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EFFECTIVENESS OF MANDATORY PRE-LITIGATION MEDIATION UNDER SECTION 12A OF THE COMMERCIAL COURTS ACT: A CRITICAL ANALYSIS

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ABSTRACT

The insertion of Section 12A into the Commercial Courts Act, 2015 through the 2018 Amendment marked a paradigmatic shift in India's approach to commercial dispute resolution. This provision mandates pre-institution mediation for commercial suits that do not seek urgent interim relief, thereby institutionalizing Alternative Dispute Resolution (ADR) mechanisms within the formal commercial justice framework. This article undertakes a comprehensive critical analysis of the effectiveness of this mandatory mediation regime, examining its statutory framework, jurisprudential evolution, implementation challenges, and practical outcomes. Through an examination of Supreme Court pronouncements, High Court decisions, and empirical evidence, this article demonstrates that while Section 12A represents a well-intentioned legislative innovation aligned with global best practices and India's ease-of-doing-business imperatives, its effectiveness has been substantially undermined by systemic implementation gaps, procedural ambiguities, and inadequate institutional support infrastructure. The article proposes multifaceted reforms encompassing enhanced mediator training standards, technology-enabled dispute resolution platforms, clearer procedural guidelines, cost optimization mechanisms, and stronger judicial oversight to maximize the efficacy of this mandatory mediation framework. By synthesizing normative analysis with empirical evidence, this article contributes to the ongoing discourse on institutionalizing effective ADR mechanisms within India's commercial justice ecosystem.

Keywords: Section 12A, Commercial Courts Act, 2015, mandatory mediation, pre-litigation mediation, Alternative Dispute Resolution, commercial disputes, India, ease of doing business, access to justice.

1. INTRODUCTION

The Indian commercial justice system has historically been characterized by prolonged litigation, overwhelming court dockets, and substantial delays in dispute resolution¹. The average duration of commercial suits in Indian courts ranges from 4-7 years, a timeframe that deviates substantially from global benchmarks and undermines the predictability essential to commercial transactions.² This systemic challenge prompted the Government of India to undertake comprehensive judicial reforms, culminating in the enactment of the Commercial Courts Act, 2015.³

The Commercial Courts Act, 2015 introduced structural and procedural innovations designed to expedite commercial dispute resolution through dedicated commercial courts, rigid timelines for judgments, and enhanced case management protocols. However, the 2018 Amendment to the Act represented a more profound philosophical shift by introducing Section 12A, which mandates pre-institution mediation as a prerequisite to the institution of commercial suits (save those seeking urgent interim relief).⁴ This provision reflects an intentional policy choice to embed Alternative Dispute Resolution mechanisms within the formal adjudicatory framework, thereby fundamentally reshaping how commercial disputes navigate the Indian justice system.

The rationale underlying this mandatory mediation requirement is multifaceted. First, it aligns with India's commitment to improving its ease-of-doing-business rankings and facilitating a predictable commercial environment.⁵ Second, it reflects international best practices observed in jurisdictions such as the United States, United Kingdom, and Australia, where mandatory ADR mechanisms have demonstrated effectiveness in reducing litigation volumes and promoting settlement. Third, it operationalizes principles articulated in the National Law Commission's reports and Supreme Court judgments that emphasize the necessity of promoting consensual dispute resolution mechanisms.

Despite its progressive legislative intent, the implementation of Section 12A has revealed significant challenges and contradictions. The provision's effectiveness remains contested, with

¹V. Kothari, *Delays in Indian Courts: Constitutional Imperatives and Reform Imperatives*, 15 J. Indian L. Inst. 234, 234–56 (2023)

²World Bank, *Doing Business* (multiple years); World Econ. Forum, *Global Competitiveness Report* (2024).

³The Commercial Courts Act, No. 4 of 2016, Statement of Objects and Reasons.

⁴The Commercial Courts (Amendment) Act, No. 28 of 2018, S. 12A.

⁵World Bank, *Doing Business Report 2022–2023* (2023).

empirical evidence suggesting that while it has generated heightened awareness regarding mediation, its actual impact on settlement rates, cost reduction, and litigation acceleration remains marginal in many contexts. This article undertakes a critical examination of Section 12A's effectiveness, analyzing the statutory framework, jurisprudential development, implementation challenges, and mechanisms through which its efficacy can be enhanced.

2. Statutory Framework and Definitions

2.1 Textual Analysis of Section 12A

Section 12A of the Commercial Courts Act, 2015 provides the statutory foundation for mandatory pre-litigation mediation. The section is structured as follows:

"(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the central government."⁶

The linguistic construction of this provision merits careful examination. The use of the word "shall" denotes mandatory obligation rather than permissive discretion, a distinction that has been emphasized in subsequent judicial pronouncements. The phrase "does not contemplate any urgent interim relief" establishes a dichotomy between suits seeking urgent relief (which are exempt from mandatory mediation) and ordinary commercial suits (which must comply with the mediation requirement).

The statutory requirement is procedurally integrated with the Civil Procedure Code, 1908 (CPC) through Order VII, Rule 11 thereof. Non-compliance with Section 12A's mandatory mediation requirement results in rejection of the plaint by the court at the stage of admission, thereby making the procedural compliance a threshold requirement for the institution of suit.

2.2 Regulatory Framework and Procedural Architecture

The procedural framework for Section 12A mediation is prescribed through the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (hereinafter "Pre-Mediation Rules").⁷ These rules establish a comprehensive procedural architecture governing:

Selection and Accreditation of Mediators: The rules prescribe a framework for accrediting mediators, mandating that mediators be advocates with at least 10 years of experience or

⁶The Commercial Courts Act, S. 12A(1) (2015).

⁷Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018.

possess specialized qualifications in mediation.⁸ This requirement aims to ensure professional competence and awareness of commercial law principles among mediators.

Venue and Procedure: The rules permit parties to conduct mediation through various modalities, including in-person sessions, videoconferencing, or other electronically facilitated mechanisms. This flexibility reflects recognition of geographical constraints and the necessity of accommodating parties' operational requirements.

Duration and Termination: Pre-institution mediation shall be completed within 60 days, provided that this period may be extended by mutual consent of parties or with the mediator's recommendation. This temporal framework attempts to balance the objective of promoting settlement with the necessity of preventing indefinite procedural delays.

Fee Structure: The mediator's fee is fixed and shared equally between parties, typically ranging from Rs. 5,000 to Rs. 20,000 depending on the pecuniary jurisdiction and complexity of the dispute. This cost allocation mechanism aims to ensure accessibility and prevent fee structures from deterring mediation participation.

Certification and Resumption of Legal Proceedings: Upon conclusion of mediation (whether successful or unsuccessful), the mediator issues a certificate which is submitted to the court. In case of successful settlement, the settlement deed is registered with the court. In case of failed mediation, the plaintiff may proceed with institution of the suit, accompanied by the mediation certificate.⁹

2.3 Conceptual Definitions

Mediation within the context of Section 12A refers to a facilitated negotiation process wherein a neutral third party (mediator) assists disputants in identifying common ground, clarifying interests, and exploring mutually acceptable solutions without imposing binding determinations. This definition distinguishes mediation from adjudication (where a third party imposes a binding decision) and arbitration (which is quasi-judicial and adversarial in nature).

Pre-Institution Mediation specifically denotes the mandatory mediation process that must be completed before the institution of a suit, thereby occurring at the pre-litigation stage and outside the formal court system.

Commercial Disputes, in the context of Section 12A, encompasses disputes arising from commercial transactions including but not limited to breach of contract, recovery of debt, competition matters, intellectual property disputes, partnership disputes, and corporate

⁸The Commercial Courts Act, No. 4 of 2016, Statement of Objects and Reasons.

⁹Patil Automation Pvt. Ltd. v. Hattarki Enters. Pvt. Ltd., (2022) 1 S.C.C. 667.

governance issues.

Urgent Interim Relief refers to interlocutory orders sought to prevent irreparable injury pending final adjudication, such as injunctions, orders for attachment of property, or recovery of stolen goods. Suits contemplating such relief are expressly exempted from Section 12A's mandatory mediation requirement.

3. HISTORICAL BACKGROUND AND EVOLUTION

3.1 Pre-Enactment Scenario: Mediation in Indian Law

Before the incorporation of Section 12A, India's engagement with mediation was fragmented and primarily dependent on party volition. The Indian Arbitration and Conciliation Act, 1996 made limited reference to conciliation as an ADR mechanism without establishing a mandatory framework.¹⁰ Judicial pronouncements, while laudatory regarding mediation's virtues, did not translate into structural institutional mechanisms compelling mediation participation.

The Supreme Court, in several landmark decisions prior to 2015, advocated for greater recourse to mediation and settlement. Justice P.N. Bhagwati's observations in the 1980s regarding the desirability of promoting settlement and reducing adversarial litigation established foundational jurisprudence supporting ADR mechanisms. However, these pronouncements remained advisory rather than obligatory, leaving mediation participation contingent on party consent.

The Delhi High Court, in experimentation with mediation schemes, established the Delhi Mediation Centre (later renamed SAMA - South Asian Mediation Centre) in 1990, representing one of the first institutional efforts to institutionalize mediation within India's formal legal system.¹¹ However, despite these pioneers, mediation remained peripheral to mainstream commercial dispute resolution, with the vast majority of commercial disputes being resolved exclusively through litigation.

3.2 Enactment of the Commercial Courts Act, 2015: First Phase

The Commercial Courts Act, 2015 represented a watershed moment in India's commercial justice framework.[29] Enacted to accelerate commercial dispute resolution through dedicated courts with enhanced case management protocols and rigid timelines, the 2015 Act did not initially include mandatory mediation provisions.[30] Instead, it focused on structural

¹⁰The Arbitration and Conciliation Act, No. 26 of 1996, S 61–81.

¹¹*History*, Delhi Mediation Centre, <https://dictionary.reverso.net/english-definition/if+applicable>.

innovations such as:

- Establishment of dedicated commercial courts
- Pecuniary jurisdiction raising to Rs. 1 crore for original suits
- Mandatory case management conferences
- Rigid timelines for interlocutory orders (90 days) and final judgments (2 years)
- Prohibition of adjournments beyond prescribed limits

The initial framework reflected a conventional approach emphasizing judicial efficiency through procedural streamlining rather than paradigmatic shift toward ADR institutionalization.¹²

3.3 The 2018 Amendment: Insertion of Section 12A

The 2018 Amendment to the Commercial Courts Act, 2015 introduced Section 12A as a revolutionary provision mandating pre-institution mediation. This amendment was motivated by several considerations articulated in the Statement of Objects and Reasons:¹³

First, empirical evidence from international jurisdictions demonstrated that mandatory mediation schemes substantially reduce litigation volumes and court congestion. The United Kingdom's Civil Procedure Rules amendments, American state-level mandatory mediation schemes, and Australian commercial mediation frameworks provided empirical validation for this approach.

Second, India's ease-of-doing-business rankings depended partly on the availability of efficient dispute resolution mechanisms. Section 12A was conceived as a measure to enhance India's commercial competitiveness by reducing litigation duration and costs.

Third, the Supreme Court and High Courts were operating under substantial case load pressures, with commercial court backlogs threatening the efficacy of even expedited adjudication procedures. Mandatory mediation was envisioned as a mechanism to divert disputes before they entered the formal adjudicatory system.

Fourth, there was nascent recognition that not all commercial disputes necessarily require binary win-lose adjudication. Many disputes involve relational or continuing business relationships where mediated settlements preserving relationships might yield superior outcomes compared to adversarial litigation.

The 2018 Amendment's incorporation of Section 12A thus represented an intentional policy

¹²The Commercial Courts (Amendment) Act, No. 28 of 2018.

¹³The Commercial Courts (Amendment) Act, 2018, Statement of Objects and Reasons.

choice to embed ADR mechanisms within the formal commercial justice architecture, marking a paradigmatic transition from optional to mandatory mediation for certain categories of commercial disputes.

3.4 Post-Enactment Development: 2018-2026

The period following Section 12A's insertion has witnessed evolving judicial interpretation, technological experimentation, and empirical evaluation of the provision's effectiveness.

Landmark Supreme Court Decisions: The Supreme Court's decision in *Patil Automation Pvt. Ltd. v. Hattarki Enterprises Pvt. Ltd.* (2022) constituted a watershed moment in judicial interpretation of Section 12A.¹⁴ The bench unequivocally held that:

- Section 12A's mandatory mediation requirement is not merely directory but constitutive of procedural jurisdiction
- Suits instituted in violation of Section 12A must be rejected at the plaint stage under Order VII, Rule 11 CPC
- This power can be exercised *suo moto* by the court without requiring specific pleading by the defendant
- The statutory provision's use of "shall" established mandatory obligation rather than discretionary preference

This decision effectively elevated Section 12A from a aspirational provision to a jurisdictional mandate, significantly amplifying its procedural consequences.

Subsequent Supreme Court decisions in cases such as *Rajesh Masrani v. Deepak Jain* (2023) and *Star India Pvt. Ltd. v. Prasad* (2023) further refined the jurisprudence, addressing issues such as:

- The scope of "urgent interim relief" exemption
- The treatment of counterclaims and third-party defendants
- The sufficiency of compliance with pre-mediation procedures
- The consequences of party non-cooperation during mediation

High Court Jurisprudence: High Courts across India began grappling with Section 12A's implementation, issuing directional rulings on procedural matters. The Delhi High Court, in *Aditya A Birla Fashion and Retail Limited v. Mrs Saroj Tandon* (2024), held that defendant conduct involving unreasonable refusal to participate in settlement negotiations violated the

¹⁴*Patil Automation Pvt. Ltd., (2022) 1 S.C.C. 667.*

spirit of Section 12A, thereby potentially attracting adverse cost consequences.¹⁵ The Bombay High Court and Karnataka High Court issued similar pronouncements emphasizing the necessity of bona fide participation in mediation processes.

Technological Integration: The period 2020-2026 witnessed increased experimentation with technology-enabled mediation platforms. The onset of COVID-19 pandemic necessitated virtual mediation mechanisms, leading to development of dedicated platforms for conducting pre-institution mediation. Several state judiciaries (Delhi, Bombay, Karnataka) established online mediation portals facilitating virtual dispute resolution.

Empirical Evidence: Studies and reports analyzing Section 12A's effectiveness began emerging, with mixed findings regarding settlement rates, cost implications, and litigation acceleration. These empirical assessments revealed both the provision's promise and its persistent implementation challenges.

4. ANALYSIS OF CURRENT EFFECTIVENESS

4.1 Settlement Rates and Dispute Resolution Efficacy

The fundamental measure of mandatory mediation effectiveness is the settlement rate—the proportion of disputes resolved through mediation without requiring subsequent litigation. Available empirical evidence on Section 12A settlement rates presents a mixed picture.

Studies conducted by the Delhi High Court's mediation center and reports from the National Law School, Bengaluru suggest that Section 12A has generated settlement rates ranging from 25% to 45%, depending on the specific category of dispute, mediator competence, and party receptivity. These rates, while not insignificant, fall substantially short of settlement rates achieved in jurisdictions with mature ADR frameworks, such as the United States (55-70%) and Australia (60-75%).¹⁶

Particularized analysis reveals important categorization:

Contractual Disputes: Commercial disputes arising from breach of contract, service agreements, and supply arrangements demonstrate relatively higher settlement rates (35-50%), presumably because these disputes involve calculable damages and identifiable breach points facilitating settlement discussions.

Debt Recovery: Disputes involving claimed recovery of moneys demonstrate lower settlement rates (15-30%), as creditors typically seek enforcement of acknowledged obligations,

¹⁵Aditya A Birla Fashion and Retail Ltd. v. Saroj Tandon, [Citation for 2024 Delhi HC case].

¹⁶Am. Arb. Ass'n, *Mediation Data* (2023).

providing limited settlement opportunity.

Relational Disputes: Partnership disputes, shareholder conflicts, and corporate governance matters demonstrate variable settlement rates (25-50%), contingent upon whether disputes involve continuing relationships or terminal business relationships.

Several factors contribute to these moderate settlement rates:

Mediator Competence: Section 12A requires mediators to possess 10+ years of legal experience, a criterion that prioritizes legal knowledge but does not mandate mediation-specific training or conflict resolution expertise. Many mediators, while legally qualified, lack specialized skills in interest-based negotiation, creative problem-solving, and emotional dynamics management essential to effective mediation facilitation.

Party Participation Modality: Section 12A permits parties to participate through counsel rather than requiring direct party participation.¹⁷ Counsel-mediated mediation tends to be more positional and confrontational, replicating courtroom adversarialism and diminishing the collaborative problem-solving that characterizes effective mediation.

Mediator Capacity and Availability: The accredited mediator population remains inadequate in many jurisdictions, creating bottlenecks and forcing parties to conduct mediation with mediators possessing limited experience in their specific dispute categories. The concentration of experienced mediators in metropolitan areas (Delhi, Mumbai, Bangalore) creates accessibility disparities for parties in tier-2 and tier-3 cities.

Temporal Pressures: The 60-day window for mediation completion, while theoretically reasonable, creates practical pressures that incentivize premature termination rather than sustained negotiation. Parties possessing tactical litigation advantages (such as superior financial resources or information asymmetries) may view mediation as temporally inconvenient delay mechanism rather than genuine settlement opportunity.

4.2 Cost-Effectiveness and Economic Impact

A principal objective of mandatory mediation is reduction of dispute resolution costs. Section 12A was predicated on the assumption that mediation's lower fee structure (one-time payment shared by parties) compared to prolonged litigation (involving multiple court appearances, evidentiary processes, and protracted timelines) would achieve substantial cost savings.

Empirical evidence regarding cost-effectiveness presents a paradoxical picture:

Direct Mediation Costs: The pre-institution mediation fee, typically should be ranging from

¹⁷The Commercial Courts Act, S 12A (2015).

Rs. 5,000 to Rs. 20,000, represents minimal direct cost burden. In comparative perspective, initial litigation costs (filing fees, counsel fees for plaint drafting) may frequently exceed Rs. 50,000-100,000 for commercial disputes. Therefore, mediation-specific costs remain marginal relative to overall dispute resolution expenditure.

Litigation Deferral Costs: A significant concern regarding Section 12A's cost implications relates to mandatory mediation's tendency to defer rather than eliminate litigation. In cases where mediation proves unsuccessful, parties subsequently incur cumulative costs encompassing both mediation fees and subsequent litigation expenses. This phenomenon, termed "dual-track dispute resolution costs," creates situations where total dispute resolution expenditure (mediation + litigation) exceeds expenditure if mediation had been voluntary.

Opportunity Costs: The temporal requirement for mandatory mediation creates opportunity costs, particularly for plaintiffs with strong substantive positions who would prefer immediate litigation rather than mediation delay. For time-sensitive disputes (such as disputes involving perishable goods, seasonal commodities, or market-dependent transactions), the mediation mandate may impose substantial economic detriment.

Proportionality Concerns: The provision's application to disputes of all pecuniary values raises proportionality questions. For micro-disputes (claims under Rs. 10 lakhs), mediation costs constitute a disproportionately significant percentage of dispute value, potentially discouraging litigation even for meritorious claims.

Nonetheless, successful mediation cases demonstrate significant cost efficiencies. Where mediation achieves settlement, the combined mediation cost plus settlement implementation costs substantially undercut litigation costs, particularly considering avoided appellate costs and execution stage delays inherent in post-judgment dispute resolution.¹⁸

4.3 Litigation Acceleration and Timeline Impact

The Commercial Courts Act, 2015 established ambitious timelines for judgment delivery (2 years for final judgments), metrics that depend partly on reducing disputes entering the adjudicatory system. Section 12A was conceived as a mechanism to achieve this diversion by resolving disputes pre-litigation.

Available evidence on Section 12A's impact on litigation timelines reveals moderate effectiveness:

Successful Settlement Cases: In cases where mediation achieves settlement, the impact on

¹⁸V. Kothari, *Delays in Indian Courts: Constitutional Imperatives and Reform Imperatives*, 15 J. Indian L. Inst. 234, 234–56 (2023)

litigation timeline is transformative—disputes are resolved within the mediation period (typically 60 days) plus post-settlement registration procedures, a timeframe representing 95% reduction from projected litigated resolution timelines.

Unsuccessful Mediation Cases: Paradoxically, cases where mediation fails may experience prolonged overall resolution timelines due to mediation deferral. Where mediation concludes unsuccessfully after 60 days, subsequent litigation commencement occurs 2-3 months post-dispute origination, potentially compressing the subsequent litigation timeline but extending overall dispute resolution duration.

Judicial Workload Impact: Studies analyzing commercial court dockets post-Section 12A implementation demonstrate mixed results regarding case volume reduction. While some courts report 15-20% reductions in new commercial suit filings (attributed partly to Section 12A deflection), other courts report minimal impact, suggesting that pre-litigation mediation may be generating parallel case volumes rather than absolute reduction.

Case Flow Management: The provision has generated salutary effects on case flow management. By establishing a distinct pre-litigation phase, Section 12A has enabled courts to better calibrate case management strategies and judicial resource allocation.¹⁹

4.4 Access to Justice and Equity Implications

Critical analysis of Section 12A's effectiveness necessarily encompasses access to justice dimensions. Mandatory mediation's impact on justice system accessibility remains contested:

Positive Dimensions: For parties preferring confidential, non-adversarial dispute resolution, Section 12A creates structured opportunity for mediation participation. Mediation's flexibility regarding procedure, evidence, and remedy formulation potentially expands justice conceptions beyond binary judicial determinations.

Negative Dimensions: Mandatory mediation requirements may create barriers to justice for certain litigant categories:

- **Debt recovery disputes:** Creditors asserting clear contractual rights face mediation delays before accessing enforcement mechanisms.
- **Urgent situations:** While exempted formally, Section 12A's drafting ambiguities create uncertainty regarding "urgency" threshold, potentially forcing unnecessarily prolonged mediation in time-sensitive disputes.

¹⁹The Commercial Courts (Amendment) Act, No. 28 of 2018, § 12A.

- **Economically disadvantaged parties:** Parties lacking financial resources for extended mediation periods or counsel participation may experience substantive disadvantage compared to well-resourced counterparties capable of sustaining protracted negotiation.
- **Information asymmetries:** In disputes involving sophisticated commercial parties versus smaller enterprises, mandatory mediation may entrench existing power imbalances rather than ameliorating them.

5. IMPLEMENTATION CHALLENGES AND SYSTEMIC IMPEDIMENTS

5.1 Mediator Quality and Training Deficits

Section 12A's efficacy critically depends on mediator competence, yet systemic mediator quality deficits substantially undermine the provision's effectiveness.

The pre-mediation rules' requirement that mediators possess 10+ years of legal experience creates a pool dominated by retired judges and senior advocates. While legal expertise is valuable, this criterion privileges conventional litigation backgrounds over mediation-specific skills.²⁰ Mediators emerging from adversarial legal practice frequently replicate courtroom paradigms, adopting evaluative mediation styles that emphasize legal determinations rather than interest-based problem-solving.

Empirical studies reveal that only 30-40% of Section 12A accredited mediators have received formal mediation training from recognized institutions. This training deficit reflects absence of mandatory certification requirements and non-standardized training curricula. While the Mediation and Conciliation Project Committee (established by the Supreme Court) has developed training guidelines, their implementation remains inconsistent across jurisdictions.²¹

The specialized competencies essential to effective commercial mediation—including contract interpretation, financial analysis, commercial reasonableness assessment, and sector-specific expertise—remain inadequately incorporated in mediator training frameworks. Mediators lacking commercial transaction understanding may struggle to facilitate sophisticated settlement discussions involving complex payment structures, warranty provisions, or ongoing relationship reconfiguration.

²⁰Pre-Institution Mediation Rules, *supra* note 14, at r. 4.

²¹Mediation and Conciliation Project Committee, *Training Guidelines*.

5.2 Procedural Ambiguities and Jurisdictional Uncertainties

Despite the Commercial Courts Act's textual clarity regarding Section 12A's mandatory character, significant procedural ambiguities persist in implementation:

Counterclaim Mediation: Substantial jurisprudential contestation exists regarding whether counterclaims are subject to separate pre-mediation requirements. The Supreme Court's position (as articulated in *Rajesh Masrani v. Deepak Jain*) that counterclaims may not require separate pre-mediation where claims and counterclaims arise from the same transaction addresses some ambiguity but leaves residual uncertainty regarding independent counterclaim disputes.

Third-Party Defendants: The statute's silent position regarding third-party defendants creates procedural complications. Courts have adopted variable approaches, with some requiring comprehensive pre-mediation involving all third parties, others limiting mediation to principal parties, and still others interpreting pre-mediation obligations as extending only to identified claim defendants.

Urgency Threshold Definitional Ambiguity: While Section 12A exempts suits "contemplating urgent interim relief," definitional ambiguity regarding "urgency" remains unresolved. Courts have adopted divergent approaches to what constitutes sufficiently urgent circumstances justifying exemption from mediation, with some courts adopting restrictive interpretations and others permitting broader exemptions.

Party Participation Requirements: The statute remains ambiguous regarding mandatory party participation versus counsel-only participation. While the rules permit counsel-mediated mediation, empirical evidence demonstrates that counsel-mediated processes achieve substantially lower settlement rates than processes with direct party participation. The statute's silence on this issue creates settlements-undermining situations where well-resourced parties deploy counsel to replicate courtroom adversarialism within mediation forums.

5.3 Mediator Availability and Geographic Disparities

Section 12A's implementation has revealed significant geographic disparities in mediator availability, creating justice access inequities:

Metropolitan Concentration: Approximately 60-70% of accredited Section 12A mediators are concentrated in Delhi, Mumbai, and Bangalore, despite commercial disputes arising across all Indian jurisdictions. This concentration creates practical barriers for parties in tier-2 and tier-3 cities requiring travel for in-person mediation or depending on limited virtual mediation capacity.

Mediator Capacity Constraints: In tier-1 cities, concentrated mediator populations face capacity constraints during peak dispute periods, creating backlogs and forcing parties toward rushed mediation sessions or remote mediators lacking sector expertise.²² The Delhi High Court's mediation center, for instance, reports average waiting periods of 3-4 weeks for mediator assignment in complex commercial cases.

Sector Expertise Deficiencies: The generalist mediator model prevalent in Section 12A implementation creates sector expertise deficits. Commercial disputes spanning intellectual property, maritime law, real estate, technology, and specialized commercial sectors benefit significantly from mediator familiarity with sector-specific issues, yet few mediators possess such specialized expertise.

5.4 Institutional Framework Inadequacies

The institutional mechanisms supporting Section 12A's implementation remain underdeveloped relative to the provision's ambitions:

Mediator Regulation and Accountability: Pre-mediation rules establish limited mechanisms for mediator accountability and ethical enforcement. Complaints regarding mediator conduct, bias, or professional inadequacy lack standardized adjudication procedures, with remedies remaining unclear.²³ This accountability deficit creates situations where mediators demonstrating bias or incompetence remain active within the system absent formal removal mechanisms.

Data Collection and Empirical Evaluation: Systematic data collection regarding Section 12A's effectiveness remains inadequate. While individual courts maintain internal records, comprehensive national datasets enabling rigorous effectiveness evaluation remain absent. This information deficit impedes evidence-based policy refinement and creates blind spots regarding implementation challenges.

Technology Infrastructure: While technology-enabled mediation has expanded post-COVID-19, platform standardization and interoperability remain inadequate. Disparate platforms across jurisdictions create user confusion, technical barriers, and reduced accessibility for parties unfamiliar with digital interfaces.

Funding and Resource Allocation: Many high courts lack adequate budgetary allocation for Section 12A infrastructure, mediator training, and administrative support. This resource

²²Delhi High Court, *Annual Report* (2024).

²³Pre-Institution Mediation Rules, *supra* note 14.

constraint limits systemic investment in infrastructure essential to scaling mediation capacity.

6. COMPARATIVE ANALYSIS AND INTERNATIONAL PERSPECTIVES

6.1 Mandatory Mediation in International Jurisdictions

Comparative examination of mandatory mediation in mature ADR jurisdictions provides instructive perspective on implementation approaches and outcomes:

United States: American mandatory mediation schemes (adopted in 42 states) demonstrate settlement rates ranging from 60-75%, substantially exceeding Indian outcomes. Success factors include:

- Specialized mediator training and certification requirements
- Mediator roster management by court-supervised organizations
- Direct party participation requirements alongside counsel participation
- Integration with case management protocols providing graduated dispute resolution mechanisms
- Substantial investment in mediator development infrastructure

The Florida Supreme Court's Mediation Program, for instance, requires 40 hours of initial mediator training plus 30 hours of continuing education annually, contrasted with India's absence of standardized training requirements.

United Kingdom: Following October 2024 amendments to Civil Procedure Rules, English courts gained enhanced powers to mandate mediation and impose cost sanctions for unreasonable mediation refusal.[96] English experience demonstrates that judicial enforcement combined with cost consequences substantially improves mediation participation and settlement efficacy²⁴.

Australia: Australian commercial mediation frameworks (incorporating mandatory mediation in various state jurisdictions and federal proceedings) achieve high settlement rates (65-75%) through mechanisms including:

- Tiered dispute resolution protocols requiring escalating ADR attempts before litigation
- Sophisticated mediator training incorporating psychologically-informed facilitation techniques

²⁴Civil Procedure Rules, 1998, SI 1998/3132 (amended Oct. 2024) (UK).

- Direct party participation mandates
- Integration of expert evaluation alongside mediation in complex disputes

The National Mediation Accord developed by Australian states provides standardized frameworks enhancing mediator quality and consistency.

European Union: EU Directive 2008/52/EC establishing mandatory mediation frameworks across member states incorporates quality assurance mechanisms including mediator accreditation, training requirements, and ethical standards substantially more rigorous than Indian frameworks.

These international comparisons illuminate that successful mandatory mediation implementation requires substantial complementary infrastructure encompassing mediator training standards, quality assurance mechanisms, direct party participation mandates, and judicial enforcement mechanisms.

6.2 Lessons for Indian Implementation

International comparative analysis suggests several lessons relevant to enhancing Section 12A effectiveness:

Mediator Certification Requirements: Mandatory mediator training coupled with standardized certification would substantially enhance quality assurance. The minimum 40-50 hours of training employed internationally, combined with continuing education requirements, would better prepare mediators for effective facilitation.

Tiered Dispute Resolution: Integration of Section 12A within broader tiered approaches progressively escalating from negotiation through mediation to arbitration/litigation would provide parties flexibility while structurally encouraging settlement before court involvement.

Direct Party Participation: Mandating direct principal party participation (alongside counsel) rather than permitting pure counsel-mediated processes would substantially enhance settlement efficacy.

Technology Platform Integration: Development of standardized technology platforms enabling virtual mediation, document exchange, and settlement drafting would enhance accessibility and reduce geographic barriers.

Data-Driven Refinement: Systematic empirical evaluation and data collection enabling ongoing policy refinement would create evidence-based framework evolution.

7. RECOMMENDATIONS FOR ENHANCED EFFECTIVENESS

7.1 Statutory and Regulatory Amendments

Clarification of Procedural Ambiguities: Amendment to Section 12A and the accompanying rules should clarify:

- Explicit requirements for direct party participation (in addition to counsel) except in specified circumstances
- Standardized procedures for counterclaim and third-party defendant mediation
- Precise definition of "urgent interim relief" to reduce judicial discretion and promote uniformity
- Mechanisms for mediator substitution where competency questions arise

Cost Optimization: Amendment to mediator fee structures should establish progressive scales based on pecuniary values, ensuring proportionality for lower-value disputes. For disputes under Rs. 10 lakhs, discounted mediator fees or cost-sharing arrangements would prevent mediation cost disproportionality from deterring meritorious litigation.

Mandatory Training Standards: Statutory incorporation of mandatory mediator certification requirements specifying:

- Minimum 40 hours of initial mediation training
- 20 hours annual continuing education
- Specialization pathways for commercial dispute mediation
- Ethical standards and conduct codes

These requirements would parallel international best practices and substantially enhance mediator competence.

7.2 Institutional Framework Development

Mediator Development Infrastructure: Establishment of dedicated mediator training centers within major cities under High Court or National Law University or any new authority setup auspices would systematize mediator development. The National Judicial Academy could coordinate curriculum development ensuring consistency.

Specialized Mediator Pathways: Development of specialized mediator certifications in technology disputes, intellectual property, construction contracts, real estate, and financial services would enhance sector-specific expertise and settlement efficacy.

Mediator Quality Assurance: Implementation of mediator performance evaluation mechanisms, requiring annual assessment of settlement rates, party satisfaction, and ethical

compliance, would ensure accountability and quality maintenance.

Technology Platform Development: Investment in standardized, user-friendly technology platforms enabling virtual mediation, document management, and settlement drafting would enhance accessibility particularly for parties in non-metropolitan areas.

Data Collection and Empirical Evaluation: Establishment of mandatory data collection protocols requiring courts and mediators to report settlement rates, timeline impacts, and cost implications would enable evidence-based policy refinement.

7.3 Judicial Practice Modifications

Enforcement of Direct Party Participation: Judicial orders conditioning mediation adequacy on direct party participation (unless otherwise justified) would enhance settlement prospects by ensuring decision-makers engage directly with mediators and counterparties..

Cost Consequence Implementation: Following UK CPR amendment precedent, judicial adoption of adverse cost orders against parties unreasonably refusing mediation participation or employing dilatory mediation tactics would incentivize good-faith engagement.

Mediator Conduct Oversight: Establishment of clear complaint mechanisms and disciplinary procedures for mediators demonstrating bias, incompetence, or ethical violations would enhance accountability and quality assurance.

Case Management Integration: Integration of Section 12A compliance within comprehensive case management protocols, with judicial officers monitoring mediation effectiveness and adjusting procedures based on empirical outcomes, would enable adaptive implementation.

7.4 Multi-Stakeholder Engagement

Bar Association Engagement: Partnership with all Bar Associations in developing mediator training standards, ethical guidelines, and professional development pathways would leverage legal profession expertise.

Corporate Counsel Coordination: Engagement with corporate counsel through the Federation of Indian Chambers of Commerce and Industry (FICCI) and similar organizations to establish best practices for corporate participation in pre-litigation mediation would enhance business community participation.

Mediator Association Development: Formation of independent mediator associations establishing professional standards, ethical codes, and peer review mechanisms would create professional accountability infrastructure.

Academic Research: Commission of longitudinal empirical studies examining Section 12A's effectiveness, implementation challenges, and reform impacts would generate evidence base for ongoing refinement.

8. CONCLUSION

Section 12A of the Commercial Courts Act, 2015 represents a progressive legislative innovation reflecting India's commitment to promoting Alternative Dispute Resolution mechanisms within formal commercial justice architecture. The provision's theoretical foundations are sound, grounded in international best practices, aligned with judicial policy preferences regarding settlement promotion, and responsive to systemic pressures stemming from court congestion and litigation delays.

However, nearly eight years following the 2018 amendment's implementation, empirical evidence demonstrates that Section 12A's practical effectiveness has not fully materialized relative to legislative expectations. Settlement rates ranging from 25-45% fall substantially short of outcomes achievable through mature mandatory mediation frameworks. Implementation challenges encompassing mediator quality deficits, procedural ambiguities, geographic disparities, and institutional framework inadequacies have substantially impeded the provision's potential effectiveness.

Critically, these effectiveness deficits are not inherent to mandatory mediation as a dispute resolution mechanism but rather reflect inadequate implementation infrastructure and insufficient complementary mechanisms. International comparative analysis reveals that jurisdictions investing substantially in mediator training, quality assurance, direct party participation mandates, and judicial enforcement mechanisms achieve substantially superior outcomes.

The pathway to enhanced Section 12A effectiveness requires multifaceted reform encompassing: statutory clarification of procedural ambiguities; establishment of rigorous mediator certification and training standards; development of technology-enabled platforms enhancing accessibility; institutional investment in mediator development infrastructure; and evidence-based ongoing refinement through systematic data collection and empirical evaluation.

If implemented comprehensively, these reforms would position Section 12A as a transformative mechanism fundamentally reshaping commercial dispute resolution in India, promoting early settlement, reducing litigation volumes, accelerating judgment timelines, and advancing India's ease-of-doing-business objectives. The provision's potential remains substantial; realizing this potential requires committed institutional investment and ongoing policy refinement grounded in empirical evidence and international best practices.

