parties or their lawyers do not have to risk appearing weak by suggesting mediation.

The second myth that mediation only provides second-hand justice is busted by the legitimacy that is afforded to mediation once it is mandated by law. Thus, mandatory mediation can help bring parties into the fold of mediation by helping them get over the initial inertia associated with voluntary mediation.

Often, there are cases where a party is keen on litigation because they believe that forcing the other side to go through the long and painstaking process of litigation would be a form of punishment for the opposite party. This ‘make them pay’ attitude of the client puts even the most well-meaning lawyer in a quandary, as she may feel hesitant to suggest mediation as an alternative to her client. By shifting the burden of referring a dispute for mediation to the law or the court, mandatory mediation relieves the lawyer of this dilemma (Hutchinson 1996, 90).

Mandatory mediation is not just beneficial for the parties but also for the country’s legal system. By creating massive demand for people and institutions providing mediation services, mandatory mediation offers an opportunity to mainstream mediation and create capacity at scale. The demand for mediators spurred by mandatory mediation, if met through proper capacity building, will lead to the creation of a body of skilled mediators (Hutchinson 1996, 90). Training lawyers in mediation will not only help overcome the shortage of qualified mediators, it will also improve ‘legal health’ (Susskind 2019, 113) in the country.

Further, once lawyer mediators understand the value of mediation, they would be more inclined to suggest mediation to their clients voluntarily (Hutchinson 1996, 90). Consequently, mandatory mediation can become a stepping stone towards voluntary adoption of mediation in the country.

Lastly, the emergence of mediation as a distinct profession will not only create additional employment opportunities for professionals in various fields, but will also help create a culture of amicable settlement of disputes.

While it is obvious from the discussion above that making mediation mandatory can be advantageous for the legal system as a whole, it is also important to address some of the concerns that have surrounded the debate on mandatory mediation.

### **Concerns about mandatory mediation**

Some authors argue that mandatory mediation is ‘the antithesis of mediation’ and denigrates the process to such an extent that it would lose most of its advantages (Vettori 2015, 356). There is a concern that mandating mediation and taking away voluntary decision making from the parties is tantamount to denial of access to justice.

There is no denying that voluntariness is a major characteristic of mediation. However, it is an exaggeration to argue that mandating parties to simply *attempt* mediation (for instance, by attending one mandatory mediation session) would mean that mediation no longer remains voluntary. Even in mandatory mediation, parties are free to decide whether to continue with the process of mediation, or to enter into a settlement, after attending the sessions mandated under the law. Therefore, it is important to look at the entire process of mediation in a holistic manner and not just focus on one element which is made compulsory.

Further, some argue that a one-size-fits-all approach towards mediation could hurt the prospects of voluntary uptake of mediation. It is argued that mediation may not be the most appropriate method of resolving a particular type of dispute (Vettori 2015, 357). Therefore, mandatorily referring all disputes to mediation may actually end up doing more harm than good.



It is important to note that the proponents of mandatory mediation (including the authors) are not arguing for such an approach. In fact, it is argued that mediation should only be made mandatory for certain categories of disputes, and that too, in a phased manner. Any other approach would thwart the purpose for which it is adopted. It is in fact suggested that before introducing mandatory mediation, a study be carried out to identify categories of disputes that have shown the highest potential for settlement through mediation within the existing framework. Mandatory mediation should be first introduced in such categories so that they show an even greater percentage of settlement.

Critics further argue that coercing parties into the process of mediation may make them reluctant to attempt mediation in its true spirit and thereby negate the possibility of a settlement (Vettori 2015, 358). In the same vein, it is further said that even when coercion can manage to bring the parties to the table, the latter are frequently focused on litigation; mediation is merely an unnecessary stop on the way for them (Cohen 1991, 43). This results in additional costs, both in terms of time, money and efforts and makes mediation an impediment to access justice (Vettori 2015, 358).

It is also argued by some that mandatory mediation will be totally ineffective if the parties to the dispute and their lawyers do not participate in the process in good faith and are only there to try to obstruct the process (Hutchinson 1996, 95) or merely comply with the letter of the law.

While these may be legitimate concerns, it can also be argued that parties may be able to appreciate its benefits better, when they are compelled to enter the process of mediation. Sometimes it takes a compulsory process to educate a reluctant adversary about the benefits that can flow from mediation (Hutchinson 1996, 91). At the bare minimum, the process should cause parties to realistically assess their case at an early stage and could enhance opportunities for settlement in the future (91-92).

A skilled mediator can be instrumental in parties overcoming their mental block towards a non-adversarial process. Further, adopting an opt-out model for mandatory mediation can ensure that parties always have the option to leave the mediation process after going through its mandatory element. Consequently, mandatory mediation would not obstruct access to justice. Further, laws providing for mandatory mediation can always carve out an exception for cases where compelling parties to mediate would lead to defeating the ends of justice.

Opponents of mandatory mediation also argue that compelling parties to attempt mediation may lead them to disclose sensitive information during the proceedings which might be used to their detriment if the mediation fails to result in a settlement and the matter eventually reaches the court (Vettori 2015, 363). This concern can be addressed by requiring the parties to attempt mediation in good faith. Additionally, unlike open court proceedings where the other party is entitled to access the information relied upon by the opposite party, in mediation, the parties and the mediator are bound by confidentiality. The process of mediation offers greater confidentiality as compared to the courts.

To discourage incidents where parties try to abuse the information they become privy to during mediation, the Supreme Court in *Perry Kansagra v. Smriti Madan Kansagra* (MANU/SC/0220/2019) held that statements made by the parties during the course of mediation may not be relied upon during court proceedings on the ground of confidentiality. Holding confidentiality as an important element of mediation, the Apex Court said that statements which were essentially made in order to see if there could be a settlement, ought not to be used against the maker of such statements in case attempts at mediation completely fail at a later point.

If, however, mandatory mediation is implemented in the country, the lack of sufficient number of quality mediators in the country would pose a major challenge. At present, mediation is not treated as a separate profession, so there are hardly any courses at the university or college level that students can take

up in order to become mediators. According to the Mediation Training Manual of India, issued by the Mediation and Conciliation Project Committee of the Supreme Court, training to potential mediators should be provided for a minimum of 40 hours.

Further, while the Model Rules, 2003 allow professionals apart from legal practitioners to become mediators, they impose an onerous burden of having at least fifteen years standing at the Bar for lawyers and fifteen years standing for other experts or other professionals. Further, while the Model Rules also recognise institutions specialising in mediation if they have been recognised as such by the concerned High Court, few such institutions exist in the country. Adding to this is the lack of awareness among professionals about the process and benefits of mediation. A combination of these factors has resulted in a paucity of quality trained mediators in the country. In the case of *Daramic Battery Separator India Pvt. Ltd. v. Union of India* (W.P.(C) 7857/2018), the petitioner had to approach the Delhi High Court because the National Legal Services Authority was unable to find a suitable commercial mediator within its pool of mediators (NITI Aayog 2020, 75).

In such a scenario, it may be argued that the system is not prepared for implementing mandatory mediation. However, the authors believe that once demand for mediators is gradually increased, market forces will ensure that sufficient capacity is built. However, this will require the legislative framework to provide for such scaling up of resources. This means and includes encouraging private mediators and mediation centres to offer their services to parties and not restrict recognition to just court-annexed ADR centres.

In the coming section, a brief overview of the trajectory followed in a few jurisdictions to arrive at a successful model of mandatory mediation is examined. This is also aimed at understanding the manner in which other jurisdictions have addressed the above listed concerns before recommending a suitable customised model for India.

## **Mandatory mediation in other jurisdictions**

The experience of the European Union and Italy, the United States and Australia has been discussed below.

### **European Union**

In 2008, the European Union ('the EU') adopted Directive 2008/52 ('Mediation Directive') to provide guidance to the EU Member States to develop legislation pertaining to mediation in civil and commercial matters. The Mediation Directive's stated goal was to encourage the use of mediation and achieve a balanced relationship between mediation and judicial proceedings (Article 1). According to Article 1 of the Directive, it applies only to cross-border civil and commercial matters, and provides a common set of rules for mediation practice in the European Union (Nolan-Haley 2012, 992). Article 1.2 further provides that it shall not extend to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority.

The Mediation Directive establishes the minimum regulatory standards for mediation legislation to be implemented by the Member States in their national legal systems (De Palo 2018, 2). Article 5.2 of the Mediation Directive allows Member States, without making it obligatory for them, to make mediation mandatory provided the parties' rights to access justice were not infringed (De Palo 2018, 2). The Court of Justice of the European Union in *Menini and another v. Banco Popolare Società Cooperativa* (Case C-75/16) concluded that national legislation imposing mandatory mediation as a pre-condition to litigation

is not precluded by the EU ADR legislative framework, provided that the parties are not prevented from exercising their rights of access to the judicial system (Morek 2018).

However, the common refrain in the EU is that even though the Mediation Directive has helped further the development of mediation as a dispute resolution mechanism in Europe, its impact has been limited. To study why this is the case, the European Parliament, in 2013, commissioned a study to examine the implementation of the Mediation Directive (De Palo 2018, 3).

The Rebooting Study found that mediation was being used in fewer than 1% of cases in the EU (De Palo et al. 2014, 162) and in 46% of EU Member States, fewer than 500 mediations took place every year (6). The study linked this to the retention of a voluntary approach to mediation in almost all of the 28 Member States (Linklaters Europe 2020). Through a thorough comparative analysis of the legal frameworks of the 28 Member States, the Rebooting Study found that only a certain degree of compulsion to mediate can generate a significant number of mediations.

It went on to argue that other pro-mediation regulatory features such as strong confidentiality protection, frequent invitations by judges to mediate and a solid mediator accreditation system, have failed to generate any major effect on the occurrence of mediations (De Palo et al. 2014, 7). It finally recommended the opt-out model of mandatory mediation (De Palo and Canessa 2014-2015, 721). While the recommendations of this study are yet to find legislative sanction across the EU, a few jurisdictions within the EU have implemented some form of mandatory mediation.

## Italy

The Italian experiment with mandatory mediation is being hailed as a success across the world. However, it has not been an easy journey for Italy. Between 1990 and 2016, Italy experimented with five different models of mediation ranging between voluntary and mandatory mediation, until it adopted its current 'opt-out' model in 2013 (Elsaman 2020, 61-62). Mediation entered a new phase in Italy after the enactment of Law No. 60/2009 that authorised the government to regulate mediation in civil and commercial disputes (62). To implement this law, the Italian Government passed a special decree (the Legislative Decree No. 28/2010), introducing the concept of mandatory mediation prior to initiating court proceedings in civil and commercial matters (Mojasevic 2015, 101).

However, the model introduced with Decree No. 28/2010 was repudiated in 2012 by Italy's Constitutional Court, which held as unconstitutional the provisions that hindered parties' access to a court prior to the mediation process (Conte 2014). The Constitutional Court found that the legislature had unconstitutionally exceeded its power of delegation (De Hoom 2014, 24) and ruled that mandatory mediation must have its legal basis in the national legislation (Mojasevic 2015, 103). Following this ruling, the rate of mediations plummeted from 200,000 to around 2000 per year (De Palo and Canessa 2014-2015, 722).

To curb this drastic fall in the number of mediations, including voluntary mediations, in September 2013, Italy reintroduced the mandatory requirement by an Act of Parliament (De Palo and Canessa 2014-2015, 722). Consequently, the Decree of 2010 was significantly modified by adopting a new decree (Legislative Decree No. 69/2013) on "Urgent Measures on economy stimulation" (Mojasevic 2015, 103).

The most important amendments introduced were reducing the requirement of mandatory mediation to fewer types of claims and making it compulsory for lawyers to participate in the mediation process (Elsaman 2020, 63). To remove the hostility and distrust from lawyers, the amended law provided that the agreement reached by the parties in mediation would be enforceable, provided that it contained the

signature of the parties' lawyers (in addition to the parties' own signatures) to attest and certify compliance of the agreement with mandatory rules and public policy (Conte 2014). The Italian model of mandatory mediation places an obligation on lawyers to inform their clients, in writing, about the possibility to mediate their dispute while the mediators have the authority to draft settlement proposals (Elsaman 2020, 62).

Under the new law, parties must participate at the first meeting with the mediator (De Palo and Canessa 2014-2015, 723). The meeting is inexpensive, there are material penalties for non-attendance, and there is no compulsion to pursue mediation after this initial meeting. If the parties choose to proceed with mediation, the government provides tax credits for the first €500 of fees (Mulder 2016). However, at the first meeting, either party can decide to stop the mediation immediately, by paying only a nominal fee for the attended session (De Palo and Canessa 2014-2015, 723). In this easy opt-out model, the first meeting is already part of a formal mediation process (De Palo 2018, 5).

In Italy, in commercial and civil cases, mediation has been made mandatory in about 8% of the cases and remains voluntary in the remaining 92% of the cases (European Parliament 2016). The categories of cases include civil and commercial disputes arising out of property rights, division of property, inheritance law, family agreements, lease, loan, rent, compensation arising from medical liability, damages resulting from defamation through the press or other publicized means, banking and insurance contracts, and financial contracts (Usluel 2020, 461). Under this system, Italy is experiencing upwards of 150,000 mediations a year (De Palo and Canessa 2014-2015, 723).

In 2015, the total of the new civil and commercial cases filed in first instance courts was 1,748,384, where 8% of these new cases filed (139,870 cases) were subject to the required attempt to mediate and the remaining 92% (1,608,513 cases) were subject to voluntary mediation. In the same year, there were 19,624,714 mediations, 81.6% due to the required attempt (160,137 required mediations) with an average success rate of 44% and 8.3% voluntary mediations (16,288 voluntary mediations) with an average success rate of 60% (European Parliament 2016). From 2011 to 2018, a total of 130,438 agreements were reached in mediation proceedings. In 2018 alone, 20,965 settlements were arrived at. According to data, if all parties were present and they decided to continue with mediation beyond the first meeting, the success rate in 2018 was 45% (Matteucci 2019). In the disputes subjected to the initial required mediation session, the decrease of new judicial proceedings in court is about 16% (D'Urso 2017).

From this data, the Italian experience substantiates the claim that introducing an easy opt-out model of mandatory mediation is likely to substantially increase the number of both mandatory and voluntary mediations. Significantly, it is also going to reduce the burden on the judiciary - something that the Indian judicial system desperately needs.

### **United States of America (US)**

There is a strong public policy in the US favouring methods of ADR, including mediation (Linklaters U.S. 2020). Although widely known for its propensity for litigation, the U.S. has one of the world's most advanced and successful systems for settlement of disputes outside the formal legal system through mechanisms of mediation and arbitration (McManus 2011). Although there is no country-wide uniform policy on mediation, many courts and federal agencies in the United States have adopted mandatory mediation programmes after realising that purely voluntary programmes were receiving little usage (Welsh 2011). A very important reason for the adoption of such mediation programmes is the public policy of reducing the caseload of the courts and the substantial costs associated with the expansion of the court

system (Ginkel 2005). Currently, mediation has gradually become the primary ADR model used by the courts in the U.S. (Saul 2012).

### **Australia**

Australia's model of mandatory mediation differs from Italy's because it is a federal country where different states have their own models. Nonetheless, mandatory mediation is commonly used in Australia's civil justice system and the fields where mandatory mediation is employed are continually expanding (Waye 2016, 215). Unlike the opposition from the legal profession in Italy, Australia witnessed the judiciary and the legal profession embrace mandatory mediation to deal with the huge pendency of cases (Rooney 2015).

The mediation movement in Australia began in the 1980s. By the mid-1990s, legislation was introduced mandating ADR processes for farm debt, franchising, residential tenancies, retail tenancies, small businesses and building disputes among others, in the various states and territories of Australia (Rooney 2015). Presently, mandatory ADR is prescribed in the provisions of the Native Title Act, 1993 (Cth), the Administrative Appeals Tribunal Act, 1975 (Cth), and the Civil Procedure Act, 2005 (NSW) (Howarth 2017).

Apart from legislation by the states, the Civil Dispute Resolution Act, 2011 (Cth), requires applicants, who institute civil proceedings in the Federal Court of Australia or the Federal Circuit Court of Australia, to file a statement explaining the genuine steps they took to resolve their dispute or the reasons why no such steps were taken with an application initiating the proceedings (McNamara 2020). Section 4 of this Act provides a non-exhaustive list of examples of genuine steps, including considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process. Although the legislation does not expressly require pre-action mediation, it is believed that it will inevitably be one of the most common mechanisms for demonstrating that genuine steps have been taken to resolve a civil dispute (Bergin 2012).

Because of its federal polity, Australia also has a complex and highly fragmented civil justice system due to which, country wide statistics for disputes submitted to and settled through mandatory mediation are unavailable (Waye 2016, 215). Australian research reveals that settlement rates and degrees of satisfaction are similar, whether participation be voluntary or compelled. For example, retail tenancy disputes, that are required by statute to be mediated before they can be heard, have a settlement rate of over 80% (Limbury 2018).

The above discussion shows that there is no one correct way to implement mandatory mediation. While a country like Italy has made legislative changes at the national level to incorporate mandatory mediation, in countries like Australia, the process has been more decentralised. From this discussion, it is also clear that the Australian model is more complex than the Italian one as different states have passed individual legislation according to the subject matter of the mediation. Also, in Australian legislation, the focus is not just on mandatory mediation but other forms of dispute resolution as well. Thus, which model is best suited for a country depends on a number of domestic factors that need to be taken into consideration. Before India implements mandatory mediation, certain considerations unique to India must be borne in mind.

## **Mandatory mediation in India**

It is crucial to ensure that mediation in India does not go down the same road as arbitration in its initial years. For this, based on the lessons drawn from the arbitration experience, certain provisions need to be incorporated within any law on mediation. The first would be to provide adequate safeguards against frivolous and motivated challenges to mediation agreements in courts.

Making the profession of mediation more lucrative is crucial for mediation to achieve its full potential as a dispute resolution mechanism. This will ensure that the best talent is attracted towards this profession and the quality of services provided improves substantially. Therefore, any attempts to cap fees charged for mediation need to be thought through carefully. Ideally, overregulation in the form of price caps should be avoided. However, if implemented, it is imperative to link it to the monetary value of the dispute and not decide in an arbitrary manner.

Any attempt at making mediation mandatory would fail unless there is an adequate number of skilled mediators available to meet the demand that would be generated. This is why upskilling lawyers to become mediators is the need of the hour. Further, it is crucial that restrictions are not placed on who could become a mediator. Rather, apart from certain basic qualifications, regulation should only require mandatory training for mediators. This could ensure that people across professions opt to become trained mediators, bringing the subject matter expertise that is required for different kinds of disputes.

Further, in the era of the Fourth Industrial Revolution, integration of technology in the process of mediation is imperative. Online dispute resolution (ODR) holds a lot of potential especially for cross-border disputes and disputes where parties are geographically separated, and any policy should therefore sufficiently provide for utilisation of this potential. It is extremely important to support and encourage optimal use of technology in making mandatory mediation feasible and convenient for parties.

Another challenge that mandatory mediation could face is from the legal community itself, which may perceive mediation as a threat and not an opportunity. This was witnessed in Italy when mediation was first made mandatory. To avoid a similar backlash, it is important to co-opt lawyers as important stakeholders in this process. This can be done by allowing lawyers to be present during mediation and encouraging lawyers to take up mediation as a profession. Bearing these considerations in mind, the authors suggest the following mandatory mediation model for India.

### **Mandatory mediation model for India**

The process of introducing mandatory mediation should be well-thought out and no hasty decisions should be taken which might lead to unnecessary vilification of this process. We recommend that India should adopt a modified version of Italy's opt-out model of mandatory mediation. We should learn from some of the hurdles that Italy faced when introducing mandatory mediation, so that similar teething troubles are not witnessed in India.

India should also learn from the experience in Romania, which adopted the opt-in model of mandatory mediation and required parties to attend an information session on mediation prior to initiating certain kinds of civil cases (Rühl et al. 2015, 310). In the opt-in model, the parties interested in mediation, after the mandatory information session, must start a separate process to actually mediate (De Palo et al. 2014, 8). The Romanian law also contained a provision expressly requiring the court to dismiss a case when the parties had not attended a mediation information meeting (Rühl et al. 2015, 310). In 2014, the Romanian Constitutional Court ruled both these provisions unconstitutional because they were drafted in such a manner that they imposed an unreasonable burden on litigants and violated the

citizens' right to access to justice (310-311). Thus, caution should be observed while passing any law which makes mediation mandatory, to ensure that it does not hinder access to justice for people. Else it could fall foul of the constitutional guarantees that Indian citizens enjoy.

India should also learn from the things Italy did right. In 2013, it introduced mandatory mediation with a four year sunset clause, after which the law had to be reviewed. A similar approach can be adopted in India wherein mandatory mediation would start with a small pilot programme and then gradually be modified to correct for demonstrated defects that are discovered (Sander 2007, 16). An evidence-based approach towards mandatory mediation would help impart more legitimacy to any effort to make mediation mandatory.

In Italy, in civil and commercial matters, the Legislative Decree No. 28/2010 considers the mediation attempt as 'voluntary' for all disputes, but as a condition for admissibility of judicial action, and therefore 'mandatory' for disputes relating to co-ownership of land, property rights, division of assets, hereditary succession, family agreements, leasing, loans, commercial leases, medical and paramedical liability, defamation, insurance, banking and financial agreements (Bruni 2019, 6). For India, categories of disputes where the opt-out mandatory mediation model could be introduced include commercial, labour, family, consumer and tenancy disputes, as well as cases of negligence. Since the Consumer Protection Act, 2018 already provides for mediation, consumer disputes can be used as a test case for mandatory mediation in the country. This is because such disputes often involve simple questions of law and facts and are likely to be less time consuming than other kinds of disputes.

Caution must be observed to ensure that the attempt at mandatory mediation does not end up becoming a token gesture and parties to a dispute make a serious attempt to mediate. This is why, as against Italy's one mandatory session, India should give careful consideration to having more than one mandatory mediation session to truly derive value from this process. Since awareness about the benefits of mediation is poor in India, this would give the parties a fair opportunity to understand the value that could accrue to them by resolving their disputes through mediation.

Since India has already experimented with mandatory mediation with the 2018 amendment to the Commercial Courts Act, 2015, it is important to initiate a detailed study on how the mandatory mediation process has fared and the reasons why it has been unable to achieve its objective. This information can be extremely useful when an attempt is made to institutionalise mandatory mediation in the country. Also, correcting the bottlenecks that this process uncovers could help increase people's faith in mediation as a workable dispute resolution mechanism.

Another element that is important for mandatory mediation to succeed in India is the parties' freedom to choose their mediator. Making mediation mandatory and compelling parties to have their disputes mediated by people who would be assigned to their case by the concerned Court-Annexed Mediation Centre would hinder the growth of quality professionals in this field. It could also erode the parties' trust in the process. Further, any law making mediation mandatory for certain categories of disputes should contain a procedure for exemption from mandatory mediation under certain circumstances.

In *M.R. Krishna Murthi v. The New India Assurance Co. Ltd. and Ors.* (MANU/SC/0321/2019), the Supreme Court asked the government to consider the feasibility of enacting the Indian Mediation Act to take care of various aspects of mediation in general. There is an urgent need for an umbrella legislation regulating mediation in the country. This can either be in the form of a stand-alone legislation or through suitable inclusions in the Arbitration and Conciliation Act, 1996. In either case, mandatory mediation should be introduced in a phased manner, starting with a limited number of case categories, as described above.

## Conclusion

In this paper we have examined the need for integrating mediation as one of the chief components of the dispute resolution framework in the country. We have looked at the present framework governing mediation and the shortcomings therein. We have explained the concept of mandatory mediation and how it can help us deal with some of the problems associated with voluntary mediation. We have also tried to address certain concerns that have been expressed regarding mandatory mediation. After looking at the experience of some other countries with mandatory mediation, we have suggested the steps India needs to take in order to successfully introduce mandatory mediation. Finally, we have suggested a mandatory mediation model suitable for India.

While mandatory mediation holds tremendous potential, it must not be perceived as a panacea for an ailing and overcrowded court system. Other reform measures to improve the overall legal health of our society must continue in parallel. However, as already witnessed in a few jurisdictions, it can play a significant role in lessening the courts' burden even while providing an effective means to resolve disputes.

Mandatory mediation requires something of a reordering of our view of the legal system. Courts should not be looked upon as the forum of first resort to dispute resolution, but rather as one of last resort when all else fails. By requiring parties to mediate first, communication lines are kept open or re-established, so that the parties themselves can guide their own destinies rather than place them in the hands of a stranger (Hutchinson 1996, 94).

In essence, it represents a paradigm shift in the way we resolve conflicts (Saposnek 1992, 502). Embracing it requires a recognition of the societal costs of adversarial dispute resolution and the need to mainstream an alternative.



## References

- Bergin, P. A. 2012, "The Right Balance Between Trial and Mediation: Visions, Experiences and Proposals - A Look Beyond the EU - Australia." Accessed November 25, 2020. <http://www.austlii.edu.au/au/journals/NSWJSchol/2012/38.pdf>.
- Bruni, Alessandro. 2019. "Italy." Accessed February 8, 2021. [http://www.concilia.it/mediation\\_2019.pdf](http://www.concilia.it/mediation_2019.pdf).
- Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003. Accessed November 07, 2020. [http://chdsla.gov.in/right\\_menu/rules\\_regulationslsa/pdf\\_files/cpadrm-rules-2003.pdf](http://chdsla.gov.in/right_menu/rules_regulationslsa/pdf_files/cpadrm-rules-2003.pdf).
- Civil Procedure Alternative Dispute Resolution Rules, 2006 (Bombay High Court). Accessed November 17, 2020. [https://www.mediate.com/Prachi/docs/adr\\_rules.pdf](https://www.mediate.com/Prachi/docs/adr_rules.pdf).
- Cohen, Lester. 1991. "Mandatory mediation: A rose by any other name." *Mediation Quarterly* 9, no. 1 (Fall): 33-46.
- Conte, Giuseppe. 2014. "The Italian Way of Mediation." Accessed November 19, 2020. <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1059&context=arbitrationlawreview>.
- Cutolo, Daniele and Mark Alexander Shalaby. 2010. "Mandatory Mediation and the Right to Court Proceedings." *Dispute Resolution International* 4, no. 1 (May): 131-144.
- D'Urso, Leonardo. 2017. "Italy's Mediation Law: An Overview." Accessed November 24, 2020. <https://imimediation.org/2017/06/22/italys-mediation-law-an-overview/>.
- De Hoom, Machteld W. 2014. "Making Mediation Work in Europe: What's Needed Is a New Balance between Mediation and Court Proceedings." *Dispute Resolution Magazine* 20, no. 2 (Winter): 23-26.
- De Palo, Giuseppe. 2018. "A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs To Be More ...Directive." Accessed November 14, 2020. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL\\_BRI\(2018\)608847\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf).
- De Palo, Giuseppe and Romina Canessa. 2014-2015. "Sleeping - Comatose - Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union." *Cardozo Journal of Conflict Resolution* 16, no. 3: 713-730.
- De Palo, Giuseppe, Leonardo D'Urso, Mary Trevor, Bryan Branon, Romina Canessa, Beverly Caywer, and L. Reagan Florence. 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." Accessed November 20, 2020. [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI\\_ET\(2014\)493042\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf).

Elsaman, Mahmoud. 2020. "Introducing Mandatory Mediation to Egypt's Administrative Courts: Two Feasible Approaches." *Courts & Justice Law Journal* 2, no. 1 (Winter): 55-75.

European Parliament. 2016. "The Implementation of the Mediation Directive Workshop: Compilation of In-depth Analyses." Accessed November 22, 2020. [https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL\\_IDA%282016%29571395\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf).

Ginkel, Eric van. 2005. "Mediation under National Law: United States of America." Accessed February 7, 2021. <https://www.mediate.com/globalbusiness/docs/Mediation%20and%20the%20Law%20-%20United%20States.pdf>.

Gupta, Juhi. 2018. "Bridge over Troubled Water: The Case for Private Commercial Mediation in India." *American Journal of Mediation* 11: 59-88.

Hanks, Melissa. 2012. "Perspectives on Mandatory Mediation." *University of New South Wales Law Journal* 35, no. 3: 929-952. <http://classic.austlii.edu.au/au/journals/UNSWLawJl/2012/39.html>.

Howarth, Shelby Higgs and Catherine Caruana. 2017. "Appendix A: Mandatory Mediation in Family Law – A Review of the Literature." Accessed November 17, 2020. [https://csm.cass.anu.edu.au/sites/default/files/docs/CSRM\\_60ICERT\\_APPENDIX\\_A.pdf](https://csm.cass.anu.edu.au/sites/default/files/docs/CSRM_60ICERT_APPENDIX_A.pdf).

Hutchinson, Campbell C. 1996. "The Case for Mandatory Mediation." *Loyola Law Review* 42, no. 1 (Spring): 85-96.

Law Commission of India. 2011. "Report No. 238 on Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions." Accessed November 8, 2020. <https://lawcommissionofindia.nic.in/reports/report238.pdf>.

Limbury, Alan. 2018. "Compulsory Mediation – The Australian Experience." Accessed November 24, 2020. <http://mediationblog.kluwerarbitration.com/2018/10/22/compulsory-mediation-australian-experience/>.

Linklaters. 2020. "Commercial Mediation in the U.S." Accessed February 8, 2021. <https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/us>.

Linklaters. 2020. "The European Mediation Directive." Accessed November 22, 2020. <https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/eu-commercial-mediation>.

Matteucci, Giovanni. 2019. "Mediation and Judiciary in Italy." Accessed November 25, 2020. <https://www.gemme-mediation.eu/2019/10/22/mediation-and-judiciary-in-italy-2019/>.

McManus, Michael and Brianna Silverstein. 2011. "Brief History of Alternative Dispute Resolution in the United States." Accessed February 7, 2021. <https://www.cadmusjournal.org/article/issue-3/brief-history-alternative-dispute-resolution-united-states>.

McNamara, Philip. 2020. "The Rise of Mandatory Mediation in Australia - Insights for Litigators." Accessed November 20, 2020. [http://images.info.lexisnexis.com.au/Web/LexisNexisAustralia/%7B005461ac-703b-4b2f-a313-8d52fb9a6386%7D\\_FINAL-Q4\\_Bar\\_ADR\\_Jan\\_2020.pdf](http://images.info.lexisnexis.com.au/Web/LexisNexisAustralia/%7B005461ac-703b-4b2f-a313-8d52fb9a6386%7D_FINAL-Q4_Bar_ADR_Jan_2020.pdf).

Mediation and Conciliation Project Committee, Supreme Court of India. n.d. "Mediation Training Manual of India." Accessed November 15, 2020. <https://www.mediate.com/pdf/MT%20MANUAL%20OF%20INDIA.pdf>.

Mediation and Conciliation Rules, 2004 (Delhi High Court). Accessed November 17, 2020. [http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile\\_QEP90BUB.pdf](http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_QEP90BUB.pdf).

Morek, Rafal. 2018. "To compel or not to compel: Is mandatory mediation becoming "popular"?" Accessed November 23, 2020. <http://mediationblog.kluwerarbitration.com/2018/11/19/to-compel-or-not-to-compel-is-mandatory-mediation-becoming-popular/>.

Mulder, Claire. 2016. "Commercial Mediation: The United States and Europe The view through practitioners' eyes." Accessed November 25, 2020. <https://www.reulingschutte.nl/wp-content/uploads/2016/02/Commercial-Mediation-The-United-States-and-Europe.-The-view-through-practitioners-eyes.pdf>.

Narain, Rashika and Abhinav Sankaranarayanan. 2018. "Formulating a Model Legislative Framework for Mediation in India." *NUJS Law Review* 11, no. 1 (January-March): 75-120.

National Judicial Data Grid. [https://njdg.ecourts.gov.in/njdgnew/?p=main/pend\\_dashboard](https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard). Accessed November 12, 2020.

NITI Aayog. 2020. "Designing the Future of Dispute Resolution: The ODR Policy Plan for India." Accessed December 10, 2020. <https://niti.gov.in/sites/default/files/2020-10/Draft-ODR-Report-NITI-Aayog-Committee.pdf>.

Nolan-Haley, Jacqueline M. 2012. "Is Europe Headed down the Primrose Path with Mandatory Mediation." *North Carolina Journal of International Law and Commercial Regulation* 37, no. 4 (Summer): 981-1012.

Official Journal of the European Union. 2008. "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." Accessed November 20, 2020. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0052>.

Quek, Dorcas. 2010. "Mandatory Mediation: An Oxymoron - Examining the Feasibility of

- Implementing a Court-Mandated Mediation Program.” *Cardozo Journal of Conflict Resolution* 11, no. 2 (Spring): 479-510. <https://cardozoocr.com/vol11no2/479-510.pdf>.
- Rooney, Greg. 2015. “The Australian Experience of Legislated Pre-Action ADR Requirements: Specificities, Acceptation, and Keys to Success.” Accessed November 24, 2020. [https://www.mediate.com/products/docs/6th\\_Symposium\\_of\\_the\\_Institut\\_de\\_m%C3%A9diation\\_et\\_d'arbitrage\\_du\\_Qu%C3%A9bec.pdf](https://www.mediate.com/products/docs/6th_Symposium_of_the_Institut_de_m%C3%A9diation_et_d'arbitrage_du_Qu%C3%A9bec.pdf).
- Rühl, Giesela, Jan von Hein, Pierre Callé, Michael P. Clancy, Christiane Wendehorst, Kurt Lechner, Eva Pötter et al. 2015. “Cross-border activities in the EU - Making life easier for citizens.” Accessed December 13, 2020. [https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/IPOL\\_STU2015510003\\_EN\\_short-version.pdf](https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/IPOL_STU2015510003_EN_short-version.pdf).
- Sander, Frank E. A. 2007. “Another View of Mandatory Mediation.” *Dispute Resolution Magazine* 13, no. 2 (Winter): 16-16.
- Saposnek, Donald T. 1992. “Clarifying Perspectives on Mandatory Mediation.” *Family and Conciliation Courts Review* 30, no. 4 (October): 490-506.
- Saul, Judith. 2012. “The Legal and Cultural Roots of Mediation in the United States.” Accessed February 7, 2021. <https://ssrn.com/abstract=2125440>.
- Susskind, Richard. 2019. *Online Courts and the Future of Justice*. Oxford: Oxford University Press.
- United Nations Commission on International Trade Law. n.d. “United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the ‘Singapore Convention on Mediation’).” Accessed November 10, 2020. [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements).
- Usluel, Asli E. Gurbuz. 2020. “Mandatory or Voluntary Mediation? Recent Turkish Mediation Legislation and a Comparative Analysis with the EU’s Mediation Framework.” *Journal of Dispute Resolution* 2020, no. 2 (Spring): 445-466.
- Vettori, Stella. 2015. “Mandatory Mediation: An Obstacle to Access to Justice.” *African Human Rights Law Journal* 15, no. 2: 355-377.
- Vidhi Centre for Legal Policy. 2016. “Strengthening Mediation in India - A Report on Court-Connected Mediations.” Accessed November 9, 2020. [https://vidhilegalpolicy.in/wp-content/uploads/2019/05/26122016\\_StrengtheningMediationinIndia\\_FinalReport.pdf](https://vidhilegalpolicy.in/wp-content/uploads/2019/05/26122016_StrengtheningMediationinIndia_FinalReport.pdf).
- Vidhi Centre for Legal Policy. 2020. “ODR - The Future of Dispute Resolution in India.” Accessed November 3, 2020. [https://vidhilegalpolicy.in/wp-content/uploads/2020/07/200727\\_The-future-of-dispute-resolution-in-India\\_Final-Version.pdf](https://vidhilegalpolicy.in/wp-content/uploads/2020/07/200727_The-future-of-dispute-resolution-in-India_Final-Version.pdf).
- Waye, Vicki. 2016. “Mandatory Mediation in Australia’s Civil Justice System.” *Common Law World Review* 45, no. 2-3 (June-September): 214-235.

Welsh, Nancy A. 2011. "Mandatory Mediation and Its Variations." Accessed February 8, 2021. <https://scholarship.law.tamu.edu/facscholar/974>.

## Notes

1. Title inspired from National ADR Advisory Council Report titled "The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General". Accessed November 15, 2020. <https://apo.org.au/sites/default/files/resource-files/2009-09/apo-nid67039.pdf>.
2. According to the Ease of Doing Business - Economic Profile of India. Accessed November 06, 2020. <https://www.doingbusiness.org/content/dam/doingBusiness/country/i/india/IND.pdf>
3. Frank E. A. Sander's Address Before the National Conference on the Causes of Popular
4. Code of Civil Procedure (Amendment) Act 1999 with effect from July 01, 2002. For a history of how mediation has grown in India, refer to Xavier, Anil. 2006. "Mediation: Its Origin and Growth in India." *Hamline Journal of Public Law & Policy* 27, no. 2 (Spring): 275-282.
5. Rule 1A, Order 10, Code of Civil Procedure, 1908: Direction of the Court to opt for any one mode of alternative dispute resolution. After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.
6. The Legal Services Management System of the National Legal Services Authority tracks the mediation infrastructure in the country along with the number of cases settled through mediation. However, no data is available on the number of referrals by courts. This is why, a study conducted by Gujarat National Law University, Gandhinagar recommends that the National Judicial Data Grid (NJDG) should maintain separate data on Section 89 referral and regularly audit the success and failure of referred cases. Refer to A., Marisport, Ambati Nageswara Rao and Heena Goswami. 2019. "Project Report on Resolving pending cases through Alternative Dispute Resolution under Section 89 of Civil Procedure Code: A Case Study." Accessed November 12, 2020. <https://doj.gov.in/sites/default/files/GNLU.pdf>.
7. Rule 4, Consumer Protection (Mediation) Rules, 2020: These include matters relating to proceedings in respect of medical negligence resulting in grievous injury or death; matters which relate to defaults or offences for which applications for compounding of offences have been made by one or more parties; cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion; cases relating to prosecution for criminal and non-compoundable offences; and cases which involve public interest or the interest of numerous persons who are not parties before the Commission.