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PRE-LITIGATION MEDIATION IN INDIA: ACCESS TO JUSTICE OR AN ADDITIONAL PROCEDURAL BARRIER?

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I. ABSTRACT

India has spent two decades trying to move disputes out of overloaded courts and into consensual processes. That effort has gone through three phases. Section 89 of the Code of Civil Procedure 1908 introduced court-annexed referral to alternative dispute resolution. Section 12A of the Commercial Courts Act 2015 then made pre-institution mediation a precondition to filing most commercial suits. The Mediation Act 2023 followed, adopting a consent-based default for civil disputes while the proviso to section 5(1) preserves the compulsory commercial gateway. This paper traces that trajectory and asks whether compulsory pre-litigation mediation advances access to justice or adds a procedural hurdle that delays vindication of rights. It situates India against two comparators, England and Wales and Italy, and against a domestic comparator, the pre-litigation conciliation conducted by Permanent Lok Adalats. The paper argues that the legitimacy of mandatory mediation depends on design rather than principle. Compulsion is defensible where the process is time-bound, inexpensive, institutionally staffed and leaves urgent relief untouched. It is indefensible where it operates as a ritual gateway. Drawing on the Supreme Court's decisions in Patil Automation, Yamini Manohar, Dhanbad Fuels and Novenco, the paper proposes a calibrated model built around consent-sensitive gateways, a narrow and well-defined urgency exception, a mediator-capacity guarantee, cost and delay safeguards, a clear relationship between section 12A and the Mediation Act 2023, and evidence-led review through public data.

II. KEYWORDS

Pre-litigation mediation; access to justice; Section 12A Commercial Courts Act; Mediation Act 2023; alternative dispute resolution.

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III. INTRODUCTION

Access to justice is not only the right to file a case. It is the right to obtain an effective, affordable and timely resolution of a legal grievance. Indian constitutional doctrine treats it accordingly. The Supreme Court has read access to justice into article 21 and, because the denial of an adjudicatory mechanism defeats equality before the law, into article 14 as well, while article 39A directs the State to ensure that legal opportunity is not denied by economic or other disabilities.³ Against that standard, the Indian civil justice system performs poorly.

The National Judicial Data Grid records pendency of more than 4.76 crore cases in the district and subordinate courts alone and of over 5.39 crore across the court hierarchy.⁴ The Law Commission of India has flagged arrears as a structural problem since its Fourteenth Report of 1958, returning to the question in the Seventy-seventh and Seventy-ninth Reports of 1979, the One Hundred and Twentieth Report of 1987, the Two Hundred and Thirtieth Report of 2009 and again in Report No 245 of 2014, which itself surveys that record.⁵ Six decades of diagnosis have not produced material improvement.

Mediation has been offered as one answer. Its appeal is easy to state. A negotiated settlement is faster than adjudication, preserves commercial and personal relationships, and relieves the court of a case that may not need a judge. The difficulty is the relationship between persuasion and compulsion. A mediation that parties choose is an expression of autonomy. A mediation that the law requires before a court can be approached is a condition on the exercise of the right to sue. That distinction sits at the centre of this paper.

³ *Anita Kushwaha v Pushap Sudan* (2016) 8 SCC 509 [28] and [30]; *Hussainara Khatoon (IV) v Home Secretary, State of Bihar* (1980) 1 SCC 98; Constitution of India 1950, arts 14, 21 and 39A.

⁴ National Judicial Data Grid, 'Pendency Dashboard: Summary of Pending Cases' <https://njdg.ecourts.gov.in> accessed 5 October 2026.

⁵ Law Commission of India, *Arrears and Backlog: Creating Additional Judicial (wo)manpower* (Report No 245, July 2014) 6-7, fn 11 and 20, fn 22 (the One Hundred and Twentieth Report); Law Commission of India, *Reform of Judicial Administration* (Report No 14, 1958) vol 1, 130.

The Indian legislative record shows the tension. Section 12A of the Commercial Courts Act 2015, inserted in 2018, provides that a commercial suit that does not contemplate urgent interim relief shall not be instituted unless the plaintiff has exhausted pre-institution mediation.⁶ The Supreme Court held the requirement mandatory in 2022.⁷ The Mediation Act 2023, enacted after years of debate, then framed pre-litigation mediation as a step parties may take by mutual consent, but the proviso to section 5(1) requires that pre-litigation mediation in matters of commercial disputes of Specified Value be undertaken in accordance with section 12A of the Commercial Courts Act 2015 and the rules made thereunder.⁸ A voluntary default for civil disputes therefore coexists with a compulsory gateway expressly preserved for commercial plaintiffs, and the terms on which the two regimes are to operate together remain to be settled. The question this paper takes up is not whether mediation is valuable. It plainly is. The question is whether making it a condition of access preserves or damages the very right it is meant to serve, and what design features separate the two outcomes.

The paper proceeds in five parts. It begins with the architecture and rationale of section 12A and the pre-institution scheme. It then traces the judicial treatment of the provision, and the parallel arrival of the Mediation Act 2023. It sets the Indian experience against England and Wales, Italy and the Permanent Lok Adalat model. It examines the institutional and practical conditions that determine whether mandatory mediation works. It closes with proposals for a calibrated model.

A. Research Objectives

This paper pursues the following research objectives:

1. To examine the evolution of pre-litigation mediation in India from section 89 of the Code of Civil Procedure 1908 to section 12A of the Commercial Courts Act 2015 and the Mediation Act 2023.

⁶ Commercial Courts Act 2015, s 12A, inserted by the Commercial Courts (Amendment) Act 2018.

⁷ *Patil Automation Pvt Ltd v Rakheja Engineers Pvt Ltd* (2022) 10 SCC 1.

⁸ Mediation Act 2023, s 5(1) and the proviso thereto.

2. To assess whether the compulsory pre-institution mediation scheme is compatible with the constitutional right of access to justice.
3. To compare the Indian approach with the experience of England and Wales, Italy and the Permanent Lok Adalat framework under the Legal Services Authorities Act 1987.
4. To evaluate how judicial interpretation, institutional capacity and procedural design determine whether mandatory mediation operates as access or as obstruction.
5. To propose a calibrated model for pre-litigation mediation that is consent-sensitive, institutionally feasible and consistent with the Mediation Act 2023.

B. Research Questions

The paper is guided by the following research questions:

1. Why did Indian law move from voluntary court-annexed ADR towards mandatory pre-institution mediation in commercial disputes?
2. How have the Supreme Court's decisions shaped the scope, enforceability and exceptions of section 12A?
3. Is compulsory mediation as a precondition to suit consistent with the right of access to justice under articles 14 and 21 of the Constitution?
4. What lessons can India draw from England and Wales, Italy and the Permanent Lok Adalat model?
5. What legal and institutional design should a future Indian framework adopt so that pre-litigation mediation facilitates settlement without becoming an additional procedural barrier?

C. Research Methodology

This paper adopts a doctrinal and comparative legal research methodology. It analyses primary legal materials, including the Code of Civil Procedure 1908, the Legal Services Authorities Act 1987, the Commercial Courts Act 2015 as amended in

2018, the Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018, and the Mediation Act 2023. It also analyses decisions of the Supreme Court of India and of courts in the comparator jurisdictions. The doctrinal analysis is supplemented by Law Commission reports, parliamentary materials and selected secondary scholarship on dispute resolution and access to justice.

The comparative component is deliberately confined to England and Wales, Italy and the domestic Permanent Lok Adalat model. England and Wales is examined because its courts have moved from a position that compulsion to mediate is impermissible towards one that permits courts to order engagement with ADR. Italy is examined because it has operated mandatory mediation as a condition of suit for a defined category of disputes and has been tested before both its Constitutional Court and the Court of Justice of the European Union.

The Permanent Lok Adalat is examined because it is India's oldest statutory pre-litigation settlement mechanism. Together these comparators allow the paper to assess three regulatory choices: judicially managed encouragement, legislated compulsion with constitutional limits, and institutional conciliation backed by an adjudicatory fallback.

The paper does not rely on empirical data of its own. Publicly available settlement and disposal data for pre-institution mediation are limited, and where the paper makes claims about practice it frames them as inferences from doctrine and reported decisions rather than as measured outcomes.

IV. THE DIAGNOSIS AND THE DESIGN OF SECTION 12A

A. From Section 89 to Section 12A

Statutory ADR in Indian civil procedure began with the Code of Civil Procedure (Amendment) Act 1999 and 2002, which inserted section 89 and Order X rules 1A to 1C. Section 89 empowers a court, where it appears that elements of a settlement exist, to formulate terms and refer the parties to arbitration, conciliation, judicial settlement

including Lok Adalat, or mediation.⁹ The Supreme Court upheld the provision in *Salem Advocate Bar Association v Union of India* and later issued detailed guidance in *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd*, distinguishing categories of dispute that are and are not suitable for referral.¹⁰

Two features of section 89 matter for what followed. First, referral came after the suit had been filed and the pleadings stood, so the mediation worked in the shadow of an existing case. Second, referral depended on the judge's assessment of the dispute. The regime was therefore discretionary and late. It did little to keep disputes out of the system in the first place, and critics noted that the burden of deciding which cases deserved mediation fell on judges who were already short of time.

B. The Design of Section 12A

The Commercial Courts Act 2015 was enacted to create a specialised, faster forum for commercial disputes. The Commercial Courts (Amendment) Act 2018 added section 12A and reduced the specified value of a commercial dispute to ₹3 lakh, bringing a much larger volume of litigation within the Act.¹¹ Section 12A has four working components. Its first sentence bars institution of a suit that does not contemplate urgent interim relief unless the plaintiff has exhausted pre-institution mediation in accordance with rules made by the Central Government.¹²

It authorises authorities constituted under the Legal Services Authorities Act 1987 to conduct the mediation. It limits the mediation to three months, extendable by two months with the consent of the parties, and excludes that period from computation of limitation. And it gives a settlement signed by the parties and the mediator the status of an arbitral award on agreed terms under section 30(4) of the Arbitration and Conciliation Act 1996.¹³

⁹ Code of Civil Procedure 1908, s 89 and Order X, rr 1A to 1C.

¹⁰ *Salem Advocate Bar Association v Union of India* (2005) 6 SCC 344; *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* (2010) 8 SCC 24.

¹¹ Commercial Courts Act 2015, s 2(1)(i), as amended by the Commercial Courts (Amendment) Act 2018.

¹² Commercial Courts Act 2015, s 12A(1).

¹³ Commercial Courts Act 2015, s 12A(2) to (5); Arbitration and Conciliation Act 1996, s 30(4).

The Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018 supplied the procedure: an application to the competent legal services authority, notice to the opposite party, and a "non-starter report" where the opposite party does not participate, which entitles the applicant to approach the court.¹⁴

The design logic is clear. Compulsion removes the problem of the unwilling gateway, since a party cannot ignore mediation and go straight to court. The use of State legal services authorities supplies a neutral and publicly funded infrastructure. The statutory limit on duration and the limitation exclusion is meant to prevent the process from eroding the claimant's rights.

B. The Structural Concerns

The scheme invites four concerns that the remainder of this paper develops.

First, compulsion converts a voluntary process into a precondition, and a precondition is a barrier by definition, however benign its purpose.

Second, the urgency exception introduces a threshold dispute about what counts as urgent interim relief, and that dispute can be litigated before the merits are reached.

Third, the legal services authorities were not built as commercial mediation institutions, and their capacity to deliver quality mediation at volume was always uncertain.

Fourth, the consequence of non-compliance, rejection of the plaint, is severe for a claimant who may by then be out of time, and although the Supreme Court has since confined that consequence to suits instituted on or after 20 August 2022 and has held that a properly founded urgency claim survives the refusal of interim relief, the risk attending a good-faith misjudgment of the exception remains.

¹⁴ Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018.

C. Section 12A and the Constitution

Whether section 12A is compatible with the constitutional right of access to justice must be tested against Indian doctrine rather than intuition. In *Anita Kushwaha v Pushap Sudan* a Constitution Bench held that access to justice is a facet of the right to life under article 21 and, because the denial of access to an adjudicatory mechanism defeats equality before the law, equally a facet of article 14. The Court then reduced the right to four components: the State must provide an effective adjudicatory mechanism; that mechanism must be reasonably accessible in terms of distance; the process of adjudication must be speedy; and the litigant's access to it must be affordable.¹⁵

Applied to section 12A, those components yield a structured rather than a rhetorical assessment. The first is satisfied, because the commercial court remains available and the mediator decides nothing; a settlement derives its force from the parties' agreement. The second is engaged only indirectly, since the mediation is conducted by legal services authorities whose reach is territorially organised. It is the third and fourth components that do the work. A gateway that may consume three months, extendable to five, before a plaint can be presented bears directly on speed, and the fees of the pre-institution stage, together with the cost of attending it, bear on affordability.¹⁶ The constitutional question is therefore not whether compulsion is permissible in the abstract but whether its delay and cost remain proportionate to the settlements it produces. Part VII tests that proposition against the institutional record. Article 14 raises a distinct question of classification. Section 12A applies the compulsory gateway to commercial disputes of Specified Value while the Mediation Act 2023 leaves other civil disputes to a consensual default.¹⁷ The classification is defensible on conventional principles. Commercial litigants are ordinarily repeat participants with legal representation and quantifiable claims, such disputes are

¹⁵ *Anita Kushwaha* (n 3) [28].

¹⁶ Commercial Courts Act 2015, s 12A(3); Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018 (n 14).

¹⁷ Commercial Courts Act 2015, s 2(1)(i) (n 11); Mediation Act 2023, s 5(1) and the proviso thereto (n 8).

frequently amenable to settlement, and the Commercial Courts Act was enacted to supply an expedited forum for precisely that class, so the differentia is intelligible and bears a rational nexus to the object of expeditious commercial dispute resolution. The reduction of the specified value to three lakh rupees nonetheless strains that reasoning, because it draws small traders and single-transaction claimants into a gateway designed for sophisticated commercial parties, and it is at that margin that a challenge under article 14 would be most plausible.

Two decisions confirm that compulsion is not foreclosed. In *Bar Council of India v Union of India* the Supreme Court upheld Chapter VIA of the Legal Services Authorities Act 1987 and the Permanent Lok Adalat scheme, observing that it is not a constitutional right of any person to have a dispute adjudicated by means of a court only.¹⁸ *Patil Automation* proceeds on the same premise, and its prospective operation shows the Court treating the severity of the consequence, rather than the fact of compulsion, as the point of constitutional pressure.¹⁹ Read together, the authorities locate the vulnerability of section 12A in its operation rather than its existence: in the length and cost of the gateway, the adequacy of the institutions that administer it, and the proportionality of rejecting a plaint for a good-faith misjudgment of the urgency exception.

V. THE JUDICIAL PATH AND THE ARRIVAL OF THE MEDIATION ACT 2023

A. Mandatory but Prospective: *Patil Automation*

For four years after its insertion, High Courts disagreed on whether section 12A was truly mandatory or merely directory. In *Patil Automation Pvt Ltd v Rakheja Engineers Pvt Ltd*, the Supreme Court resolved the question in August 2022. It held that the word "shall" and the structure of the provision made pre-institution mediation mandatory, and that a plaint instituted in breach was liable to rejection under Order VII rule 11(d) of the Code of Civil Procedure.²⁰ The Court reasoned that the object of the amendment,

¹⁸ *Bar Council of India v Union of India* (2012) 8 SCC 243 [22] (SC, 3 August 2012).

¹⁹ *Patil Automation* (n 7).

²⁰ *Patil Automation* (n 7); Code of Civil Procedure 1908, Order VII, r 11(d).

reducing the burden on commercial courts and encouraging early resolution, would be defeated if the requirement were optional. It held, however, that the ruling would operate prospectively from 20 August 2022, so as not to prejudice litigants who had relied on the earlier uncertainty.²¹

The judgment is significant for two reasons. It confirms that Indian law is willing to treat access to a court as conditional on prior engagement with a non-adjudicatory process. It also shows the Court's awareness of the cost of that choice, since the prospective operation was a direct acknowledgement that a sudden bar could cut off genuine claims.

B. Policing the Urgency Exception: *Yamini Manohar*

The exception for suits contemplating urgent interim relief proved the most contested part of the section. Some plaintiffs sought to avoid mediation by appending an interim application to every plaint. In *Yamini Manohar v TKD Keerthi*, the Supreme Court held that the court must examine the nature and subject matter of the suit and the interim relief sought, and that a claim of urgency cannot be a device to bypass mediation.²² The Court added that the assessment is not an examination of the merits of the interim application. It is an inquiry into whether the plaintiff genuinely contemplates urgent relief.

The decision narrows the loophole but relocates the burden. The gateway question becomes a judicial determination at the threshold, so that the procedural barrier has not disappeared but has moved from the plaintiff's election to the court's scrutiny. How far that exposes a claimant who misjudges the exception has since been qualified by two further decisions of the Supreme Court, considered next.

C. Recalibrating the Exception: *Dhanbad Fuels* and *Novenco*

Two later decisions have softened the threshold risk that *Yamini Manohar* created. In *Dhanbad Fuels Pvt Ltd v Union of India* the Supreme Court held that the contemplation of urgent interim relief is to be assessed from the plaintiff's standpoint, by reference

²¹ *Patil Automation* (n 7).

²² *Yamini Manohar v TKD Keerthi* (2024) 5 SCC 815, 2023 SCC OnLine SC 1382 (SC, 13 October 2023).

to the nature of the suit, the cause of action and the relief sought; that no leave of court is required before instituting such a suit, unlike section 80(2) of the Code of Civil Procedure; and that a suit properly instituted on that basis may proceed even if the interim application is ultimately refused on the merits.²³

The Court also addressed the transitional position. Where a commercial suit instituted before 20 August 2022 without pre-institution mediation is pending and the defendant objects under Order VII rule 11, or the parties indicate a willingness to mediate, the court should keep the suit in abeyance and refer the parties to time-bound mediation rather than reject the plaint.²⁴

In *Novenco Building and Industry A/S v Xero Energy Engineering Solutions Pvt Ltd* the Court applied that approach to continuing intellectual property infringement. It held that urgency is inherent where each act of manufacture or sale constitutes a fresh wrong, so that delay in instituting the suit does not by itself negate the contemplation of urgent relief.²⁵ The Court nonetheless preserved the discipline of *Yamini Manohar*, holding that a pro forma or anticipatory prayer deployed as a device to avoid mediation will be disregarded, and that the exemption is available only where the plaint and the documents filed with it disclose a real need for urgent intervention.²⁶

The combined effect is a narrower band of risk than the earlier case law suggested. A plaintiff no longer bears the risk that a genuine claim of urgency will fail because the interim application does not succeed, and a pending pre-2022 suit is no longer exposed to outright rejection. What survives is a real but defined exposure: for a suit instituted on or after 20 August 2022 that does not genuinely contemplate urgent relief, rejection of the plaint under Order VII rule 11(d) remains the consequence, and the characterisation of urgency continues to be decided by the court at the threshold.²⁷ The gateway question has therefore been clarified rather than removed, and the

²³ *Dhanbad Fuels Pvt Ltd v Union of India* (2025) 9 SCC 424, 2025 INSC 696 (SC, 15 May 2025).

²⁴ *Ibid.*

²⁵ *Novenco Building and Industry A/S v Xero Energy Engineering Solutions Pvt Ltd* 2025 INSC 1256 (SC, 27 October 2025).

²⁶ *ibid.*

²⁷ Code of Civil Procedure 1908, Order VII, r 11(d); *Patil Automation* (n 7).

design response lies in regulating the consequence rather than abandoning the inquiry.

D. The Mediation Act 2023

The Mediation Act 2023 received assent on 14 September 2023 and has been brought into force in stages. The notification of 9 October 2023 commenced sections 1, 3, 26, 31 to 38, 45 to 47, 50 to 54 and 56 to 57, and no later commencement notification extends that list, so section 5 is not yet in force.²⁸ The Mediation Council of India was established by notification of 27 August 2026 under section 31(1), which the earlier notification had already commenced.²⁹ The Act provides a statutory framework for mediation in India, covering domestic and international commercial mediation, community mediation, the enforceability of mediated settlement agreements and the Council itself.

For present purposes the relevant feature is its treatment of pre-litigation mediation, and here the Act is more qualified than it first appears. Section 5(1) permits parties, whether or not a mediation agreement subsists between them, to attempt settlement by mediation before instituting a suit or proceeding. The proviso, however, requires that pre-litigation mediation in matters of commercial disputes of Specified Value be undertaken in accordance with section 12A of the Commercial Courts Act 2015 and the rules made thereunder.³⁰

The Act therefore does not treat pre-litigation mediation as uniformly voluntary; it preserves the compulsory commercial gateway and routes it back into the Commercial Courts Act. Nor is the choice of mediator free. Unless the parties otherwise agree, section 5(3) requires a mediator registered with the Council or empanelled by a court-annexed mediation centre, a legal services authority or a recognised mediation service

²⁸ Mediation Act 2023 (Act 32 of 2023), assented to on 14 September 2023; Ministry of Law and Justice (Department of Legal Affairs), Notification SO 4384(E) (9 October 2023), issued under s 1(3) and bringing into force ss 1, 3, 26, 31 to 38, 45 to 47, 50 to 54 and 56 to 57.

²⁹ Ministry of Law and Justice, Notification dated 27 August 2026 establishing the Mediation Council of India under s 31(1) of the Mediation Act 2023, with its head office at Delhi.

³⁰ Mediation Act 2023, s 5(1).

provider, and sections 5(4) and 5(5) oblige court-annexed centres and legal services authorities to maintain panels for this purpose.³¹

This choice reflects a considered legislative shift. The Bill as introduced in 2021 was understood to make pre-litigation mediation compulsory for a wider range of civil and commercial disputes. After scrutiny by the Rajya Sabha's Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, which recommended that the compulsory provision be reconsidered, the final Act adopted a voluntary default while preserving the commercial gateway.³² The change suggests that Parliament was unwilling to impose universal compulsion without evidence that the system could sustain it.

E. The Unresolved Interaction

The relationship between the two regimes is not, as is sometimes suggested, an unresolved conflict awaiting legislative or judicial attention. Parliament has already chosen a direction. Section 64 of the Mediation Act 2023 amends the Commercial Courts Act in the manner specified in the Ninth Schedule, which replaces Chapter IIIA with a new chapter and substitutes section 12A.³³ The requirement itself is retained, for a suit not contemplating urgent interim relief may still not be instituted unless the plaintiff exhausts pre-litigation mediation in the prescribed manner.

Three things change. The institutional monopoly of the legal services authorities ends, because the Central Government may by notification authorise either an authority constituted under the Legal Services Authorities Act 1987 or a mediation service provider as defined in section 3(m) of the Mediation Act. The timetable is extended, for the period becomes one hundred and twenty days, extendable by sixty days with the consent of the parties, again excluded from the computation of limitation. And the status of the settlement changes: it is no longer deemed an arbitral award on agreed

³¹ Mediation Act 2023, ss 5(3) to (5); Commercial Courts Act 2015, s 2(1)(i) (n 11).

³² Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, *The Mediation Bill, 2021* (117th Report, Rajya Sabha Secretariat, July 2022) paras 3.96-3.97, presented to the Rajya Sabha and forwarded to the Speaker of the Lok Sabha on 13 July 2022.

³³ Mediation Act 2023, s 64 and the Ninth Schedule, substituting ch IIIA and s 12A of the Commercial Courts Act 2015.

terms under section 30(4) of the Arbitration and Conciliation Act 1996 but is governed by sections 27 and 28 of the Mediation Act, which make an authenticated mediated settlement agreement enforceable as a decree and confine challenge to fraud, corruption, impersonation or the mediation of a matter not fit for mediation.³⁴

The live question is therefore commencement and transition rather than legislative direction. Section 64 does not appear in the notification of 9 October 2023, and no later notification brings it into force, so the substituted section 12A stands enacted but inoperative while the original provision continues to govern.³⁵ Three issues remain genuinely unresolved. The first is transition: whether a mediation already commenced, or a suit already instituted, when section 64 is notified will be governed by the three-month regime or by the one-hundred-and-twenty-day regime.

The second is capacity, because the substituted provision presupposes a body of accredited mediators and registered service providers that the Council, established only in August 2026, has yet to build. The third is the exercise of the choice the provision creates between legal services authorities and mediation service providers, which will determine the standards, cost and quality of the gateway in practice. These are questions of executive sequencing and institutional readiness, and they are the proper focus of reform.

VI. THREE MODELS COMPARED: ENGLAND AND WALES, ITALY AND THE PERMANENT LOK ADALAT

A. England and Wales: From Voluntarism to Directed Engagement

For two decades English law took a firm view that a court could not compel parties to mediate. In *Halsey v Milton Keynes General NHS Trust*, the Court of Appeal observed that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court, and that it

³⁴ Substituted Commercial Courts Act 2015, s 12A(2) to (5); Mediation Act 2023, ss 3(m), 27 and 28.

³⁵ Notification SO 4384(E) (n 28); Mediation Act 2023, s 1(3) (different dates may be appointed for different provisions).

might violate article 6 of the European Convention on Human Rights.³⁶ Courts nevertheless encouraged mediation through costs sanctions for unreasonable refusal. That position changed in *Churchill v Merthyr Tydfil County Borough Council* in 2023, where the Court of Appeal held that a court may stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process, provided the order does not impair the very essence of the right to a fair hearing and is proportionate to achieving a legitimate aim.³⁷ The court did not set out an exhaustive test. It indicated that relevant considerations include the form and process of the ADR, its cost, the likely delay, and whether it has a reasonable prospect of success.

The English trajectory offers India a useful structure for thinking about compulsion. Compulsion is not condemned in principle. It is subject to a proportionality analysis that asks about cost, delay and the genuine prospects of the process. Importantly, English courts direct engagement with ADR once proceedings are underway and preserve access to the court, so the claimant is never denied a forum. Section 12A, by contrast, operates before the court is seized at all.

B. Italy: Compulsion Tested Against Effective Judicial Protection

Italy introduced mandatory mediation as a condition of proceedings for specified categories of dispute through Legislative Decree 28 of 2010. The Constitutional Court struck down the mandatory element in 2012 on the technical ground that the government had exceeded its delegated powers, and the legislature reintroduced the requirement in 2013.³⁸ The scheme has since been expanded in later procedural reforms.

The Court of Justice of the European Union has addressed the compatibility of mandatory out-of-court procedures with effective judicial protection. In *Allassini*, it held that a national rule requiring an attempt at out-of-court settlement before court proceedings is not incompatible with the principle of effective judicial protection where the procedure does not result in a decision binding on the parties, does not

³⁶ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002.

³⁷ *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416.

³⁸ Legislative Decree 4 March 2010 No 28 (Italy); Corte costituzionale, judgment no 272 of 2012.

cause substantial delay, suspends limitation, and involves no costs or only very low costs.³⁹ In *Menini v Banco Popolare*, concerning the Italian scheme, the Court applied that reasoning and added that the mediation requirement must not require compulsory legal representation or impose significant costs.⁴⁰

The Italian experience yields concrete criteria. Compulsion is tolerable where the process is non-binding, quick, cheap, and protective of limitation. Notably, the Court of Justice treated these not as aspirations but as conditions of validity. Section 12A satisfies some of them on paper, for example the three-month limit and the limitation exclusion, but India has no equivalent judicial test that treats cost and delay as constitutional conditions.

C. The Permanent Lok Adalat: India's Domestic Comparator

India already has a statutory pre-litigation settlement mechanism that predates section 12A. Chapter VIA of the Legal Services Authorities Act 1987, inserted in 2002, provides for Permanent Lok Adalats in respect of public utility services. A party may apply to a Permanent Lok Adalat before the dispute is brought before any court, and once an application is made, the applicant and the opposite party cannot invoke the jurisdiction of a court in the same dispute.⁴¹ The Permanent Lok Adalat first attempts conciliation and, if that fails and the dispute is not of a prescribed excluded kind, decides the dispute on the merits. Its award is final and binding.

The Permanent Lok Adalat shows a different relationship between settlement and access. The process is initiated by the party rather than imposed as a precondition, and it has a built-in adjudicatory endpoint so that failure of conciliation does not leave the claimant without a remedy. Section 12A, by contrast, produces at best a non-starter report or a failure report and then sends the party back to the court, so the same dispute can be processed twice, with the first process producing nothing.

The Permanent Lok Adalat also leaves a lesson about legitimacy. Its adjudicatory powers drew constitutional scrutiny precisely because a conciliation body was

³⁹ Joined Cases C-317/08 to C-320/08 *Alassini v Telecom Italia SpA* [2010] ECR I-2213.

⁴⁰ Case C-75/16 *Menini and Rampanelli v Banco Popolare Società Cooperativa* EU:C: 2017:457.

⁴¹ Legal Services Authorities Act 1987, ch VIA, ss 22A to 22E.

empowered to decide, which is a reminder that blending settlement and adjudication demands procedural safeguards.

D. Reading the Three Models Together

None of the three is available to India in unmodified form. The English model presumes a mature judiciary able to apply proportionality case by case and a developed private mediation market. The Italian model presumes a supranational rights framework that treats cost, delay and limitation as justiciable conditions. The Permanent Lok Adalat model is confined to public utility services and does not scale to commercial disputes generally. What each supply is a discrete design lesson: proportionality review from London, enforceable access conditions from Luxembourg and Rome, and an adjudicatory fallback from the Indian statute book itself. How much India can absorb depends on the institutional realities examined next.

VII. ACCESS OR BARRIER: THE INSTITUTIONAL TEST

The debate over whether compulsory mediation helps or hinders access cannot be resolved in the abstract. It depends on four measurable conditions.

1. **Delay:** Pre-institution mediation adds up to five months before a commercial suit can be filed. For a claimant with a straightforward debt claim and a debtor who has no intention of settling, that period is pure delay. The limitation exclusion in section 12A protects the claim from becoming time-barred but does not compensate the claimant for lost time, dissipated assets or deteriorating evidence. The justification for the delay is the proportion of cases that settle. Public data on that proportion are fragmentary, which is itself a problem, because a barrier justified by its results should be accompanied by results that can be examined.
2. **Cost:** The Rules provide for fees payable to the authority, and parties bear their own representation costs where they choose to be represented. For small commercial claimants, even modest fees and the opportunity cost of attending sessions weigh against the value of the claim. The Italian case law treats cost as a validity criterion. In India it is treated as an administrative detail.

3. **Quality and capacity:** Legal services authorities carry many functions, including legal aid, Lok Adalats and awareness programmes. Delivering commercial mediation of consistent quality at scale requires trained mediators with subject knowledge. The Mediation and Conciliation Project Committee of the Supreme Court has trained mediators over many years, but the supply of experienced commercial mediators relative to the volume of cases that must now pass through the gateway is a legitimate concern. A mediation conducted by an unprepared mediator, with a respondent who attends only to obtain a certificate, is a procedural formality rather than a settlement opportunity.
4. **The incentive problem:** Where a respondent knows that the claimant cannot sue without first completing the process, non-participation becomes a delaying tactic. The non-starter report mitigates this, but it comes only after notices and waiting periods. Conversely, where claimants treat the process as a box to tick, the mediation becomes a procedural ritual. Scholarship on civil justice has long warned that compulsion can produce this kind of performative compliance.⁴²

Beyond these practical conditions lies a deeper objection that is not about implementation. Owen Fiss argued that settlement, however efficient, can substitute private bargaining for public adjudication and may disadvantage weaker parties negotiating in the shadow of unequal resources.⁴³ Marc Galanter's analysis of repeat players points the same way: institutional parties who litigate often are better positioned to extract value from informal processes than one-time claimants.⁴⁴

Hazel Genn has made the related argument that the promotion of mediation, particularly under pressure of court backlogs, risks eroding the public function of civil courts.⁴⁵ These warnings do not make mediation undesirable. They suggest that

⁴² Hazel Genn, *Judging Civil Justice* (CUP 2010) ch 3, 78-125.

⁴³ Owen M Fiss, 'Against Settlement' (1984) 93 Yale LJ 1073.

⁴⁴ Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Rev 95.

⁴⁵ Hazel Genn, 'Why the Privatisation of Civil Justice is a Rule of Law Issue' (36th FA Mann Lecture, Lincoln's Inn, 19 November 2012).

compulsion should be justified by evidence that the weaker party gains, not merely by the court's need to reduce its docket.

The counterargument deserves equal weight. The access-to-justice movement itself has long treated informal and consensual processes as part of the answer to the barriers of cost and delay in formal courts, and Frank Sander's vision of a courthouse offering several doors, each suited to a type of dispute, remains influential.⁴⁶ Cappelletti and Garth identified the reform of procedures and the development of alternative mechanisms as a distinct wave of access reform.⁴⁷

On this view, a well-designed gateway to mediation is itself an access measure, because it offers a faster and cheaper route that many parties prefer once they are required to try it. The honest conclusion is that mandatory mediation is neither inherently an access measure nor inherently a barrier. It is whichever its design makes it.

VIII. TOWARDS A CALIBRATED MODEL: WHAT PRE-LITIGATION MEDIATION IN INDIA SHOULD LOOK LIKE

The evidence surveyed above points away from two mistaken responses: abandoning compulsion altogether in favour of a purely voluntary model, and extending the section 12A model unchanged to all civil disputes. A calibrated model is built around six choices.

1. **First, tie compulsion to demonstrated suitability:** The compulsory gateway should apply only to categories of dispute where mediation is shown to produce settlements at a meaningful rate, and should be extended only on the basis of published outcome data. The Mediation Act's voluntary default for general civil disputes is a sound starting point. Parliament should extend compulsion category by category, as the Italian legislature did, rather than by a single sweeping provision.

⁴⁶ Frank EA Sander, 'Varieties of Dispute Processing' (1976) 70 FRD 111.

⁴⁷ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo L Rev 181.

2. **Second, define the urgency exception by statute and procedure:** After *Yamini Manohar*, *Dhanbad Fuels* and *Novenco*, the exception turns on a judicial inquiry into genuine urgency conducted from the plaintiff's standpoint, with continuing wrongs treated as inherently urgent and pro forma prayers disregarded.⁴⁸ That inquiry should be given statutory and procedural form rather than left to accumulate case by case: a short declaration in the plaint of the interim relief sought and the grounds of urgency, and an express power for the court to refer the parties to time-bound mediation, as *Dhanbad Fuels* directs for pre-2022 suits, instead of rejecting the plaint. Codifying that remedy of abeyance and reference for all suits would complete what the Court has begun, and would confine rejection of the plaint to evident abuse, so that a good-faith misjudgment of the exception does not extinguish a claim.
3. **Third, impose cost and delay ceilings as conditions of validity:** Drawing on *Alassini* and *Menini*, the Rules should fix a low cap on fees, provide fee waivers for small claimants, and require authorities to publish time-to-first-session and completion times. If the process routinely exceeds the statutory period, the compulsory requirement should be treated as suspended for that authority, so that the claimant is not punished for institutional delay.
4. **Fourth, build mediator capacity before the substituted gateway is notified:** The Ninth Schedule already permits the Central Government to authorise mediation service providers alongside legal services authorities, so the question is no longer whether the function should be opened but whether the institutions are ready to receive it.⁴⁹ The Mediation Council of India, established in August 2026, should therefore publish accreditation standards, constitute subject-specific panels for commercial disputes and impose continuing training obligations before section 64 is brought into force, and legal services authorities should be resourced to remain a credible option rather than

⁴⁸ *Dhanbad Fuels* (n 23); *Novenco* (n 25).

⁴⁹ Substituted Commercial Courts Act 2015, s 12A(2) (n 34).

a default. Notifying the substituted provision into an untrained market would convert a reform into a bottleneck.

5. **Fifth, complete the statutory relationship rather than restate it:** Parliament has already chosen a single pathway through section 64 and the Ninth Schedule, and what is missing is commencement with transitional provision. The notification should accordingly specify which regime governs mediations already commenced and suits already instituted, confirm that a mediation conducted before an authorised service provider satisfies the requirement, and align the Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018 with the one hundred and twenty-day timetable and with sections 27 and 28 of the Mediation Act.⁵⁰ A single coherent pathway, with one set of standards for mediators, confidentiality and the enforcement of settlements, is preferable to two parallel regimes, and it is now a matter of executive action rather than legislative choice.
6. **Sixth, make the system measurable:** Every pre-institution mediation should generate data that are published in aggregate: applications received, non-starter reports, settlements reached, average duration, and the subject matter of disputes. The compulsory gateway is justified only by its effects, and those effects should be open to scrutiny by the courts, Parliament and researchers. A periodic statutory review, with a power to narrow or suspend the requirement where outcomes do not justify it, would convert the gateway from an article of faith into a testable policy.

A further safeguard is worth adding. Where a party participates in good faith and mediation fails, the court should not treat the process as a mere formality when it later considers costs. Conversely, an unreasonable refusal to participate or a pattern of bad-faith non-attendance should carry costs consequences, which is the direction English

⁵⁰ Mediation Act 2023, s 64 and the Ninth Schedule (n 33); Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018 (n 14).

law has taken since *Halsey*. Consequences of this kind align incentives without barring the court door.

IX. CONCLUSION

The Indian experience with pre-litigation mediation has not followed a straight line. Section 89 of the Code of Civil Procedure offered a late and discretionary referral. Section 12A made mediation a precondition for commercial suits, and the Supreme Court confirmed its mandatory character in *Patil Automation*, policed its exception in *Yamini Manohar* and recalibrated that exception in *Dhanbad Fuels* and *Novenco*. The Mediation Act 2023 then adopted a consensual default for civil disputes while expressly preserving the commercial gateway, and through section 64 and the Ninth Schedule it substituted a new section 12A that awaits commencement, so that the direction of travel is settled while the transition is not.

The comparative record shows that compulsion is not inherently incompatible with access to justice, but it is conditional. English courts accept directed engagement with ADR subject to proportionality. The Court of Justice of the European Union accepts mandatory out-of-court attempts where the process is non-binding, quick, cheap and protective of limitation. India's own Permanent Lok Adalat shows how a pre-litigation process can be coupled to an adjudicatory fallback so that a failed settlement does not leave the claimant starting again.

Pre-litigation mediation in India is therefore best understood as a policy whose effect on access depends on its implementation. It serves access where the gateway is cheap, fast, staffed by competent mediators and measured by public data. It becomes an additional barrier where it adds months of delay, imposes cost on small claimants, invites threshold litigation about exceptions, and is justified by docket relief rather than evidence of benefit to parties. The measure of success for the next phase of reform will not be how many disputes are channelled into mediation. It will be whether, for the claimant who cannot settle, the road to the court remains open, affordable and short.

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