**MANDATORY COMMERCIAL MEDIATION IN INDIA AND ITS IMPACT ON THE COURTS OF LAW**

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 **ABSTRACT**

Mediation is an informal, but structured settlement procedure. In the recent years, people are preferring alternative dispute settlement methods in any commercial dispute rather than going to courts. This is because it consumes a lot of time. For this process mediation is acting as a main tool. The main characteristics of mediation are that it provides; a voluntary, non-binding, confidential and interest-based procedure. In order to reduce pendency of cases in the courts, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court (Amendment) Ordinance of 2018, dated May 03, 2018, has inserted section 12A to the Commercial Courts Act, 2015, contemplating pre-institution mediation and settlement, before the filing of any commercial disputes.

The mandatory mediation gives a chance to the parties to learn about the process and decide whether they can mutually settle the commercial dispute. If after this pre-institutional session it’s up to the parties that whether they want to settle the dispute through mediation or they want to take the matter to the court. This mediation process is a helpful device to the Indian judiciary system as it aims to reduce the burden on courts. The ordinance identifies the Legal Service Authorities Act, 1987 (LSA) as the authority to look after such matters which is already overburdened with the task of providing free legal aid.

This paper analyses the concept of mandatory mediation in commercial disputes. The subject of this article will be commercial insurance disputes. Firstly it will focus on the mediation and pre-institutional mediation process. Then it will take account into the insurance coverage disputes and lastly it will deal with the advantages of mandatory mediation in consideration of this disputes.

**Keywords** – mediation, commercial disputes, courts, India, pre-institutional, settlement, commercial insurance disputes,

 **INTRODUCTION**

“*In the middle of every difficulty lies opportunity.”*

 – **Albert Einstein**

In every difficulty there lies at least one opportunity which one needs to grab. Alternative dispute resolution (ADR) is one such opportunity in the difficulty of any disputes. ADRs provides out of court settlements which keeps away the parties from the difficulties of court procedure. Mediation is one such tool of ADR.

**Mediation is a flexible and consensual technique in which a neutral facility helps the parties reach a negotiated settlement of their dispute. The parties have control over the decision to settle and the terms of any agreement. Settlements are contractually binding and widely enforceable.[[1]](#footnote-1)**

It is a process crafted to facilitate the parties in reaching the settlement for the dispute. Mediation is an informal, but structured settlement procedure. The main characteristics of mediation are that it provides; a voluntary, non-binding, confidential and interest-based procedure. To avoid the time-consuming court proceedings it is one of the best medium of dispute resolution especially in cases of commercial disputes. The mediation can be of two types, namely,

1. Court referred mediation
2. Private mediation

In order to reduce pendency of cases in the courts, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court (Amendment) Ordinance of 2018, dated May 03, 2018, has inserted section 12A to the Commercial Courts Act, 2015, contemplating pre-institution mediation and settlement, before the filing of any commercial disputes.

The mediation process, under the Rules, can be commenced at the instance of the applicant by making an application to the concerned 'Authority' who will assign a mediator to conduct the mediation process.[[2]](#footnote-2) The time period prescribed for completion of the mediation process is three months from the date of the application for initiating such mediation. The time period may be extended by two months, with the consent of the parties. The settlement arrived during the mediation process will have the same status and effect as that of an arbitral award under sub-section (4) of sec.30 of the Arbitration and Conciliation Act, 1996.

Section 89(1) of the Arbitration and Conciliation Act, 1996 mentions Settlement of disputes outside the Court as-

 Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

(a) Arbitration;

(b) Conciliation

(c) Judicial settlement including settlement through Lok Adalat; or

(d) Mediation.

[Commercial Dispute](https://www.lawinsider.com/dictionary/commercial-dispute) means any material dispute or claim in any respect (including, without limitation, any alleged dispute as to price, invoice terms, quantity, quality or late delivery and claims of release from liability, counterclaim or any alleged claim of deduction, offset, or counterclaim or otherwise) arising out of or in connection with an Account or any other transaction related thereto, which dispute relates to an Account.[[3]](#footnote-3)

India has seen an increase in disputes arising out of increased business activity. There are disputes which arise out of contentious interpretations of shareholder rights in newly formed joint ventures, disputes arising out of rescission or cancellation of contracts, issues arising out of enforcement of foreign judgments and awards in India. There are also multifaceted disputes with the government which may arise as a result of denial of requisite clearances by the government or actions initiated by the government which have a direct bearing on the commercial activities of a company.

Mediation has emerged as a leading alternative of dispute resolution in the recent years. With its worthy approach, the method is in trending method of dispute resolution.

Alternative dispute resolution is an [insurance](https://www.investopedia.com/terms/i/insurance-coverage.asp) sense, a number of disparate processes used by insurance companies to resolve claim and contractual disputes. Insured clients who are denied a claim are offered this course of action as a form of recourse as it avoids expensive and time-consuming litigation and arbitration. The ADR can be in any form, however, here we will focus on the mediation.

**COMMERCIAL INSURANCE DISPUTES**

**Causes** –

1. Coverage limits and exclusion – the difference in the interpretation of the contractual wordings such as the scope of insured entities and other and conditions.[[4]](#footnote-4)
2. Loss assessments – the variation in the estimation of losses is one of the main causes of commercial insurance disputes. In liability cases, it can include legal and investigation costs, penalties and reputational damages, etc.
3. Duty to defend – discrepancy over the insurer’s duty to provide legal defense for policyholder in a lawsuit is another major problem[[5]](#footnote-5)
4. Communication deficiency – the communication gap between the policyholder and insurers can used to misunderstandings of the risk.

The major commercial dispute arising in insurance matter is coverage disputes. So it is important to learn the types of coverage disputes. This disputes are basically categorized into three types as follows -

1. **Insurance defense and indemnity**–**the third party claims**

The cases involving the third party claims are the cases that occur the most. In an insurance agreement, the basic duty of the insurer is to protect the insured against the party which is not under the liability of the agreement or the parties which are within the scope of the agreement. Examples of commercial third-party claims include inter alia – commercial liability, professional liability or “errors and omissions”, Directors, Officers and employment practices liability.[[6]](#footnote-6)

Mediation in this matter is beneficial as it provide room to resolve the grievances in a courteous and controlled environment. This is productive for employment settings. Furthermore, it allows the claimant to speak to the mediator privately to develop creative non-monetary solutions, for example, relocating the disgruntled employee to a different department.[[7]](#footnote-7)

Also, in case of multiple number of indemnifiers, the mediation is the best possible process to get a way out of disputes. Collective work together with the help of a skilled mediator is better than being rebellious.

Mediating at an early stage is advantageous to both parties in that it avoids the “sunk cost” phenomenon where litigants feel obligated to “stay the course” of litigation because their clients have already invested so much time effort and money into the litigation.[[8]](#footnote-8)

1. **First party Insurance Claims**

Unlike the other coverage dispute cases, first party insurance cases include a debate between the insurer and it's protected and includes the back-up plan precluding or renouncing inclusion from securing it’s safeguarded. Most usually, the first party disputes emerges out of a third party claim. The focal question in such debates is whether the insurer has a commitment to reimburse and guard its policyholder in accordance with the protection strategy they contracted to.

One of the reason when the insurer may deny the coverage can be the failure of the giving of the notice in the due time-period or non-payment of premium.

Most first party insurance cases are settled through the courts by method for declaratory judgment. Mediation introduces an appealing option in contrast to a declaratory judgment. To begin with, it diminishes the time and cost of extended movement practice and claims.[[9]](#footnote-9) Second, the parties are not consigned to a judge chosen aimlessly who may not be acquainted with the law concerning protection inclusion, rather, the parties can choose a mediator with ability in the field. Ultimately, the mediator might almost certainly prescribe practical business arrangements not accessible to a judge who needs to stick to strictures of the law.

1. **Insurer v/s Insurer Disputes**

It is progressively normal to see different insurers and arrangements responds to one or more claims. A great precedent is the point at which the damages of the third-party action outstrips the coverage of the essential protection strategy consequently requiring the contribution of excess carrier.[[10]](#footnote-10)

Other examples of insurer v. insurer disputes are “other insurance” clauses which seek to prioritize coverage and subrogation claims[[11]](#footnote-11).

If the parties go for mediation it will preserve the business relationships because insurance carriers in the same market are guaranteed to see each other in future disputes thus cooperation and trust can be very beneficial over the long run.

**INSURANCE OMBUDSMAN**

With the objective of speedy redressal of the insurance related disputes, the Indian government constituted the Insurance Ombudsman Rules which applies to all insurance companies including general and life insurance business in public and private sectors.

 The Insurance Ombudsman scheme was created by the Government of India for individual policyholders to have their complaints settled out of the courts system in a cost-effective, efficient and impartial way.[[12]](#footnote-12)

There are at present 17 Insurance Ombudsman in different locations and any person who has a grievance against an insurer, may himself or through his legal heirs, nominee or assignee, make a complaint in writing to the Insurance ombudsman within whose territorial jurisdiction the branch or office of the insurer complained against or the residential address or place of residence of the complainant is located.[[13]](#footnote-13)

The Insurance Ombudsman entertain disputes relating to delay in settlement of claims, a partial or total repudiation of claims, disputes over premium paid or payable in terms of insurance policy, misrepresentation of policy terms and conditions at any time in the policy contract, disputes relate to claim, certain policy servicing aspects that have financial implications, non-issuance of policy or any other matter resulting from the violation of provisions of the Insurance Act or the Regulations and Guidelines issued by the Insurance Regulatory and Development Authority.[[14]](#footnote-14)

If the claim is rejected, the complainant should file a review application with the complaint redressal office/nodal officer of the insurance agency. In the event that an answer isn't received within one month or the answer isn't agreeable, at that point, a complainant may file a protest with the Insurance Ombudsman's office in the respective jurisdiction. The Insurance Ombudsman acts as a mediator to settle issues in a genial way.

Complaint to the Insurance Ombudsman should be made within one year from

* the date of receipt of the letter from the insurer rejecting the representation, or ​
* the date of receipt of the decision of the insurer, which is not to the satisfaction of the complainant, or
* Whens, even after one month of written representation made by the complainant, the insurer fails to respond.

Further, for a dispute to be entertained by the Ombudsman, the total relief sought should be within Rs.30 Lakhs. In case both parties agree for mediation, the Ombudsman should give recommendations within one month. Otherwise, he shall pass his award within three months from the date of receipt of all requirements from the complainant. If the petitioner is not satisfied with the order passed by the Ombudsman, he/she may approach the Consumer Fora. At the same time, one must remember that if a case is already filed before the Consumer Fora, the same cannot be represented before the Ombudsman.[[15]](#footnote-15)

**EARLY MEDIATION IN INSURANCE COVERAGE DISPUTES**

Pre-institutional mediation in insurance coverage dispute has seen an increase at international level. In part, this trend is the result of ADR provisions in insurance policies that require that the policyholder and insurer mediate coverage disputes prior to engaging in litigation.[[16]](#footnote-16)  Some of these provisions provide that the mediation shall continue until the mediator declares an impasse.

While early mediation and resolution of disputes is a praiseworthy goal, saving the parties the time and expense of protracted litigation, the question is whether early mediation can result in a resolution of the dispute. Mediation provides insurers and their policy holders with the open door for private, adaptable, faster, more affordable dispute resolution with more agreeable results than court-based contest goals alternatives. Such advantages might be especially appealing for commercial insurance disputes for various reasons.

1. Privacy - Mediations are private and set no points of reference.[[17]](#footnote-17) From an insurers perspective, there is less worry that a decision including an agitated territory of the law, which is genuinely regular in inclusion questions, will set point of reference. Consequently, there is less worry that an unfriendly honor or even settlement will have consequences past the specific issue. From a policyholder point of view, there is less concern with respect to the conceivable arrival of restrictive data subject to disclosure or the requirement for defensive requests. Confidentiality enables the two sides to manage the current issue without permitting the potential effect on other disputes to get in the way of mediation.
2. Speed – Commercial insurance disputes can take two-three years to determine in court whereas the mediation can take less than a year. From a policyholder viewpoint, speed is fundamental. The period of time it takes to determine a case could significantly affect a policyholder's work. Settling claims in the most proficient and quick way conceivable is an objective shared by insurers as it takes out the erratic expenses related with unresolved issues.
3. Cost – Mediation is more affordable than litigation. From an insurer's point of view, executives just as financiers comprehend the impact that suit expenses can have on an organization's primary concern[[18]](#footnote-18). This need to oversee lawful expenses related with a question is shared by policyholders also.
4. Expertise – Commercial insurance disputes frequently involve exceedingly complex issues. Coverage disputes, specifically, frequently include forefront inquiries of law. As evident in the result of Hurricane Katrina, business interference cases can also be amazingly complicated, including issues of causation as well as damages. Unfortunately, in a jury preliminary, those included may not be knowledgeable enough to manage these issues.[[19]](#footnote-19) In mediation, however, offer neutrals with explicit expertise in these areas and mediation enables the gatherings to choose the neutrals who will choose their case.

After going through the causes of commercial insurance disputes and analyzing the advantages of mediation; it is evident if we go for mandatory mediation in such disputes it will a great hand.

In litigation, the court settles on the choice after assessing the certainties and proof. The parties are not responsible for the result. In a settlement understanding, the parties set out the terms. In that capacity they are responsible for the result. The terms of the settlement need not be revealed to any individual who isn't conscious of the settlement understanding. In the event that parties like, the terms can be private.

**CONCLUSION AND SUGGESTIONS**

As showed throughout the study, the mandatory mediation can act as a boon in dispute resolution. The mandatory mediation has not yet spread effectively but steps are being taken for preferring mediatory settlement before going for litigation. Section 442 of companies Act, 2013 provides for the constitution of mediation and conciliation panels and panels of experts to be maintained by the Central Govt. for mediation between the parties during the pendency of any proceeding before the central govt., National Company Law Tribunal or National Company Law Appellate Tribunal. The govt. also promulgated the Companies (Mediation and Conciliation) Rules of 2016, which mechanizes the Panel to follow particular process to facilitate a voluntary resolution of dispute between the parties. Recently, in order to reduce pendency of cases in the courts, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court (Amendment) Ordinance of 2018, dated May 03, 2018, has inserted section 12A to the Commercial Courts Act, 2015, contemplating pre-institution mediation and settlement, before the filing of any commercial disputes.

Coming to the case of insurance coverage disputes, the Indian Government has published Insurance Ombudsman Rules. Although it’s a great step taken but if we will go for mandatory mediation in these cases, it will not only save the time of the parties but will also save their interest and is also cost effective.

The model adopted in India is similar to the “opt-out” model, which is currently being followed in countries like Italy and Turkey. Under this model, after going through the session of mandatory mediation at an initial stage, parties have the right to opt out and approach the court in case they are not satisfied and do not wish to continue with the mediation process.

Although India is in progressive stage, it needs consider the following points –

* Need to introduce quality control mechanism - In India there exists no such guideline that administers the qualification of mediators. Rules for mediators’ capability were issued by the Mediation and Conciliation Project Committee that propose a base forty-hour course to be finished by the mediators. The course is additionally in accordance with a significant number of the globally perceived mediation training programs; nonetheless, the issue lies with the non-binding nature of the rules.
* Duration of completing the mediation - section 12A(3)[[20]](#footnote-20), sought be introduced by the Ordinance, suggests the completion of mediation within a period of 3 months, subject to an extension of 2 months. The duration for completion of the process in India is much longer as compared to other jurisdictions. This could be termed as a reflection of poor mediation infrastructure in the country.

The initiative taken by the Government to diminish the burden of pending cases on commercial courts is commendatory. However, endeavors must be made at right time to expel prevailing curbs. Acknowledgment must be given to external mediation centers for completing the procedure of mediation at the initial stage, falling flat which the distinguished experts would endure a similar destiny as is being looked by the courts. Quality control systems for administering the conduct of mediators should likewise be presented; else the parties would some way or another lose certainty on the credibility of mediators. This would likewise clear path for the efforts by the parties to avoid from the underlying intervention organize, since no approval has been recommended in the Ordinance for non-participation. Improving the mediation infrastructure would likewise help in decreasing as far as possible for the finish of intercession process. Moreover, there is a squeezing need to spread the awareness about mediation among commercial actors in the market to meet the desired objective.

1. https://iccwbo.org/dispute-resolution-services/mediation/ 25-05-19 7:19 [↑](#footnote-ref-1)
2. Naval sharma and Shreya lurke,*India: Mandatory mediation prescribed prior to filing of commercial suits* –http://www.mondaq.com/india/ [↑](#footnote-ref-2)
3. https://www.lawinsider.com/dictionary/commercial-dispute [↑](#footnote-ref-3)
4. Matt Dunnings, *Most common causes of commercial disputes*, www.businessinsurance.com, 29/04/12 [↑](#footnote-ref-4)
5. *ibid* [↑](#footnote-ref-5)
6. 0 B. Ostrager & T. Newman, *Handbook on Insurance Coverage Disputes* Fourteenth Ed. (Aspen 2008) [↑](#footnote-ref-6)
7. C. Plato, P. Scarpato & S. Baum *Insurance/Reinsurance Arbitration and Mediation* PLI Item #42816 (Jan. 2013) [↑](#footnote-ref-7)
8. *ibid* [↑](#footnote-ref-8)
9. Boulle, L., & Rycrof, A. (1998). *Mediation: principles, process, practice*. *JS Afr. L.*, 167. [↑](#footnote-ref-9)
10. Vishal Hablani and Pankaj Agrawal,*Mandatory Pre-Institution Mediation in Commercial Matters: Is India Ready?* [↑](#footnote-ref-10)
11. Hon. John A. Barone and Daniel J. Watts, Esq, *Mediation of Insurance and Insurance Coverage Disputes* [↑](#footnote-ref-11)
12. http://www.policyholder.gov.in/Ombudsman.aspx [↑](#footnote-ref-12)
13. *ibid* [↑](#footnote-ref-13)
14. Savitha Thirunavukkarasu, *Insurance Ombudsman*, www.cag.org.in [↑](#footnote-ref-14)
15. *ibid* [↑](#footnote-ref-15)
16. Bruce Friedman, *Early Mediation Of Insurance Coverage Disputes,* www.mediate.com [↑](#footnote-ref-16)
17. Green, E. D. (1997). International Commercial Dispute Resolution: Courts, Arbitration, and Mediation--Introduction. *BU Int'l LJ*, *15*, 175. [↑](#footnote-ref-17)
18. Strong, S. I. (2014). Beyond International Commercial Arbitration-The Promise of International Commercial Mediation. *Wash. UJL & Pol'y*, *45*, 10. [↑](#footnote-ref-18)
19. Corporate Counsel Business Journal, *Alternative Dispute Resolution And Its Use In Commercial Insurance Disputes,*vol.28 nov-dec 2018 [↑](#footnote-ref-19)
20. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Court (Amendment) Ordinance of 2018 (the “Ordinance”) [↑](#footnote-ref-20)