



Department of Justice
Ministry of Law and Justice
Government of India



Mid-Term Progress Report

PROJECT TITLE: STRENGTHENING LEGAL PROVISIONS FOR THE ENFORCEMENT OF CONTRACTS: REASSESSING THE QUALITY AND EFFICIENCY OF DISPUTE RESOLUTION OF COMMERCIAL MATTERS IN INDIA

Submitted by

THE NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BENGALURU

Under the

DEPARTMENT OF JUSTICE

MINISTRY OF LAW AND JUSTICE

“SCHEME FOR ACTION RESEARCH AND STUDIES ON JUDICIAL REFORMS”

May 2019



National Law School of India University, Bengaluru

Table of Contents

PART A: PRELIMINARY

INTRODUCTION.....	4
SANCTION LETTER	7
DELIVERABLES AND OUTCOMES	8
DECLARATION	11

PART B: INTERIM STAGE

A REVIEW OF THE EXISTING LAWS ON CONTRACT ENFORCEMENT IN INDIA	13
The Indian Contract Act, 1872	13
The Specific Relief Act, 1963	15
The Sales of Goods Act, 1930	17
The Arbitration and Conciliation Act, 1996.....	18
The Commercial Courts Act, 2015	20
The Competition Act, 2002	22
Objective Achieved:.....	23
Whether Indian contractual remedies can include Punitive or exemplary damages for Intentional/ deliberate/ knowingly/ committing the breach of contract?.....	24
Arguments for and Against the Punitive Damages for Breach of Contract	25
Intention of the Parties to a Contract.....	28
Comparison of common law and civil law countries on the provision of punitive damages....	28
Test to Award Punitive Damages for the Breach of Contract	34
Proposed Amendment to section 73 and 74 of the Contract Act.....	41
Research Questions Identified	43

PART C: MID-TERM PROGRESS

Whether a Reform in Section 74 of the Indian Contract Act, 1872 is required to enforce the Penalty Clauses.	48
Penalty Clauses Enforcement in India	50
Theoretical Underpinnings behind Penalty Clauses	52
Other jurisdictions:.....	54

Role of courts in interpretation and upholding of penalty and liquidated damages clauses	58
The Role of Penalty Clauses in Government Contracts.....	60
REVIEW OF 35 CASE LAWS.....	63
QUESTIONNAIRES FOR EMPIRICAL DATA COLLECTION.....	73
 PART D: FUTURE RESEARCH IN RELATION TO AND IN CONNECTION TO THE PROJECT	
QUESTIONS YET TO BE RESEARCHED UPON	94
BROCHURE OF THE NATIONAL SEMINAR TO BE ORGANIZED ON 21ST AND 22ND AUGUST 2019.	97
THREE DAY RESIDENTIAL PROFESSIONAL CERTIFICATE COURSE ON PUBLIC PROCUREMENT, TENDERING AND LAW RELATING TO GOVERNMENT CONTRACTS	105
 ANNEXURE	
PROJECT PROPOSAL.....	116

PART A:

Preliminary

INTRODUCTION

India ranked 142nd in 2015 Ease of doing business rankings published on 29 October 2014 by the World Bank.¹ Since then it has moved up to sixty-five places to reach its current 77th position in the 2019 ranking as published on 31 October 2018.² One of the factors taken into account to calculate these rankings is the contract enforcement indicator.³ However on this indicator the country has not been able to register that good a performance. In 2015 rankings, India was 186th among 189 countries. In the 2019 Rankings it ranked 163rd among 190 countries in relation to contract enforcement by the World Bank in its ease of doing business report of 2018.⁴

The rankings are based on the Enforcement of Contract Score which is calculated based on three criteria namely, Time Taken by the court of first instance to dispose the case, Cost (as a percentage of claim value) incurred, and the quality of Judicial process index which vary from a scale of 0-18.⁵ A comparison of India with the best performing economy Singapore and United States is done in the table below.

	Singapore	United States	India
Time Taken	164	370	1445
Filing	6	30	45
Trial and Judgment	118	240	1095
Enforcement	40	100	305
Cost (% of Claim value)	25.8	30.5	31.1

¹ Available at <http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf>. (last visited on 18 December 2018).

² Doing Business 2019: Training for Reform, available at http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf. (last visited 18 December, 018).

³ Available at <http://www.doingbusiness.org/en/methodology/enforcing-contracts>. (Last visited on 18 December 2018).

⁴ *Ibid.*

⁵ *Supra* note 3, enforcing contracts.

Quality of Judicial Process Index (0-18)	15.5	13.8	10.5
Enforcement of Contract Rank	1	16	163

As the table above shows India lags very much behind on the time factor as Legal disputes in India are very infamous for the consumption of time. Radical substantive and procedural reforms are required to reduce the time taken by courts to conclusively settle contractual disputes.

To remedy this dire situation the Parliament of India enacted the Specific Relief (Amendment) Act, 2018. The amendment brought radical changes in the area of contract enforcement. Most important were limiting the discretion of the court in granting the remedy of specific performance and injunctions in disputes related to infrastructures and introducing the right to substituted performance.⁶ However, more such radical adjustments are required to be made in the future to improve the contracting environment in India.

The present research as conducted, explores the possibility of reform in other avenues of contractual enforcement law. It shall undertake a thorough review of the existing laws on contractual enforcement in India and shall evaluate and ascertain the efficiency of the Indian enforcement mechanism (both substantive rights and procedure) of contractual obligations in a globalized economic environment. The ultimate aim of this project is to look into legal reforms to improve the ease of doing business ranking of India and making Indian Contracting environment suitable to the needs and requirements of business and commerce in a globalized economy.

The Centre for Environmental Law Education, Research and Advocacy- National Law School of India University submitted a Proposal to the Ministry of Law and Justice as per the required format, to conduct research on **“STRENGTHENING LEGAL PROVISIONS FOR THE ENFORCEMENT OF CONTRACTS: REASSESSING THE QUALITY AND EFFICIENCY OF DISPUTE RESOLUTION OF COMMERCIAL MATTERS IN INDIA.”**

The Proposal as sent was approved by the concerned department of the Ministry and the Sanction Letter for the same was duly received on the 14th of December 2018.

⁶ See the Specific Relief (Amendment) Act, 2018 § 3, 10 (amending section 10 & 20 of the Act and inserting section 20A).

The First installment of Rs. Five Lakh (INR 5,00,000/-) was received on the 24th of December 2018, and the Second installment of Rs. Ten Lakh (INR 10,00,000) was received on the 14th of March 2019.

Research Associates have been appointed to carry out the research on the Project.

An Interim Report, containing the main research questions, the methodology being adopted to find solutions of the identified research questions and an exhaustive description of the existing law governing the Contractual issues in India was submitted under the project in the month of February 2019.

The Project Deliverable in the duration of this research Project, have been laid down in the forthcoming Table of Contents, and this particular 'Progress Report' highlights the work which has been done since the time the project has commenced. Two key questions, which form the very basis of this Research Project have been attempted to be answered and it is the objective of the National Law School of India University, to be able to propose and suggest a workable manner for the Ministry of Law and Justice to overcome the impediments and increase the efficiency of the dispute resolution process in the commercial matters.

SANCTION LETTER

File No. N-9/23/2017-NM
Government of India
Ministry of Law and Justice
(Department of Justice)

Jaisalmer House,
26-Mansingh Road, New Delhi-110011
Dated: 24th December, 2018

SANCTION ORDER

Sanction of the Competent Authority is hereby accorded to the payment of Rs. 5,00,000/- (Rupees Five Lakhs Only) to National Law School of India University, Bengaluru towards **First Instalment** (being 20%) out of the total project cost of Rs. 25,00,000/- (Rupees Twenty Five Lakhs Only) (non-recurring expenditure) for undertaking research project titled "Strengthening legal Provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial matters in India" submitted by National Law School of India University, Bengaluru vide letter dated 31.12.2017 under the "Scheme of Action Research and Studies on Judicial Reforms" and as per the terms of the agreement signed by National Law School of India University, Bengaluru with Department of Justice on 24th December, 2018. The implementing agency is requested to strictly adhere to the timeline mentioned in the approved proposal and agreement dated 24.12.2018 for timely completion of the project as there have been delays in past in submission of reports by National Law School of India University, Bengaluru.

2. The expenditure involved is debitable to Demand No. 81 during 2018-19 (Plan) under MH 2014-Administration of Justice, 17-National Mission for Justice Delivery and Legal Reforms, 17.02-Action Research and Studies on Judicial Reforms, 17.02.25-Professional Services.

3. This has been entered in the Register of Grants/Expenditure at Sl. No. 1 at page No. 151-152.

4. This issues with the concurrence of AS & FA [Law] vide their Note No. 18 dated 28.11.2018 and approval of Secretary (Justice) vide Note No. 20 dated 03.12.2018 in eOffice/Computer File No. 3593.

(Z.A. Khan)
Under Secretary to the Government of India
Telefax: 23072139

To,
Pay & Accounts Officer,
Ministry of Law & Justice, Department of Legal Affairs,
Janpath Bhawan, Janpath,
New Delhi

Copy to:-

1. Cash Section, Department of Justice with one spare copy and a copy of Agreement. It is requested that the payment may be made through e-payment to National Law School of India University, Bengaluru.
2. Under Secretary (Admin-II), Department of Justice, Jaisalmer House, New Delhi.
3. IFD/Budget Division, Ministry of Law and Justice, Legislative Department, Shastri Bhawan, New Delhi.
4. NIO, Jaisalmer House, New Delhi for uploading on the Department of Justice website.
5. National Law School of India University (Kind Attention: Prof. (Dr.) R. Venkata Rao, Vice-Chancellor), Post Bag No. 7201, Nagarbhavi, Bengaluru-560242, Karnataka with a signed copy of agreement dated 24.12.2018.
6. Section Officer, Admin Unit, Department of Justice, Jaisalmer House, New Delhi.
7. Principal Accounts Office, 4th Floor, Ministry of Law and Justice, Lok Nayak Bhawan, Khan Market, New Delhi.
8. Guard File.
9. Spare Copies-5.

DELIVERABLES AND OUTCOMES

S. No.	Deliverable	Status
1.	Interim Report Submission	Interim Report was submitted to the Ministry of Law and Justice, Department of Justice in February 2019.
2.	Conducting of a <u>Review</u> of the existing laws in India, dealing with contractual enforcement.	Literature review completed; Issues identified; Research Questions framed
3.	Whether penalty clauses in the Contracts can be enforced and determining the role of Courts in enforcing these penalty clauses.	<p>Research Completed; It is suggested that:</p> <ul style="list-style-type: none"> • s. 74 of the Contract Act should be amended to render penalty clauses enforceable to the extent they are not manifestly unreasonable • S. 74 should be amended to allow claims of liquidated damages without the need to show/suffer any loss/damage • An illustration to be inserted in s. 74 to make Liquidated damages and penalty clauses enforceable without the need to show/suffer any loss or damage.
4.	Whether Indian Contractual remedies can include Punitive or Exemplary damages for	<p>Research Completed:</p> <ul style="list-style-type: none"> • A detailed analysis of

	intentional/deliberate commitment of breach?	<p>numerous cases from 1942 till 2015 has been done to understand the nature of the damages as awarded by courts from time to time and the decisions as given.</p> <ul style="list-style-type: none"> • A distinction has also been made in between Nominal and Punitive damages based on various factors. • Suggestion has been made in the form of an Amendment to Sec. 73 and 74 of the Indian Contract Act, 1872.
5.	Whether positive steps maybe taken for accelerating the time taken for commercial matter adjudication?	<i>In progress</i>
6.	To determine and investigate any existing formula used by the courts to determine the amount of damages as awarded; whether the award of interest on damages shall accelerate the efficiency of commercial litigation?	<i>In progress</i>
7.	To determine the effect of Commercial Courts in India and their role in strengthening the adjudication procedure.	<i>In progress</i>
8.	To understand whether the amendment to the Specific Relief Act in 2018 bringing substituted performance shall help in contract enforcement?	<i>In progress</i>
9.	To elucidate whether the limitation time of twelve months under the Arbitration and Conciliation Act, 1996 will help in speedier resolution of commercial	<i>In progress</i>

	disputes in India.	
10.	Analysis of 35 Case Laws Relating to Commercial Dispute	Completed
11.	Empirical Survey	Questionnaires have been Prepared and the empirical data collection will be conducted in the next phase
12.	2 Day National Seminar	Will be Organised on 21 st and 22 nd August 2019

DECLARATION

This is to declare that the present Mid-Term report on the project titled “**Strengthening Legal Provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial Matters in India**” is a *bonafide* independent research work done by the Centre for Environmental Law Education Research and Advocacy (CEERA) team under me.

Prof. (Dr.) Sairam Bhat
Professor of Law, NLSIU

PART B

INTERIM STAGE

A REVIEW OF THE EXISTING LAWS ON CONTRACT ENFORCEMENT IN INDIA

In India a number of legislations deal with various aspects of contractual enforcement. They are: The Indian Contract Act, 1872; The Specific Relief Act, 1963; The Sales of Goods Act, 1930; The Arbitration and Conciliation Act, 1996; The Commercial Courts Act, 2015; and, The Competition Act, 2002. The purpose of attempting to review these laws, is to provide and put forth all provisions which exist in law for contract-enforcement in order to facilitate a better and broad understanding of this key concept. Once that is achieved, only then can the research proceed further on the basic facts as established. The underlying purpose of this research project is to suggest and recommend amendments to the contractual legislations in the Indian Legal system in order to ensure a better function and efficient performance of not only the law, but also the process of commercial dispute adjudication. With the times being of high competition and continuous progression into an advanced sphere of business opportunities, the nation shall not be able to develop in its economic and business area, if the process is marred by pending legislations and laws with numerous leeway's. Thus, a detailed research into best practices and strengthened legal provisions is required. Commencing the same, a brief discussion on the key provisions relating to contractual enforcement in these acts is provided as under:

The Indian Contract Act, 1872

The Indian Contract Act 1872 is the primary legislation regarding contract law in India. It is a substantive legislation laying down the various rights and duties of the contracting parties and provides the basics of contract law. However, out of the various remedies and reliefs available for contractual breach, the act primarily deals with damages vide sections. 73-75. These Provisions are contained under chapter VI of the Act entitled “of the consequences of breach of contract”. However, the Act does not use the term ‘damages’ but uses the word ‘compensation’, implying thereby the nature of the remedy provided therein is only compensatory and not punitive or vindictive. The underlying theory is that the object of awarding damages for breach is

to put the injured party into the position in which he would have been had there been performance and not breach.⁷

Section 73 talks about compensation in two situations: (i) compensation for loss or damage caused by breach of contract; (ii) compensation for failure to discharge obligation resembling those created by contract.⁸ Section 73 follows the principles given in *Hadley v. Baxendale*.⁹ The injured party is not entitled to receive damages ipso facto of the breach. It has to prove that some loss or damage is caused to it due to the breach. Further, no compensation is given for loss or damage which is remote and indirect. That is to say, losses which are too remote a consequence of the defendant's breach cannot be recovered by the claimant. This principle emerges from the well-known case of *Hadley v. Baxendale* and is called the 'Foreseeability Rule'.

However, there are limitations to the foreseeability rule, and it has been observed and remarked by authors that the rule laid in *Hadley v. Baxendale* case, like all legal rules in a developing common law system, is an interim rule. It seemed sufficient in 1856. The fact that it has stood for so long time suggests that it responds to a need in contractual law with considerable success.¹⁰ However, with the change in times and advancement of technology and considering the poor state of affairs of contractual enforcement in India, this law also needs to be reflected and relooked into.

Further, the default rule in cases of contractual breach is that the injured party is only entitled to damages which are only compensatory in nature and the penalty damages or "in terrorem" damages are not awarded. Conventional legal theory and economic analysis assumes that the most efficient legal rule should be chosen as the default rule.¹¹ This means that the suitability and efficiency of the rule of compensatory damages needs to be relooked into and assessed with respect to the needs of the present day global and fast track economic relationship keeping in mind the nature of judicial proceedings in India. Areas where deterrent damages can be awarded as a

⁷ See M. Krishnan Nair, *The Law of Contracts* 213 (5th ed., 1997, Reprint 2004)

⁸ Section 73 of the Indian Contract Act, 1872.

⁹ (1854) 9 Exch 341.

¹⁰ SM Waddams, *The Law of Contracts* 740 (4th ed., Toronto, Canada Law Book Inc, 1999) [as cited in Adam Kramer, *An Agreement-Centred Approach to Remoteness and Contract Damages*, in *Comparative Remedies for Breach of Contracts* 283 (Nili Cohen et al. ed(s), 2005).

¹¹ I Ayres and R Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale Law Journal* 87 (1989). [as cited in 245 David Gilo, *The Deterrent Factor of Damages where pricing is affected*, in *Comparative Remedies for Breach of Contracts* (Nili Cohen et al. ed(s), 2005)].

default rule have to be identified and assessed. One such possible avenue is intentional breach of contracts especially when they adversely affect the prices¹². Another such avenues could be intentional breaches of infrastructural contracts where the public interest is at stake.

In the normal course of transactions, the innocent party has to prefer a claim against the promisor and if there is a dispute, resort to litigation through the courts of law, to get the compensation, and has to prove the actual loss or damage to him to the satisfaction of the courts. As these are civil cases, there would be a considerable time lag in getting the final decision about the relief. The decisions are also contested by one party or the other by preferring appeals.¹³ Therefore those engaged in trade and commerce look to other remedies which are quicker and may not lead lengthy litigation.

One such remedy is provided under Sec. 74 of the Act. This section enables the parties to the contract to predetermine the compensation or damages payable by the party who has broken the contract to the innocent party who has suffered inconvenience or damage due to breach. Such predetermined damages are called 'liquidated damages'.¹⁴ The Indian Law in relation to liquidated damages and possibility of reform thereto is discussed and explored in depth in the next chapter of this report.¹⁵

The Specific Relief Act, 1963

Chapter II of the Specific Relief Act, 1963 deals with specific performance of the contractual obligations. The provisions of the Act with regard to specific performance were amended by the Specific Relief (Amendment) Act 2018.¹⁶ Under the un-amended Act, the remedy of specific relief was dependent on the judicial discretion. But the 2018 amendment removed this discretionary power of the court in granting this remedy. Now, the Courts have to mandatorily

¹²See David Gilo, *supra* note (Gilo has identified this area and assessed the applicability of deterrent damages as a default rule. However, its suitability in Indian Context needs to be assessed).

¹³ BS Ramaswamy, *Contracts and their Management* 80 (2003).

¹⁴ BS Ramaswamy, *supra* note 13 at 81

¹⁵ *Infra* Possibility of Reform in s.74 of the Contract Act.

¹⁶ The Specific Relief (Amendment) Act, 2018, No. 18 of 2018.

grant specific performance if prayed by the parties.¹⁷ This brings a radical change in contractual enforcement jurisprudence in India which was hitherto focused primarily upon the grant of damages. Thus, now the party can opt for either of the two remedies. However, in certain cases the plaintiff can also obtain both specific performance and damages.¹⁸ But, the grant of compensation in addition to specific performance is discretionary.¹⁹

Apart from removing the discretionary power in granting specific performance the 2018 amendment also provides for substituted performance.²⁰ Now where a contract is broken, the party who suffers would be entitled to get the contract performed by a third party or by his own agency and to recover expenses and costs including compensation from the party who failed to perform his part.²¹ This is an alternative remedy at the option of the party who suffers breach.²²

Another important feature of the amendment is the introduction of section 20A. Section 20A prohibits the court from granting injunctions in contracts relating to infrastructure projects where the grant of injunction would cause impediment or delay in the progress or completion of such infrastructure projects.²³ Apart from the projects listed under the schedule the Department of Economic Affairs is the nodal agency for various projects as infrastructure projects and the said department may amend the Schedule relating to any such category or sub-sectors. However, any such notification shall be laid before the parliament for its approval.²⁴ Further, section 20B of the Act mandates the constitution of special courts to try suits related to infrastructural projects related contracts.

To ensure that suits are expeditiously disposed of, a strict time limit of 12 months is provided. The period will commence from the date of service of summons to the defendant. This period

¹⁷ Section 10 of Act after amendment states that “The specific performance of a contract **shall** be enforced the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16”.

¹⁸ Section 21(1) of the Act states “In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach in addition to such performance”.

¹⁹ *Ibid.*

²⁰ Section 20 of the Act.

²¹ *Ibid.*

²² The specific Relief (Amendment) Bill 2017 Annexure containing the statement of object and reasons.

²³ Section 20A of the Specific Relief Act.

²⁴ Section 20A (3).

can be extended by a further period of 6 months for which reasons have to be recorded in writing.²⁵

These amendments were made after the recommendations of the Expert Committee²⁶ constituted in this behalf the Ministry of Law and Justice. However, the Amending Act has not adopted all recommendations of the Committee relating to this radical change of approach to contractual remedies. According to Nilima Bhadbhade it has discarded the recommendations which were meant to ensure fairness in the procedure.²⁷ The thorough review of these amendments and left out recommendations will be undertaken and submitted in the final report to ensure that strengthened enforcement does not lead to unfair or unjust enforcement.

The Sales of Goods Act, 1930

The Sales of Goods Act, 1930 is a specific legislation dealing with contracts of sales of goods. Chapter 6 of the Act deals with suits for breach of such contracts. It comprises of section 55-61. Section 55 provides for suit for prices by the seller where the property in goods has been passed to the buyer and he wrongfully neglects or refuses to pay for the goods as per terms of the contract.²⁸ The seller can also sue for price in those cases where the price becomes payable on a certain day irrespective of the passing of the property in goods.²⁹ Under section 56 the seller can also sue the buyer for damages in cases of wrongfully neglecting or refusal to accept and pay for the goods. Similarly, the buyer can also sue the seller for damages for non-delivery.

Comparison of Section 73 of Contract Act and Section 55 of Sales of Goods Act: Section 73 of the Contract Act contains the general principles regarding fixing of damages, whereas s.55 of the Sales of Goods Act speaks of more specific case sold moveable property. Thus, s.55 being a special provision prevails over s.73 of the contract act, though both the sections are based on the

²⁵ Section 20 C.

²⁶ The Expert committee (also called the Anand Desai Committee) Report. Available at <https://drive.google.com/file/d/0B-ZUXtJuPbi3ak0wbENVdUdjQTZWcTNQSW5vNWpUSWVNYnc0/view>. (last visited January 5, 2019).

²⁷ Nilima Bhadbhade, The Specific Relief (Amendment) Act 2018: a Hurried Legislation available at <https://barandbench.com/specific-relief-amendment-act-hurried-legislation/>. (last visited 10th January, 2019).

²⁸ Section 55 of the Sales of Goods Act.

²⁹ *Ibid* Section 55(2),

same general principles.³⁰ Where, in a contract of sale of goods, the property in the goods has passed to the buyer and the buyer refuses to pay for the goods, the seller can accept the breach and claim damages, or affirm the contract and claim the price. Further, if the buyer refuses to take delivery, the seller can sue for the price of goods.³¹

Specific performance of the contract of sale of goods: under s. 58 of the Act, The Court, in any suit for breach of contract relating to delivery of specific or ascertained goods, may direct that the contract be specifically performed. It may order so even without giving the defendant the option of retaining the goods on payment of damages. This decree may be unconditional or contain condition such as payment of price.³²

The Arbitration and Conciliation Act, 1996

The normal remedy for resolution of disputes arising between any two parties is to approach the courts of law by the aggrieved party. However, these lawsuits take long periods of time to be decided as both the parties have recourse to appeals to the higher courts, till they reach the Supreme Court. Parties to commercial contracts prefer that such disputes are settled as early as possible so that their long relationship can continue. Further, the proceedings are held in an open court which leads to unwanted public attention and scrutiny which the parties would want to avoid. This leads them to utilize the various Alternate Dispute Redressal [ADR] mechanisms to settle their contractual dispute. In commercial transactions the mode of arbitration is generally preferred. There are many advantages of arbitration namely: Less costly, speedy settlement, simpler process and maintenance of confidentiality.

Till 1996, the law regulating arbitration was contained in the Arbitration Act 1940. This Act is now repealed and replaced by the Arbitration Act 1996. The 1996 Act (hereinafter the Act) introduced major changes and for the first time in India formalized the concept of conciliation. The act is divided into four parts: Part I deals with arbitration (an award under this part is considered as a domestic award), Part II deals with enforcement of certain foreign awards, Part III deals with conciliation and Part IV contains supplementary provisions. The Act also contains

³⁰ Mysore Sugar Co. Ltd v. Manohar Metal Industries, AIR 1982 Kant. 283 at 287.

³¹ Pollock & Mulla, The Indian Contract Act & Specific Relief Acts 1154 (15th ed., Vol 2., R Yashod Vardhan & Chitra Narayan eds. 2017).

³² Section 58 of the Sales of Goods Act.

three Schedules. The First Schedule refers to the Convention on the Recognition and Enforcement of Foreign Awards (also covered under Section 44). The Second Schedule refers to Protocol on Arbitration Clauses (also covered under Section 53). The Third Schedule refers to the convention on the Execution of Foreign Arbitration Awards.³³

The Law Commission of India *vide* its 246th Report proposed a series of amendments to the Arbitration Act which led to the enactment of the Arbitration and Conciliation Act, 2016. However, the final amended Act did not include all the recommendations of the Law Commission. Some of the rejected recommendations include: S. 6A (which would have introduced a Cost Regime to dis-incentivize the filing of frivolous claims) among others.

As far as contractual enforcement is concerned, the Arbitral Tribunal can grant the same remedies as the court can so far as the substantive rights of the parties are concerned including the relief of interim injunctions.³⁴ Thus, so far as the substantive law with regard to contractual enforcement is concerned, Arbitration Act does not provide any new remedy for contractual breach.

However, an important reform introduced by the 2016 amendment is the insertion of section 29A and Section 29B. Section 29A prescribes a statutory time limit of 12 months which can be extended to further 6 months by the consent of the parties. Thus, a maximum limit of 18 months is provided under the Act. But if still the proceedings are not concluded they can be extended by the Court provided there exists sufficient cause to do so. The speedy conclusion of proceedings is incentivized by making the arbitrator entitled to additional fees if the proceedings are concluded within a period of 6 months, also if the proceedings are delayed on his part then a deduction up to 5% can be made from the fees.³⁵ Section 29B on the other hand relates to fast track procedure. The parties to the arbitration agreement can apply for fast track procedure which has to be concluded within a period of 6 months. To accomplish this, the requirement of oral hearing has been relaxed and the tribunal is given power to dispense with technical formalities.³⁶

³³ The Arbitration and Conciliation Act, 1996; also See 246th Report of Law Commission of India at 4, available at <http://lawcommissionofindia.nic.in/reports/Report246.pdf> (last visited January 10th, 2019).

³⁴ S. 17 of the Arbitration and Conciliation Act as amended by the 2016 amendment.

³⁵ Section 29A.

³⁶ Section 29B.

The 2018 amendment bill further proposes major amendments into the Act. Most important of which is the establishment of Arbitration Council of India (ACI)³⁷ to institutionalize the arbitration process and make India a hub for commercial arbitration.

The Commercial Courts Act, 2015

The Act establishes separate courts to deal with commercial matters at district levels. Before the Act, there were only five High Courts which exercised original jurisdiction over the commercial dispute (Bombay, Calcutta, Delhi, Himachal Pradesh, and Madras). Now each state will have its own commercial courts to decide upon commercial disputes in every district.³⁸ Further, those High Courts which do not had original jurisdiction over commercial contracts will now have a commercial division within itself to do so.³⁹ Further, Commercial Appellate Divisions of High Courts are also constituted to hear appeals.⁴⁰ By 2018 amendment a new section 3A has been inserted in the act to establish commercial appellate courts.⁴¹

The other important change made by the 2018 amendment is the reduction of values of commercial dispute. Earlier the commercial dispute pertaining to a value of at least one crore were adjudicated by the commercial courts but after the 2018 amendment this value has been reduced to 3 Lakh rupees.⁴²

Further, section 12A of the Act which was inserted by 2018 amendment Act⁴³ contemplates mandatory pre-institution mediation and settlement, before the filing of any commercial dispute. In accordance with section 12A (1) institution of any suit in which urgent interim relief is not contemplated is barred unless the plaintiff has exhausted the remedy of pre-institution mediation and settlement. Rules in this regard can be made by the central government.

The model contemplated by the said section is similar to the Italian opt-out model, wherein the direct access to Italian Courts is barred if the litigants cannot prove that they have attended an

³⁷ See Arbitration and Conciliation (Amendment) Bill, 2018.

³⁸ Section 3 of Commercial Courts Act, 2015.

³⁹ S.4, *Ibid*.

⁴⁰ S.5, *Ibid*.

⁴¹ See Section 7 of Commercial Courts (Amendment) Act, 2018. [inserting section 3A]

⁴² See Section 4, *Ibid* [amending section 2(i) of the principal Act].

⁴³ See The Commercial Courts, Commercial Division and Commercial Appellate Division of High Court (Amendment) Ordinance of 2018.

initial mediation meeting. This model is widely used in Italy since 2013 and is also used by other jurisdictions including United Kingdom and Ireland in certain category of disputes.⁴⁴ The model implemented in Italy is a very easy opt-out model under which the parties are only obliged to attend an initial mediation session. After the session they can decide whether to proceed with the mediation or not.⁴⁵

S. 12A (2) enables the Central Government to authorize the authorities under the Legal Services Authority Act, 1987 for the purpose of pre-institution mediation. However, this provision is criticized on the ground that the purpose of LSA and commercial dispute resolution is significantly different and the authorities under LSA will not be an appropriate forum for commercial disputes.⁴⁶

Under S. 12A(3) the time limit for concluding the mediation process in 3 months which can be extended to further 2 months (thereby for a maximum of 5 months). It further provides that the period of mediation shall be excluded from computing the period of limitation. Further vide sub-section 4 and 5 the settlement shall be reduced to writing, signed by parties and mediator and shall be enforceable as an arbitral award under s. 30 of Arbitration and Conciliation Act, 1996.

The Schedule of the Act amends certain provisions of CPC.⁴⁷ The commercial courts shall follow this amended procedure in relation to a commercial dispute notwithstanding any other law in force.⁴⁸ Some of the important changes brought by the Schedule in the CPC are in relation to costs (provides a general rule for payment of costs by the unsuccessful party)⁴⁹, lays down the procedure of summary judgment (Order XIII-A), verification of pleading (Rule 15A), delay in filing written statement (maximum period increased from 90 days to 120 days), increased time period for pronouncing judgment (from 60 days to 90 days), Case Management Hearings (it is an international practice introduced in India for the first time through a new order XV-A)⁵⁰.

⁴⁴ See *Mandatory Mediation under Commercial Courts Act- A Boost to Effective and Efficient Dispute Resolution in India*, available at <https://barandbench.com/mandatory-mediation-commercial-courts-act/> (last visited 14-01-2019).

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ The Code of Civil Procedure, 1908.

⁴⁸ Section 16.

⁴⁹ Section 2 of the schedule.

⁵⁰ See <http://www.indialaw.in/blog/blog/law/commercial-courts-act-2015-changes-in-provisions-of-cpc/> (last visited January 15, 2019).

The Competition Act, 2002

Prevention of concentration of economic powers to the detriment of public, control of monopolies and prohibition of monopolistic trade practices are the constitutional requirements of the State policy.⁵¹ The Competition Act, 2002 is key legislation to ensure a healthy business environment in India. As the long title of the Act provides it is enacted with a view on the economic development of the Country.⁵² It establishes a Commission called the Competition Commission of India⁵³ whose objective and mandate, *inter alia*, is to prevent practices which have an adverse effect on the competition in India.⁵⁴ It is a quasi-judicial body endowed with vast powers to deal with the complaints or information leading to invocation of the provisions of sections 3 and 4 read with section 19 of the Act.⁵⁵ Section 3 deals with anti-competitive agreements and section 4 deals with abuse of dominant position. Together they form the heart and soul of Competition Act.

The interface between Competition law and enforcement of contracts has not been explored in much depth. The ability to write contractual promises with the *ex-ante* belief that they will be enforced is an important component of economy as it provides a degree of certainty and thereby promotes economic efficiency and ensures social welfare. This becomes imperative for long-term contracts which are required to underpin large investments or large-scale projects. But long-term and large-scale contracts might have a tendency to generate an anti-competitive effect *ex-post*.⁵⁶ This creates a conflict between contract law and competition law.

Whether the strengthening of the contractual enforcement will result in dilution of competition law or whether a strong competition law will have adverse effect on contractual enforcement and thereby negatively influence ease of doing business in India, is a question that must be explored

⁵¹ Preface to the First Edition, D.P. Mittal, Competition Law and Practice (3rd ed.).

⁵² See The Competition Act, 2002 long title “An Act to provide, keeping in view of the economic development of the country...”

⁵³ S. 7 of the Competition Act, 2002.

⁵⁴ Long title of the Act.

⁵⁵ D.P. Mittal, Competition Law and Practice 408 (3rd ed.).

⁵⁶ See Lewis Evans and Neil Quigley, The Interaction between Contract and Competition Law, Draft Paper prepared for 20th Pacific Trade and Development Conference, available at <http://researcharchive.vuw.ac.nz/xmlui/handle/10063/3870> (last visited January 20, 2019). [for a brilliant exposition on the interface between Contract law and competition law].

and researched into.⁵⁷ The project will undertake this task and in the final report a thorough research work on the topic will be submitted.

Objective Achieved:

On the completion of the first step into the research as undertaken, it has been established that the Indian Contract Act, 1872 has laid the foundation for the basic principles of commercial and business laws in the country, however, there are many more ancillary legislations which govern and regulate the various aspects of contracts as practiced. An evolution of the methodology of dispute resolution can be pointed out. Secondly, to resonate with the need of the business community and the advances made in the modes of conducting commercial transactions and settlement of disputes the basic principles of the Contract Act, need to be revisited to bring them in conformity with the contemporary times. A hard suggestion here itself is the amendment to a select few provisions of the Act, which shall be elucidated upon in the forthcoming chapters of this Research.

⁵⁷ See *ibid* [wherein the authors have argued that following the path in developed countries, where strong contract law came prior to competition (or anti-trust) law, thereby providing for contractual certainty, the developing countries also should first enact a strong contractual enforcement regime. India however, on the other hand, have followed a balanced approach on the matter].

Whether Indian contractual remedies can include Punitive or exemplary damages for Intentional/ deliberate/ knowingly/ committing the breach of contract?

This chapter of the research proposes the reformation of S.73 Indian Contract Act, 1872 to authorize the courts to grant exemplary damages in case of intentional breach of contracts.

The origin of the principle on which the damages are determined for the breach of contract is generally based on two major legal systems of the world, i.e., common law and civil law. Law of damages implies the assessment of damage and the condition to impose the liability for the loss in case of breach of contract and also the form of injuries. But it is the clauses of the agreement between the parties to the contract which is paramount in deciding the amount of damages. The concept of punitive/exemplary damages under the contract law is a recent phenomenon that is granted rarely. Common law countries especially the U.K. and India are hesitant to incorporate the provision for the punitive damages for breach of contract. The judicial approach in these countries is not very supportive when it comes to the award of punitive damages for breach of contract. The underlying philosophy behind is that the contract law is based on mutuality and award of punitive damages is against this notion. When it comes to the United States, this approach differs from state to state. Most of the states do not have any legislation concerning punitive damages in case of intentional breach of contract. It has evolved, developed and shaped purely by case laws. Few states have provision for the punitive damages based on statutes of those particular states. In practice, generally punitive damages are awarded for the breach of contract in insurance cases when the insurer's actions amount to egregiously deceptive. Even in these circumstances, it is granted not for the breach of contract but under the tort law. It is generally considered that punitive damages and nominal damages are not based on loss caused to the plaintiff but instead to punish the defendant and recognize the right of the plaintiff respectively. One another notion behind this approach is that it is not awarded to compensate the loss caused to the plaintiff due to the breach of the terms of a contract. The researcher considers that there is a reason for exemplary damages to be available, which include, cases in which a plaintiff's claim would fail, however egregious the defendant's wrongdoing, and however inept the available alternative sanctions.

A contract is an exchange of promises between the parties for the breach of which law provides a remedy. To provide the remedies to the aggrieved parties, courts adopt an objective test, and it is irrelevant for the court to examine what the parties believe while entering into the contract to the extent it reflects the appropriate intent. In case of breach of the terms of a contract, parties are liable irrespective of the good faith or intent or motive or reason to breach the contract which shows it strict liability slandered. Most of the breach occurred when one of the parties to the contract feel that the outcome of the performance will be less than the benefit occurred from non-performance. Damages are generally based on the loss occurred due to the non-performance. The underlying principle of punitive damages for the breach of contract law is to punish the party at fault and create a deterrent effect for the others. Traditional view towards the compensatory damages for the breach of the contract to compensate the aggrieved party proved inadequate in some specific cases where the party at fault has breached the terms intentionally to cause the loss to the plaintiff. Punitive damages may serve its purpose better if the circumstances, the nature of the breach of the contract and the conduct of the defendant are egregious. The time consumed in case of recovery for the breach of contract, the cost of litigation for the same and the conduct of the party at fault are some factors which requires proper consideration while assessing the award for the breach of contract, especially in India

Arguments for and Against the Punitive Damages for Breach of Contract

Placing the aggrieved party in the same position in case of breach by the other party of its obligation under a contract if the wrong would not have occurred is the primary purpose for the compensatory nature of damages in every nation⁵⁸. The philosophy behind the compensatory damages for non-performance of the obligation by the parties to a contract is that it is considered private disputes; which mean the award of damages must be based upon the inconvenience caused to the parties. When a breach of a contract occurs, it affects only the private right or private interest of the parties, and there is no reason to set an example for the others by providing punitive damages to the wrong party who has done nothing more than causing the economic loss and ready to compensate for the loss⁵⁹. Further, bringing the punitive elements in the award of damages may not be fruitful for the commercial activities as the repercussion of this would be

⁵⁸ Chitty on Contract, 32nd Edition, 2 Volumes Sweet & Maxwell (2015)

⁵⁹ Robert D. Cooter, Economic Analysis of Punitive Damages, 56 S. Cal. L. Rev. 79 (1982) Available at <https://heinonline.org> (last visited on 4th January, 2019).

discouraging to those who want to enter into the contract which is the very basis of businesses and economic prosperity. Philosophy for making the breach of contract as compensatory is that sometimes it is desirable to breach the contract when the performance becomes detrimental to the interest of the one party to the contract. Compensating the aggrieved party to the extent of loss suffered makes these arguments persuasive. Putting the other party in a worse situation by proving punitive damages is considered against the economic efficiency as the formation of a contract is based upon the mutuality and there is always a possibility to break the terms of the contract. The purpose of punitive damages is to punish the parties at fault and create a deterrence effect for the other, is not in consonance with the underlying principle of the contract. Parties to a contract voluntarily take some obligation, and it is inappropriate to bring a punitive standard outside the purview of the agreement.⁶⁰

Singapore Apex Court, i.e., Court of Appeal has made a relevant observation in this regard. The Singapore court while examining the legal basis of the punitive damages for breach of the contract said that the punitive damages for the breach of contract should be considered against the general rule of the principle of damages. The Court declares that even if there is fraudulent conduct on the part of the defendant, it will not alone justify the imposition of punitive damages. The Court examined the legal position in common law countries while analyzing the reasoning for and against the grant of punitive damages in the solely contractual context.⁶¹

Some of the scholars⁶² have favored bringing punitive elements while providing damages to the aggrieved parties on the reasoning that a person's private interest in the non-performance of a contract is can be described as a violation of public interest in the security of a transaction. They

⁶⁰ John Swan, Punitive Damages for Breach of Contract: A Remedy in Search of a Justification, 29 Queen's L.J. 596 (2004) <https://heinonline.org> last visited on (10th January, 2019).

⁶¹ *PH Hydraulics & Engineering Pvt Ltd v Airtrust (Hong Kong) Ltd* [2017] SGCA 26 The Court declared it should be a general rule that punitive damages cannot be awarded in breach of contract cases due to the following reasons- The formation of a contract is based on voluntary obligation taken by the parties in the expectation of getting some work done by the other party, unlike the tort where the obligation is imposed by law. Contracting parties have the opportunity to consider the various remedies in case of breach by the other party based on mutual pre-estimated genuine loss. Therefore it would be inappropriate for the court to regulate the parties by imposing an external standard in the form of punitive damages. It was also examined by the court that the award of punitive damages will be suitable in cases of outrageous breach. The court rejected this idea on the basis that it is elusive in the commercial circumstances where accepted norm is self-serving. Available at <http://www.cms-lawnow.com> (last visited on 10th January, 2019)

⁶² John Coffee, Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193, 194–95 (1991); Robert Cooter, Prices and Sanctions, 84 COLUM. L. REV. 1523, 1523–24 (1984).

argue that public interest demand for the fulfillment of an obligation under a contract so that others must fulfill their obligation under the contract which can be ensured by providing punitive elements in the damages. A breach of the contract means should be resulted in punitive damages as here both the parties mutually agree to the terms of a contract whereby, they undertook their respective responsibilities which are self-imposed in nature. The new development of the philosophy of punitive damages in case of intentional breach grounded on the basis that when a party to a contract intentionally broke his promises that he voluntarily has undertaken to be performed and have the capacity to fulfill then why not that party should be subjected to punitive damages by setting an example for others who may also follow the same practices when their future promises becomes useless to them. It will bring more certainty and efficiency in the economy where parties will be very careful while entering into a contract and will be ensured that the other party to the contract will be respecting their obligation under a contract. Punitive elements may be very useful when the wrong party has initiated and brining the other party to enter into the contract. In case of intention breach of a contract the underlying responsibility depends upon the nature of the obligation taken; whether it is voluntary and intentional or whether non-voluntary. A non-voluntary breach may arise due to the situation beyond the control of the parties. The basic element of a contract breach is mostly voluntary as the parties promise to undertake some obligation voluntary and then chose not to perform that obligation which is also a voluntary action⁶³. The old theories of the contract law price the breach by putting an obligation of the aggrieved party not only to attempt to minimize the risk but also he will be getting only the compensatory damages from the wronged party irrespective of the fact that the other party has wrongfully denied performing his obligation under the agreement. Responding to the breach of contract in the form of punitive damages will be more appropriate by sanctioning the other party who has intentionally and wrongfully chooses not to perform his obligation. Such a provision for the intentional breach would be in consonance with the subjective norm of contractual obligation.⁶⁴

⁶³ Monu Bedi, Contract Breaches and the Criminal/Civil Divide: An Inter-Common Law Analysis, 28 Ga. St. U. L. Rev. (2013). Available at: <https://readingroom.law.gsu.edu/gsulr/vol28/iss3/10>

⁶⁴ The contract reflects a fiduciary duty whereby parties rely on each other and according to undertake other duties and responsibilities which if breaches may cause potential damage. It's a breach of trust of the other party to the contract which must be protected.

Intention of the Parties to a Contract

During the formation of the contract parties also negotiate on clauses concerning the liabilities in case of breach of the terms. The clause may contain to exclude such a liability which may arise due to the consequential or indirect losses. Parties to the contract should not get benefit from these clauses if their conduct is wrongful or there is a willful default by him. The crucial question in this situation is how to decide whether the conducts of the parties are intentional, deliberate, and willful or not? It has been observed in a case⁶⁵ that there is a difference between deliberate act and willful default. Judge analyzed the concept of deliberate default and said it would be applicable when the party at fault knew that his action is against the terms of the contract. The term willful misconduct shows that the parties know what he is doing is a breach of duty. But in commercial context it becomes difficult to decide the same due to the possibility of change in the circumstances where the performance of the obligation under a contract does not serve the interest of one party and they rightfully but intestinally knowing the nature of their conduct and the consequences of the same breach the contract and willing to compensate the plaintiff for the loss caused due to the non-performance of the contract. For Court, it is next to impossible to determine the mental elements in every breach of commercial contract where the very accepted norm is self-serving and due diligence. They are always ready with the future uncertainty, and they also have means of anticipating the loss and are ready to overcome the same.⁶⁶

Comparison of common law and civil law countries on the provision of punitive damages

French Law on Punitive Damages- French public policy in France and other civil law countries are against the notion of punitive elements in the amount of compensation due to its criminal law elements. The public policy on breach of contract is that the compensatory damages are the appropriate remedy. The current development happens over a period of time in the French legal system shows that it does not wholly condemn punitive damages. Observations of the judges made in many cases indicate that they are willing to award punitive damages if the circumstances require. It has become crucial for the French Legal system to reform its contract law as par with other legal system keeping in mind the commercial relations France is having with other

⁶⁵ De Beers UK Limited v Atos Origin IT Services [2010] EWHC (TCC

⁶⁶ Michael B. De Leeuw & Brian J. Howard, "What Is a Willful Breach of Contract?" New York Law Journal, MONDAY, APRIL 3, 2006

countries which are not possible without bringing the contract law inconsonant with those countries.⁶⁷ Till date, there is no case law found where courts have awarded punitive damages. French public policy in France and other civil law countries are against the notion of punitive elements in the amount of compensation due to its criminal law elements. The public policy on breach of contract is that the compensatory damages are the appropriate remedy⁶⁸. The current development happens over a period of time in the French legal system, reflects that it does not entirely condemn punitive damages. Observations of the judges made in many cases show that they are willing to award punitive damages if the circumstances require.⁶⁹ It has become crucial for the French Legal system to reform its contract law as par with other legal system keeping in mind the commercial relations France is having with other countries which are not possible without bringing the contract law consistent with those countries. Till date, there is no case law found where courts have awarded punitive damages.⁷⁰

UK Law on Punitive Damages- English contract law is developed through the decisions of the courts over a period of time. There is no specific legislation on the formation, performance, and breach of the contract in U.K. Principles of contract law can be found in the decisions of the court which is supplemented by some legislation over the Sale of Goods, Consumer Protection and other statutory measures some of which are based on principles having its root in European Directives. The English law of contract is a body of law having its origin in Merchant Law based on commercial practices and usage in medieval period throughout Europe. While entering into the contract, each party gets a legal right of the performance of the obligation under the particular contract. The very purpose of the contract is the performance of some act by both the parties. Liability of the parties is founded on the act of agreement itself. The means of asserting the claimant's right to performance of the contract is an order of the court to the defendant to execute his part of the obligation. In case of any failure by the defendant in doing so, the English courts will generally uphold the claimant's corresponding right by a judgment for the fixed sum or by order of specific performance, or by an injunction. The basic principle of the damages is generally concerned to compensate the victim for the loss. They are intended to make good, so

⁶⁷ Georges Cavalier. Punitive Damages and French Public Policy, Lyon Symposium, Oct 2007, Lyon, France.

⁶⁸ This is called the principle of “*full compensation for losses*” (principle of “*reparation intégrale*” in French)

⁶⁹ Prof. Georges Durré, Honorary President of the University Panthéon-Assas (Paris II), *Les Punitive Damages*, French Court de cassation, March 25, 2004 (with John C. Coffee)

⁷⁰ Punitive Damages in France: A New Deal, 3 JETL 115 (2012) Available at <https://heinonline.org> (last visited on 6th January, 2019)

far as possible, the monetary or non-pecuniary loss stained by the plaintiff by placing him in a position as if no wrong had occurred. The courts fashioned the modern boundaries of the remedy of exemplary damages on the assumption that they are an 'anomalous' civil remedy, and must be limited as far as precedents permit.⁷¹ In a case⁷² it was laid down that in England and Wales aggravated damages cannot be awarded for the tort of negligence or breach of contract. Damages for mental distress can be provided to the plaintiff if he successfully proves that the harm resulted from the misconduct by the defendant by way of breach of his contractual obligation are outrageous. Under English law, there is a settled law after the two landmark case, i.e. *Rookes v. Barnard*⁷³ and *AB v South West Water Services Ltd*⁷⁴ whereby it was laid down that punitive damages can be awarded only when the case satisfied the cause of action test⁷⁵ and categories test⁷⁶. The cause of action test needs to be overruled to award the punitive damages for the breach of contract cases. The approach adopted under this test is very restrictive and limited to the case related to breach of confidence and fiduciary duty. Cases for the award of punitive damages attract tort of intimidation whether under the tort law of intimidation for the breach of contract. But the condition to provide the punitive damages was further restricted by the Court of Appeal in *AB* case by adding the cause of the action test. *AB* case needs to be overruled by the House of Lords to extend the scope of punitive damages in some exceptional cases for breach of contract. After the *Rookes* case, it is a settled principle under the English Law that punitive damages can be provided even for breach of contract if the fact of the case is fit to cause of action test and categories test.

⁷¹ As per, *Rookes v Barnard* [1964] AC 1129 and *AB v South West Water Services Ltd* [1993] QB 507 <http://www.lawcom.gov.uk/app/uploads/2015/04/LC247.pdf>

⁷² *Kralj v McGrath* [1986] 1 All ER 54, 60-61 *Kralj v McGrath* [1986] 1 All ER 54, 60-61 The case is related to negligent conduct on the part of the defendant, an obstetrician, during the delivery of Mrs Kralj's two twin babies. It was found that her second baby was not suitable for the normal delivery. The defendant wanted to rotate the position of the child without giving any anesthesia to Mrs. Kralji. The baby died during the delivery due to the severe injuries. In action for tort and breach of contract against the doctor, it was held by the Court that it is inappropriate to award punitive damages in this case. If it is introduced in this sort of cases, then the award of punitive damages has to be extended to every sort of cases where there is any amount of negligence. Such an approach towards the punitive damages would be inconsistent with the principle of damages.

⁷³ *Rookes v Barnard* and others [1964] UKHL 1, [1964] AC 1129.

⁷⁴ *AB V South West Water Services Ltd*: CA 1993 1 All ER 609.

⁷⁵ *AB v South West Water Services Ltd* where cause of action test was laid down to award punitive damages whereby the court said that cases concerning (i) Defamation, trespass, and malicious prosecution: personal wrongs.

⁷⁶ *Rookes v. Barnard* 1964 where the test of categories was laid down whereby it was declared that punitive damages might be awarded in cases which involve (a) Oppressive, arbitrary or unconstitutional action by servants of the government (b) Wrongdoing which is calculated to make profit (c) Statutory justification.

If one compares French and English law, there are significant differences concerning the punitive damages. The point where French law and English law is same, is that both nations accept the general norms of damages should be compensatory in nature rather than punitive in case of breach of contract irrespective of the nature of breach whether intentional, willful or not. Nevertheless, there is significant difference between the two systems. English law does not require any procedural formalities to terminate the contract by the plaintiff wishing to end the contract due to the default by the defendant. Plaintiff has to inform the defendant only that he is terminating the contract and need not give any reason to him if there is valid reason for the same. The defaulter cannot challenge the termination on the ground of good faith. The contract comes to an end immediately unlike France where the immediate effect of the termination is not possible unless approved by the court and the parties at fault get a grace period to perform the obligation under the contract in question. English law is more favorable to the commercial transaction certainty and speedy resolution of the case. One other point to be noted here is that English law has instances where punitive damages have been granted for the breach of contract, unlike the France which is still to adopt the same. French legal system prohibits any elements of punitive damages because punitive compensation comes under criminal administration and only compensatory damages are suitable for the breach of contract, i.e. under civil law.⁷⁷ Current trend under the French legal system reflects that Judges are willing and had granted punitive damages without referring the same as punitive damages.

U.S. Law on Punitive Damages: Contract Law in the United States is governed by the State law. The result is that the law of contract varies from state to state. The modern practice to govern the contractual relation and the rules are largely based on the common law legal system. In some of the state, there is federal contract law, i.e. Uniform commercial Code⁷⁸ which governs the contractual relations between the private parties. Even after the adoption of the Uniform Commercial Code, there are different interpretation evolved over a period depending upon the extent to which a state has codified the common law system of contract and the Restatement of

⁷⁷ It is called the doctrine of “*full compensation for losses*” “*réparation intégrale*”.

⁷⁸ The uniform commercial code is one of the uniforms Act that has become a law after the adoption of the same by all the fifty states to govern the sale transaction and other commercial transaction, which was published in 1952.

Contracts⁷⁹. Traditionally punitive damages for the breach of contract have been avoided by courts in the United States. The philosophy behind the remedies for the breach of contract has been to compensate the aggrieved party rather than to compel the party at fault to perform the obligation under the contract in dispute⁸⁰. The reason for not accepting the punitive damages in the U.S. is indeterminable. Gradually theory of efficient breach⁸¹ became the established norm by the contemporary law and economic scholarship in the U.S. who supported compensatory damages. Punitive damages have been considered as part of common law system which was not adopted in the U.S. except in few cases related to breach of contract to marry.⁸² U.S. Supreme court has observed that our Constitution has put a restriction on the excessive punitive damages. But despite the limit put by U.S Constitution punitive damages has been awarded in the U.S as well.

Indian Law on Punitive Damages-Supreme Court has defined the term Punitive damages as “*exemplary damages are damages on an increased scale awarded to the plain over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of malice, fraud, or wanton and wicked conduct on the part of the defendant and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are called punitive or vindictive damages.*”⁸³

Calcutta High Court in a case⁸⁴ said that to award punitive damages for the breach of contract it is not necessary to prove actual pecuniary loss which is used to decide the measure of damages. In

⁷⁹ Restatement of the law of contract in the United States is a legal piece of information on the interpretation of contracts in different state in the form of many sought to inform the judges and lawyers about the general principle of contract law derived from common law in the different states which recognized by every state.

⁸⁰ E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970).

⁸¹ Efficient breach is a theory developed in worldwide which is based on the idea that sometimes rightfully breaching the term of the contract is more fruitful than the performance. The aggrieved party, after all, can get the compensation for the loss which it suffered for non-performance if it proved that it had taken all the reasonable step to mitigate the loss arose due to the non-performance.

⁸² Early American reports shows some cases where punitive damages were given. In *Coryell v. Colbaugh*, 1 N.J.L. 90 (Sup. Ct. 1791) punitive damages were awarded by New Jersey Supreme Court for breach of promise to marry as an exception to the general rule of compensatory damages. Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 214, 1977.

⁸³ *Organo Chemical Industries v. UOI* (1979) 4 SCC 573.

⁸⁴ *Sheikh Jaru Bepari v. AG Peters* AIR 1942 Cal. H.C. 493.

case of breach of contract which involves fraud, malice or oppression, the court is not restricted to confine itself to the compensatory damages only proportionate to the amount of loss, but it can go beyond that and can grant vindictive damages to punish the party. The same High Court has observed in another case⁸⁵ and said that exemplary damages could be granted if the conduct of the defendant justifies the punitive elements of the amount of compensation. In a case⁸⁶ punitive damages should be awarded against conscious wrongdoing unrelated to the actual loss suffered. Such a claim should be specially pleaded, and the other party at fault should have notice of the fact otherwise it will be considered as against the fair procedure and natural justice.

Canadian Law on Punitive Damages: In a Canadian case⁸⁷ it was observed by the Supreme Court of Canada that punitive damages should be awarded in exception cases of the breach of contract where the conduct of the defendants shows high-handed, malicious and arbitrary misconduct. Punitive damages can be awarded on the basis of assessment of amount based on the harm caused, the degree of misconduct, the bargaining position of the plaintiff, advantage gained by the defendant. The sole purpose of awarding punitive damages should be to punish the defendant for his misconduct or where the other fine or penalties imposed on the defendant are inadequate to achieve the objective of deterrence, retribution.

A relevant observation is also made by the Canadian Supreme Court in a case⁸⁸ where it was held that Court could award punitive damages in a breach of contract case, where the defendant apart from the breach sued upon; he has committed an “independent actionable wrong”⁸⁹. The Court found rejected the argument for the award of punitive damages for single, egregious breach of contract without any principles reason by saying that it will be incoherent and arbitrary. Further, the court said that the defendant must be liable under the breach of contract for malicious, high-handed, arbitrary action. The court said that fraudulent action on the part of the defendant itself would not attract the award of punitive damages.

⁸⁵ Alexander Brault v. Indrakrishna Kaul AIR 1933 Cal. H.C. 706 *Obiter dicta*.

⁸⁶ General Motors (I) Pvt. Ltd. v. Ashok Ramnik Lal Tolat, (2015) 1 SCC 429

⁸⁷ Whiten v. Pilot Insurance Company [2002] 1 RCS 595 available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1956/index.do> (last visited on 12th January, 2018).

⁸⁸ Whiten v Pilot Insurance Company (2002) 209 DLR (4th) 257 available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1956/index.do> (last visited on 13th January, 2019).

⁸⁹ This meant that an award of punitive damages could only be realized if the party in breach committed more than one breach.

England and Wales High Court has made a different observation in this regard and said in a recent case⁹⁰ that generally punitive damages cannot be awarded in case of breach of contract. Even in some situation it may be justified to be awarded; it must be awarded for the tortuous act by the defendant under a contract.

Test to Award Punitive Damages for the Breach of Contract

On the determination of the question that what should be the criteria to award punitive damages in case of breach of contract, many cases where the award of punitive damages was considered by the court shows that punitive damages can be awarded for the breach of contract if the following factors are present-

1. Breach of the contract which also results into the breach of a legal right granted by statutes⁹¹
2. Breach of a contract which occurred due to the fraudulent inducement by the defendant⁹²
3. Breach of a contract which also results into the breach of fiduciary duty⁹³.
4. Breach of a specialized contract wherein the obligation is towards public by a public company⁹⁴.

⁹⁰ IBM United Kingdom Holdings Ltd & Anr v Dalgleish & Ors (Rev 1) [2015] EWHC 389 (Ch) *Obiter dicta*.

⁹¹For example if an individual is buying a flat from the builders he will enter into a contract to buy the same. If the builder fails to fulfill his obligation under the contract, he will not only be liable for the breach of the contract he has made with the plaintiff, but he will also be liable for the violation of a legal right granted to every apartment owner under the RERA. A contract for the transfer of IP right can also be referred here where the breach may result into violation of legal duty under the IPR law in addition to the breach of contractual duty.

⁹². It requires three elements to be proved. Firstly breach of contract. Second, breach of the duty of fair dealing and good faith while performing contractual obligation thirdly, intentional or willful breach of the duty of good faith which causes loss to the plaintiff. Punitive damages can be awarded in this case if it is proved that defendant has not only violated his contractual duty, but his action shows that there is a lack of fair dealing and good faith by the defendant who intentionally disregards the duty of fairness and good faith to cause harm to the plaintiff. This type of cases covered where the defendant intentionally induce the plaintiff to entered into the contract so that not only he can make the profit but also cause the loss to the other party or absolute disregard the wellbeing of the plaintiff to make the profit for himself.

⁹³ It covers those contract cases where plaintiff relied on the defendant due to the assurance given by the defendant under a contract, secondly, the kind of relationship established through a contract is also recognized by special statutes which require the defendant a high standard of conduct, thirdly, defendant maliciously or willfully disregard the code of conduct required by law. One of the examples may be attorney and client relationship.

⁹⁴ Contract entered into by the construction company to provide road, bridges where public interest is involved and if the quality is compromised, then the party may be liable of punitive damages.

Come to the first criteria where a breach of contract also results in the breach of a legal duty imposed by a statute. The first criteria to impose punitive damages should be there where the breach of an obligation under a contract is something which is also a breach of a duty imposed by law independently from the contract duty in question. To award punitive damages, it is necessary to differentiate a mere breach of contractual duty from the breach of a legal duty independent of the contracts but arises out of a contract. Punitive damages may be awarded for the breach of contract if the plaintiff can prove the following- Firstly, there was a contract, second, there was a legal duty imposed by specific legislation arising from the contract but independent from it, and third, there was a malicious, willful or outrageous action on the part of the defendant which caused injury to the plaintiff. If all the elements are present, then it should be the perfect case to award punitive damages. But in case where there is no actual loss occurred then nominal damages can be awarded.

In a case⁹⁵ Delhi H.C made a relevant observation in this regard and said in case of a contract made for the transfer of an intellectual property right in a thing, the breach will attract punitive damages in addition to the compensatory damages. The court said that when the conduct of the defendant shows criminal propensity, then the award of punitive damages is required to curb the inclination of law breaking and infringement of the right recognized by statutes. The philosophy behind the award of punitive damages for the breach of contract is to take correctional measures in suitable cases and to give a lesson to the like-minded people. In other words, the law will not excuse them on the basis that it is a matter between two parties and as such only the particular circumstances and fact should be taken into account while determining of the award. The court said when the contract is concerning the IPR right, and there is an infringement of the same then not only the compensatory damages will be awarded but punitive damages can also be provided to discourage lawbreakers indulged in the encroachment of the right of others with liberty to make money. It is crucial to impose punitive elements in the damages to spell financial disaster for them. Another function of punitive damages is to provide a civil alternative for the minor offences, and as such, the defendant cannot escape from his liability for his outrageous behavior.

⁹⁵Time Incorporated v. Lokesh Srivastava (2005) 30 PTC 3 (Del).

Case laws	Damages	Award of damages (Nature)	Ratio decidendi
Sheikh Jaru Beparivs A.G. Peters And Ors. AIR 1942 Cal 493	Rs. 3500	Punitive	The injury complained of need not amount to any actual pecuniary loss. The pecuniary loss comes into consideration only to help the determination of the measure of damages to be awarded in such a case. In cases where the elements of fraud, oppression, malice or the like are found, the law does not confine its remedy to the payment of compensation merely proportionate to any pecuniary loss suffered by the injured person. It can grant vindictive or exemplary damages by way of punishment to the wrongdoer.
General Motors (I) Pvt. Ltd. v. Ashok Ramnik Lal Tolat, (2015) 1 SCC			Punitive damages are awarded against a conscious wrong doing unrelated to the actual loss suffered. Such a claim has to be specially pleaded. Mere proof of “unfair trade practice” is not enough for claim or award of relief unless causing of loss is also established which in the present case has not been established.
Srimagal And Co. vs. Books (India) Pvt. Ltd. And Ors. AIR 1973 Mad 49	Rs. 2,500 by way of damages for infringement		In case of a claim for accounts for profits made by the defendant, the basic question relates to the quantum copied. However, the plaintiff is not entitled to calculate damages to include his loss as well as the profits of the defendant; he can use only one of these for calculation of damages.

			Since account of profits involves a lengthy process of verification of records and books of accounts of the defendant, it is often advised that the plaintiff may choose damages for loss suffered.
Pillalamarri Lakshikantam v. Ramakrishna Pictures AIR 1981 AP 224			
Time Incorporated vs. Lokesh Srivastava And Anr. 2006 131 CompCas 198 Delhi	The plaintiff has claimed a decree of Rs. 12.5 Lakh on account of damages suffered by the plaintiff or an order of rendition of accounts of the profits illegally earned by the defendants by use of the impugned trade mark including 5 Lakh as punitive and exemplary damages for the flagrant infringement of the plaintiff's trade mark, this Court is of the	Punitive	The award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrongdoer and the like-minded from indulging in such unlawful activities. Whenever an action has criminal propensity also the punitive damages are called for so that the tendency to violate the laws and infringe the rights of others intending to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrongdoers that law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the list but suffer on account of the breach. This Court has no hesitation in saying that the time has come when the

	considered view that a distinction has to be drawn between compensatory damages and punitive damages.		Courts dealing actions for infringement of trademarks, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage dishearten lawbreakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them.
Adobe Systems, Inc & Anr. V. Mr. P. Bhominathan & Anr. on 5 March, 2009	The plaintiffs claim that he is entitled to a sum of Rs.32, 15,500/- and it has gone unrequited which includes loss of business, reputation and goodwill in the market. Since the above-claimed amount is based on the assessments by the plaintiffs, I am of the view that a sum of Rs.5 Lakhs can be reasonably	Punitive	The court justified the grant of punitive damages by flagrancy of infringement which is the doctrine derived from US law.

	awarded to the plaintiff No.2 as compensatory damages and an amount of Rs.5 Lakhs as punitive/exemplary damages as well as damages on account of loss of reputation and damage to the goodwill.		
Honeywell International Inc. v. Pravin Thorat & Ors. on 24 August, 2015	awarded punitive damages in addition to the cost of proceedings, to the tune of three Lakhs rupees	Punitive	The award of a rather sheer amount of monetary damages despite the absence of any evidence as to actual damages or award granted thereof. The question of whether punitive damages should be awarded requires the consideration of whether the defendant's misconduct ' <i>shocks the conscience</i> ', and has an element of ' <i>wilful and wanton disregard</i> ', as punitive damages are known to be awarded only in sporadic cases. In the current case, it appears that the Court has gone on to award punitive damages without looking into the nuances of this borrowed concept.

Basis	Nominal Damages	Punitive damages
Actual loss	Nominal damages can be awarded for the breach of contract where the contractual right has been violated by the defendant although no actual loss has occurred to the claimant	Punitive damages may be awarded in addition to the nominal damages in case of breach of the contract where the conduct of the defendant shows gross negligence or wilful disregard to the interest of the plaintiff under a contract
Proof	Award of nominal damages does not require proving the actual loss suffered. It is sufficient to prove that the contractual right of the plaintiff is violated.	Award of punitive damages can be possible when the actual loss is more than what is stipulated by the plaintiff and which can be calculated and proved
Unjust enrichment	Nominal damages are given to recognise the right of the plaintiff hence the sum of money awarded is less, and no question of unjust enrichment arises	Caution is required while awarding punitive damages especially when the loss occurred is non-pecuniary
Causation, Remoteness Consequential, indirect	The award to punitive damages does not require much on the causation	Punitive damages have some element of punishment, so it becomes necessary for the other party to prove that the loss or injury to the plaintiff is directly resulted from the breach of contract by the defendant who is not too remotes which is the direct consequences of his behaviour.

*Reasonableness	Nominal damages prove that the plaintiff had a legal right to file the lawsuit and that the defendant's behaviour was wrong. It is often paired with the fact that there is no financial loss, or at least not one that can amount to more than the nominal damages	Punitive damages should be proportionate to the loss caused to the plaintiff. It can be granted in addition to the compensatory damages or if the damages are incalculable but it has occurred then punitive damages is best suits the situation
Liquidated Damages (whether pre-estimated, reasonable?)	Nominal damages cannot be pre-estimated due to the small amount which is only granted to recognise the plaintiff rights under the contract	Punitive damages may be liquidated, and parties can estimate it while entering into the contract that in case of the default by either party they have to pay the specified amount when the nature of the contract justified this pre-estimation.

Objectives Achieved: Section 73 of the Contract Act deals with the actual loss which is a direct result of the breach of contract by the other party and the court decides the amount of compensation on the basis of several factors among which the most accepted one is putting the plaintiff in the same situation had the breach had not occurred. Section 73 gives the court power to award punitive damages or nominal damages keeping in mind the particular situation and fact of the case. If the circumstances of the case justify the award of punitive damages, then the court has the discretion to award the same.

Proposed Amendment to section 73 and 74 of the Contract Act

There should be an explanation added in section 73 of the Contract Act which may provide for punitive damages to the plaintiff for the breach of contract by the defendant if the test proposed is satisfied. There is a less scope under section 74 for the award of punitive damages as the parties to the contract have already stipulated the amount mutually.

In closing, this part it can be said that punitive damages are a *sui generis* class of damages which is available in exceptional circumstances. Award of punitive damages is more suitable for the intentional breach of legal duty rather than intentional breach of contractual duty. But many instances show that traditional remedy is failed to adequately compensate the plaintiff. The principle of efficient breach does not justify the opportunistic breach by the defendant where he will get more than he bargained for under the contract in question at the expense of the plaintiff. Therefore, compensatory damage is not sufficient for every breach of contract. But from the policy perspective, grant of punitive damages for the breach of contract should be regulated by legislation instead of leaving it entirely on the court to decide when it can be availed. There is not much scope for the argument in favor of punitive damages to develop as a contract law remedy. But the door is wide open for the recognition of the punitive damages for the breach of contract.

Research Questions Identified

1. Whether Indian contractual remedies can include Punitive or exemplary damages for Intentional/ deliberate/ knowingly/ committing the breach of contract?

The previous chapter has deliberated in length upon the possibility of inclusion of remedy of punitive and exemplary damages statutorily in the Indian Contract law by amending section 73 of the Contract Act, 1872. However, this is only an mid-term recommendation. The Final Report will address this issue in more detail and thereby will arrive at a conclusive recommendation and draft amendment clause.

2. Whether the Liquidated Damages and Penalty Clauses can be enforced without showing any loss or damage in the Indian Context?

The enforcement of Liquidated damages and penalty clauses in India is hit by s. 74 of the Contract Act. In implementing this section, the courts require the plaintiff to show actual loss or damages and for this they have carved out a nuanced difference between ‘proving actual loss or damage’ and ‘showing actual loss or damage’. This prolongs the litigation even when the parties have ex-ante agreed upon a desired sum. However, in many countries this is not the case. In Spain and other civil law countries, the parties are awarded the agreed upon sum *ipso-facto* of the breach. This is another avenue of reform which can be looked into. The final report will make a conclusive recommendation in this regard.

3. What should be the formula for award of damages?

Currently there is no statutory general formula for calculating and awarding damages. The Court follows general principles set by case laws and precedents, which leads to lengthy litigation process. The Project will explore the possibility and desirability of deriving a general and standard formula for calculation of damages after a comparative study of law of various countries in this regard.

4. What steps can be taken to reduce the time taken by the courts in final adjudication of commercial litigation?

The time taken by the courts is the Achilles heel in contractual enforcement in India. According to ease of doing business report, courts of first instances in India on an average takes 1445 days to finally adjudicate a commercial dispute.⁹⁶ Further, as the matter goes to appeal to the High Court and finally to the Supreme Court, the parties are up for a lengthy litigation process. And in an exceptional case the court took 31 years to dispose the matter.⁹⁷ The Arbitration Act has also not resolved the situation as after the arbitration the parties go to the court and exploiting loopholes and appeal opportunities again a tiresome litigation ensues. This lengthy litigation process is the primary reason why the contractual enforcement rank of India is so low despite performing well on the other indicators. Minor tweaks here and there will not remedy the dire situation; radical substantive and procedural readjustment is need of the hour. This project will explore the possibility of reform in substantive as well as procedural law to reduce the time taken by the judiciary in contractual enforcement.

5. What steps should be taken to operationalize Order XLI Rule 11A of Code of civil Procedure, 1908?

Under Order 41 Rule 11A the courts shall endeavor to conclude the hearing of appeals within 60 days from the date on which the memorandum of appeal is filed. This Research will analyse what steps can be taken to materialize this section into practical reality. It will also endeavor to look into the possibility of making this special provision a general rule of law.

6. Whether the enactment of commercial courts act has provided the desired result?

The Commercial Courts Act as deliberated upon earlier establishes commercial courts to adjudicate upon commercial dispute. The Recent amendment of the Act further expands this hierarchy by introducing commercial appellate courts sandwiched between commercial courts and commercial division of High Courts. Further, the amendment also decreased the minimum value of dispute from 1 Crore Rupees to 3 Lakh Rupees, so as to bring vast number of

⁹⁶*Supra* note 2, ease of doing business report 2019. (The ideal time which the report sets is 120 days which no country in the world has reached. The closest is Singapore with 164 days).

⁹⁷ Kalawati (D) through LRs & Ors Vs. Rakesh Kumar & Ors , Civil Appeal No. 2244 of 2018.

commercial litigations under the purview of commercial courts. The present project will examine the working of this commercial courts structure and the Act as a whole to assess its efficiency in resolving the commercial disputes.

7. Whether the amendment to the Specific Relief Act in 2018, bringing substituted performance will help in enforcement of contracts?

As discussed earlier the Specific Relief (Amendment) Act 2018 brought in the concept of substituted damages into Indian contract law enforcement mechanism. This was done with a specific aim of increasing the ease of doing business in India. The present research will study the effect of this reform and analyze its efficacy.

8. What should be the different avenues for commercial dispute resolution in India?

Currently the Indian legal regime provides a number of avenues for private commercial disputes including ordinary civil courts, special commercial courts, Arbitration, Mandatory mediation. The Final report will submit the thorough review of the working of these forums and look into the possibility of reform in this area.

9. What parameters should be set for assessing the quality and efficiency of dispute resolution in India?

Inherent to the issue of improving the contractual enforcement in India is the setting of standards and parameters against which the quality and efficiency of dispute resolution can be measured. Will evaluating Indian dispute resolution system against the parameters set by World Bank provide a genuine assessment of quality of the system in India or do sui-generis standards needs to be set taking into account the socio-economic circumstances in India? This project will answer this critical question.

10. Whether Limitation of time of 12 months under the Arbitration Act, will help in speedier resolution of commercial disputes in India?

The Arbitration Act sets a 12 months strict timeline for adjudication of disputes, which can be extended further the court. Will this system help in the speedier resolution of dispute? There are chances that it will be prone to the prevailing delaying tactics by the economically powerful

party against the weaker party? Further, should this time limit be further brought down is also relevant query which will be focused upon.

11. Whether “Reliance Loss” consequential damages should be introduced as remedies in contract law?

Reliance loss is a type of restitutory damages. It relates when a party to the contract placing reliance on the performance of the contract by the other party incurs some out of pocket expenditure. The present project will critically examine the possibility of their inclusion as consequential damages and the effect it will have on the improving the contractual enforcement in India.

Apart from the above highlighted research questions a comparative analysis of the legal provisions on contractual remedies in common law and civil law countries will be undertaken and will be submitted in the Final Report. Tentative Jurisdictions that are sought be covered and reviewed are: France, Switzerland, Brazil for civil law; New Zealand, Canada, Singapore, Indonesia and Japan for common law. Also, the Research Project will undertake a thorough study of reforms done by other countries to improve their contractual enforcement ranking and will assessed the suitability of those reforms for Indian context.

PART C:
MID TERM PROGRESS

Whether a Reform in Section 74 of the Indian Contract Act, 1872 is required to enforce the Penalty Clauses.

This chapter of the research proposes the reformation of Indian Contractual Law to render penalty clauses enforceable insofar as they are not “manifestly unreasonable”.

From antiquity the moral obligation to keep a promise has been a cardinal tenet of ethical philosophers, publicists, and philosophical jurists.⁹⁸ This can be best illustrated by the following quote from the Epic *Ramayana*:

रघुकुल रीत सदा चली आई,

प्राण जाए पर वचन न जाई.

This translates as “It is the tradition of the house of Raghu that promises must be kept even at the cost of one’s life”.⁹⁹ This verse from the *Ramayana* signifies the pedestal on which promise keeping was portrayed in the ancient Indian Epic Age. It is a disturbing irony that the country in which the epic originated is consistently ranked among the lowest in the Enforcement of Contracts indicator in the Ease of Doing Business rankings by the World Bank. In 2015 rankings, India was 186th among 189 countries.¹⁰⁰ In the 2019 Rankings it ranked 163rd among 190 countries in relation to contract enforcement by the World Bank in its ease of doing business report of 2018.¹⁰¹

To remedy the dire situation the Parliament of India enacted the Specific Relief (Amendment) Act, 2018. The amendment brought radical changes in the area of contract enforcement. Most important were limiting the discretion of the court in granting the remedy of specific performance and injunction in disputes related to infrastructures and introducing the right to substituted performance.¹⁰² The limitation of Court’s discretion in granting the remedy of

⁹⁸ Pound, *Promise or Bargain?* 33 Tul. L. Rev. 455, 455 (1959).

⁹⁹ TULSIDAS RAMAYANA, Ayodhya Kand available at <http://estudentdavedanta.net/The-Ramayana-Of-Tulasidas.pdf>.

¹⁰⁰ Available at <http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf>. (Last visited on 18 December, 2018).

¹⁰¹ Doing Business 2019: Training for Reform, available at http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf. (Last visited 18 December, 018).

¹⁰² See the Specific Relief (Amendment) Act, 2018 § 3, 10 (amending section 10 & 20 of the Act and inserting section 20A).

specific performance is a significant reform to strengthen contractual enforcement. Now specific performance can be claimed as a matter of right by the parties.¹⁰³ This marks a significant divergence from the compensatory principle hitherto regarded as fundamental to contract law. The principle in brief stated that instead of making an unwilling party perform his obligation under a contract reasonable compensation can be awarded to the other party. This shift from common law principle of awarding damages and compensation to the civil law system of ensuring performance marks an important turning point in Indian contractual law. However, more such radical adjustments are required to be made in the future to improve the contracting environment of India.

To resonate with the above shift towards specific performance, this chapter explores the possibility of reform in another avenue of contractual enforcement law viz. The law on penalty clauses. To this end the article is structured as follows: Firstly, it will analyze the current legal position on penalty clauses in India by discussing the statutory provision and case laws. Secondly it will evaluate the theoretical underpinnings behind such position and will attempt to counter those arguments. Thirdly, it will undertake the comparative approach and examine the legal position in common law and civil law countries with special focus on German Civil Code. The last part will humbly summarize and provide concluding remarks.

Remedies for breach of contract at common law emerged at a time when judges rode a circuit. They would appear in a town for one session of court, make their rulings, and then go to the next town. If I broke my promise to build a house for you the court had no easy way to order me to complete the job. Judges did not stay around long enough to oversee their rulings. Hence, rather than require performance, the judges would require me to pay damages.¹⁰⁴

Modern trade depends, perhaps increasingly, on our ability to call on the state to hold others to their promises: The value of your promise to perform x (as opposed to the value of x itself) stems principally from the ability it gives me to arrange my affairs in anticipation of your performance.¹⁰⁵

¹⁰³ See §3 of the Specific Relief (Amendment) Act, 2018 (which amends §10 of the Specific Relief Act making Specific Performance as a statutory right and minimizing the discretion vested in the Courts)

¹⁰⁴ Douglas G. Braid Economics of Contract Law Introduction by Douglas G. Braid xii (2007).

¹⁰⁵ Douglas G. Braid Economics of Contract Law Introduction by Douglas G. Braid ix (2007)

Penalty Clauses Enforcement in India

In India, at present, the enforcement of penal clauses in a contract is hit by S.74 of the Indian Contract Act, 1872. It lays down a general rule applicable to both liquidated damages and penalty. It states:

*“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named for, as the case may be, the penalty stipulated for”*¹⁰⁶

The Supreme Court of India has explained the meaning and scope of this section in a plethora of landmark judgements viz. *Fateh Chand v. Balkishan Das*¹⁰⁷, *Maula Bux v. Union of India*¹⁰⁸, *Rampur Distillery Case*¹⁰⁹, *Raman Iron Foundry Case*¹¹⁰, and *ONGC Case*¹¹¹ and recently in *Kailash Nath Case*¹¹². The legal position emerging as a result of judicial interpretation of S.74 can be summarised as follows:

1. The Indian legislature has enacted a uniform principle applicable to all stipulations naming amounts to be paid in case of breach.¹¹³ Therefore, the distinction found in English Common law and other jurisdictions following common law, between Liquidated damages as a genuine-pre-estimate of loss requiring the court to undertake a cumbersome enquiry is avoided.
2. S. 74 deals with the measure of damages in two classes of cases: (i) where the contract names a sum to be paid in case of breach (ii) where the contract contains any other stipulation by way of penalty.¹¹⁴ In both the cases the innocent party is only entitled to reasonable compensation.

¹⁰⁶ §74, the Indian Contract Act, 1872.

¹⁰⁷ *Fateh Chand v. Balkishan Das* AIR 1963 SC 1405.

¹⁰⁸ *Maula Bux v. Union of India*, AIR 1970 SC 1955.

¹⁰⁹ *Union of India v. Rampur Distillery and Chemical Co. Ltd.*, AIR 1973 SC 1098.

¹¹⁰ *Union of India v. Raman Iron Foundry*, AIR 1974 SC 1265.

¹¹¹ *Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd.*, AIR 2003 SC 2629.

¹¹² *Kailash Nath Associates v. Delhi Development Authority*, 2015 (1) SCALE 230; (2015) 4 SCC 136.

¹¹³ *Fatehchand Case supra* note 107.

¹¹⁴ *Ibid.*

3. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable¹¹⁵ that is to say the amount agreed by the parties merely acts as a ceiling/upper limit.
4. **Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts** by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture¹¹⁶
5. Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.¹¹⁷
6. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.¹¹⁸
7. When there is a breach of contract, **the party who commits the breach does not *eo instanti* incur any pecuniary obligation**, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, **damage or loss caused is a sine qua non** for the applicability of the Section.¹¹⁹ The effect of Section 74, Contract Act of 1872, is to disentitle the plaintiffs to recover *simpliciter* the sum agreed whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.¹²⁰ **The words in S. 74 “whether or not actual loss or damage is proved to have been caused thereby” should not mislead to think**

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ ONGC case *supra* note 111, Para 64.

¹¹⁸ Kailash Nath case, *supra* note 112, para 43.

¹¹⁹ *Ibid.*, para 43.

¹²⁰ Bhai Panna Singh and Ors v. Bhai Arjun Singh and Ors. AIR 1929 PC 179.

that actual loss is not necessary. The above referred words in s.74 are confined to cases in which it is not possible to prove the monetary value of loss and therefore reasonable compensation even as fixed by the parties may be allowed. Where the loss in money can be determined it must be proved.¹²¹

8. In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.¹²²
9. Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;¹²³
10. If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.¹²⁴

Theoretical Underpinnings behind Penalty Clauses

The position against contractually agreed penalties stems has been argued to be justified on the basis of three theoretical arguments: conformity to just compensatory principle, prevention of punishment, oppression and bar on indirect specific performance. This part will analyze these arguments and present counter arguments. It will also present in summary the argument of economic analysts in favor of enforcing penalty clauses.

Just Compensatory Principle: the just compensatory principle is a central tenant in the award of damages by the Courts. It rests on the foundation that pre-agreed sums by the parties should not act a secondary obligation to be performed in case the party fails to perform the primary obligation.¹²⁵ The compensation has to be just. However, In India the commercial litigation consumes a lot of time as we have seen in the Ease of doing business report. Also, in commercial transaction also go through several stages of negotiations and bargaining and considerable amount is spent in attorney's Fees. And, if after such a lengthy and time and consuming process

¹²¹ Maula Bux Case., *supra* note 108.

¹²² ONGC case, *supra* note 111, Para 67.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Mindy Chen-Wishart, *Controlling the Power to Agree Damages*, in *WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY* at 272 (Peter Birks ed. 2006).

no legal certainty is achieved then that itself leads to injustice. A trade need to made between expected legal certainty and ideal justice.

Prevention of Punishment and Oppression: Another argument given against penalty clauses is that it leads to civilians making penal laws through contracts. It is founded on the idea that Penalty clauses are intended for punishing the party for breach. However, Mindy Chen-Wishart, in her analysis has argued that it is not the case as the contractual clauses enacted by the parties do not have the same societal reaction and attitude as criminal provisions. The element of societal reaction and condemnation which is the central element in criminal law is absent in contractual created penalties.¹²⁶ Her point, simply stated is that these clauses though named as penalty are not penal (criminal, punishment oriented) in nature. They are more in the form of overcompensation in case of non-performance.

Bar on Indirect Specific Performance: The third Argument given against penalty clauses is that they are intended to induce a party to specific performance which in law is a discretionary remedy.¹²⁷ However, this argument has now become redundant after the Specific Relief (Amendment) Act, 2018 which has shifted the legal regime in favor of specific performance by limiting the discretionary powers of the Court. Making Penalty clauses enforceable will resonate perfectly with this shift.

On the question whether disproportionate compensation (manifesting unjust enrichment) can be a sufficient ground for intervention with contractual freedom several essays have emerged which undertake the economic analyses of penalty clauses.¹²⁸ The economists place great emphasis on the freedom of contract since the underlying assumption of economic analysis is that “if left to themselves parties on equal terms (acting as economic agents) will maximize their benefits.”¹²⁹ Arguing on this line the economist advocate the enforcement of penalty clauses as it will ensure maximum benefits for the both sides of a contractual transaction if they are on equal footing. Economists also argue that the rule against penalties fails to recognize various costs and risks such as personal and idiosyncratic loss, transaction costs of litigation and negotiation. Such

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ See for e.g. Andrew Ham, *The Rule Against Penalties in Contracts: An Economic Perspective*, 17 MELB. U. L. REV. 649 (1990); C.J. Goetz & R.E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle*, 77 COL. L. REV. 554 (1977); Samuel A. Rea, *Efficiency Implications of Penalties and Liquidated Damages*, 13 J. L. S. 147 (1984). (All cited and discussed in T. A. Downes, *Rethinking Penalty Clauses*, in PETER BIRKS (ED.), *WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY*, (2006) chapter 11 at note 85.)

¹²⁹ *Ibid. Ham.*

failure results in under-compensation of a party who has stipulated for a measure of damages in the first place.¹³⁰

The, conclusion drawn by the economists is that if the contract has been freely negotiated and then a penalty has been stipulated for then such penalties must not be interfered with by the courts to ensure certainty and respect for contractual freedom.

Other jurisdictions:

1. United Kingdom and other common law countries: the common law of UK does not allow the enforcement of Liquidated damages that are penal in nature. It involves the court to undertake a cumbersome exercise to determine whether the amount stipulated for is ‘genuine pre-estimate of loss’ or is *in terrorem* (*penal in nature*). Unlike India however, there is no provision for reasonable compensation. Thus, the courts in UK will either accept the clause or reject it completely. One of the leading case on the matter is *Dunlop Pneumatic Tyre Case*¹³¹, where the House of Lords established the principles on how to determine whether a damage clause actually is a penalty and thereby unenforceable. The principle laid down in this case has been followed in other common law jurisdiction such as Australia, Canada and Ireland.¹³² However, Recently the UK Supreme Court by its judgment in the cases of *Cavendish Square Holding BV v Makdessi*¹³³ and *ParkingEye Ltd v Beavis (Consumers’ Association intervening)*¹³⁴ have changed the legal position radically. The Court rejected the old and traditional test of determining whether the clause is LDC or a penalty.¹³⁵ It was held, *inter alia*, that:

¹³⁰ Ibid. Goetz and Scott at p. 588.

¹³¹ *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*, [1915] AC 79, 86-87

¹³² This case was cited by the High Court of Australia in *Ringrow Pty Ltd v BP Australia Pty Ltd* [2005] HCA 71, section 12; and by the Supreme Court of Ireland in *O’Donnell v Truck and Machinery Sales Limited* 1998 4 IR 191; The Supreme Court of Canada has adapted a similar approach in *Elsley v. J.G. Collins Ins Agencies*, [1978] 2 S.C.R. 916, 946, and does not allow for any recovery of an amount exceeding the actual damage; See J. Frank McKenna, *Liquidated Damages and Penalty Clauses: A Civil Law versus Common Law Comparison*, THE CRITICAL PATH, page 1 (Spring 2008) (For a brilliant exposition of comparative law on penalty clauses across jurisdictions), available at <https://www.lexology.com/library/detail.aspx?g=d413e9e1-6489-439e-82b9-246779648efb>. (last visited on 18.12.2018).

¹³³ [2015] UKSC 67.

¹³⁴ [2015] 3 W.L.R. 1373.

¹³⁵ The traditional test required a comparison between the stipulated amount and the greatest loss that could be proven to have been caused by the breach. (See. *Dunlop Case*, Supra note)

“The general test can be described as whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party’s interest in the performance of the contract.” (Lord Hodge).

The important to note is that the test laid down empowers the court to take note of various other factors in determining the true nature of the clause for e.g. negotiating power of the parties at the time of contracting, inability to prove damages in certain cases etc.

2. United States of America: The United States Commercial Code (UCC) and the Restatement 2d Contracts, both contain similar provisions with regard to rule against penalties. Both provide that damages may be liquidated in the agreement. But the amount has to be reasonable taking into account the anticipated or actual harm caused by the breach, the difficulties of proof of loss. The UCC provide another factor viz. the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term which fixes unreasonable large liquidated damages is void as a penalty under UCC. While under Restatement 2d contracts, such a term is unenforceable on grounds of public policy as a penalty.¹³⁶

3. Civil Law Countries: The exact extant of penalty clause enforcement varies across civil law countries with no single uniform rule. The civil law countries, while not disclaiming any power of control over penalty clauses, have operated from the presumption that such clauses should be given effect, as reflecting the will of the parties, and that any control must be seen as an exceptional measure.¹³⁷ However, the civil codes of most civil law countries are based on the Napoleonic code, which allowed for penalties to encourage performance of contractual obligations.¹³⁸ However, in recent times the tide has shifted towards narrowing the scope of such penalties, and enabling the courts to reduce the amount if they find it excessive.¹³⁹ A Resolution¹⁴⁰ relating to penalty clauses was issued by the Council of Europe in 1971 with the aim of recommending a uniform application of penalty clauses. The resolution allows the enforcement of penalty clauses though with some caveats viz. no enforcement if principal

¹³⁶ U.C.C. § 2-718; Restatement 2d Contracts § 356.

¹³⁷ See G.H. Treitel, Remedies for Breach of Contract (Oxford University Press, 1988) (for a comparative treatment).

¹³⁸ See McKenna, supra note 132.

¹³⁹ *Ibid.*

¹⁴⁰ Resolution 78(3) of the Committee of Ministers of the Council of Europe, Relating to Penal Clauses in Civil Law.

obligation has been performed¹⁴¹, no concurrent remedies of specific performance and penalty clause enforcement (only one of them)¹⁴², the amount stipulated sets the upper limit for damages,¹⁴³ power of the courts to reduce the amount stipulated “when manifestly excessive”, particularly after performance of principal obligation in part, however the amount cannot be reduced below the damages payable for failure to perform the obligation.¹⁴⁴ Most Civil law Countries have implemented the regulation.¹⁴⁵

Germany: The German Civil Code establishes a clear general rule, rendering contractual “penalty clauses” enforceable insofar as they are not “disproportionate.”¹⁴⁶ The German Civil Code from section 339 to section 345 lays down the law relating to enforceability of contractual penalty.¹⁴⁷ Section 339 lays down the general law with regard to playability of penalty. It states that “*Where the obligor promises the obligee, in the event that he fails to perform his obligation or fails to do so properly, payment of an amount of money as a penalty, the penalty is payable if he is in default. If the performance owed consists in forbearance, the penalty is payable on breach.*”

Section 340 talks about the promise to pay a penalty for non-performance it states:

“(1) If the obligor has promised the penalty in the event that he fails to perform his obligation, the obligee may demand the penalty that is payable in lieu of fulfilment. If the obligee declares to the obligor that he is demanding the penalty, the claim to performance is excluded.

(2) If the obligee is entitled to a claim to damages for non-performance, he may demand the penalty payable as the minimum amount of the damage. Assertion of additional damage is not excluded.”

Section 341 talks about the promise of a penalty for improper performance. It lays down the right of the obligee to demand the payment of penalty in addition to performance if the obligor has promised the penalty if he fails to perform the promise properly.

¹⁴¹ *Ibid* Art.4.

¹⁴² *Ibid* Art 2.

¹⁴³ *Ibid* Art 6.

¹⁴⁴ *Ibid* Art 7.

¹⁴⁵ McKenna, *Supra* note 132.

¹⁴⁶ George White, *Lost on Penalties: Reconsidering the rule against contractual penalty clauses* available at https://www.barcouncil.org.uk/media/313935/_30__george_white.pdf (last accessed 10th April, 2019).

¹⁴⁷ BGB §339 – 345, available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1233 (last accessed on 10th April, 2019).

Section 342 deals with alternatives to monetary penalty. It states that “*if, as penalty, performance other than the payment of a sum of money is promised, the provisions of section 339 to 341 apply; the claim to damages is excluded if the obligee demands the penalty.*”

Section 343 restricts the application of the above sections on penalty by giving the judiciary the power to reduce the amount of penalty. It states “*(1) If a payable penalty is disproportionately high, it may on the application of the obligor be reduced to a reasonable amount by judicial decision. In judging the appropriateness, every legitimate interest of the obligee, not merely his financial interest, must be taken into account. Once the penalty is paid, reduction is excluded.*

(2) The same also applies, except in the cases of section 339 and 342, if someone promises a penalty in the event that he undertakes or omits an action.”

Numerous mixed and common law jurisdictions have now adopted the civilian tradition of enforcing penalty clauses, subject to reasonableness or proportionality.¹⁴⁸ That approach finds support in various international instruments for the harmonisation of contract law.¹⁴⁹ In short, the time is right to reconsider the law of penalty clauses

International Instruments: UNIDROIT Principles 2016¹⁵⁰ also provide for enforcement of penalty clauses. Article 7.4.13 of the principles entitles the aggrieved party for “agreed payment for non-performance” irrespective of actual harm by non-performance.¹⁵¹ The illustration attached to it makes it clear that in the event of the breach the aggrieved party will be entitled to the agreed payment *simpliciter eo instanti*. However, the amount specified may be reduced to reasonable amount where it is “*grossly excessive*” in relation to the harm resulting from the non-performance and to the other circumstance.¹⁵²

Numerous mixed and common law jurisdictions have now adopted the civilian tradition of enforcing penalty clauses, subject to reasonableness or proportionality.¹⁵³ That approach finds

¹⁴⁸ George White, *Lost on Penalties: Reconsidering the rule against contractual penalty clauses* available at https://www.barcouncil.org.uk/media/313935/_30_george_white.pdf (last accessed 10th April, 2019) at Note 6.

¹⁴⁹ See International Institute for the Unification of Private Law, “UNIDROIT Principles of International Commercial Contracts” Art 7.4.13; UN Commission on International Trade Law (UNCITRAL), “Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance”, Art. 8 (UN Doc. A/CN.9/243, annex I.).

¹⁵⁰ Available at <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>. (last visited on 20.12.2018).

¹⁵¹ Art. 7.4.13 (1) UNIDROIT Principles 2016.

¹⁵² Art. 7.4.13(2) UNIDROIT Principles 2016.

¹⁵³ George White, *Lost on Penalties: Reconsidering the rule against contractual penalty clauses* available at https://www.barcouncil.org.uk/media/313935/_30_george_white.pdf (last accessed 10th April, 2019) at Note 6.

support in various international instruments for the harmonisation of contract law.¹⁵⁴ In short, the time is right to reconsider the law of penalty clauses.

Role of courts in interpretation and upholding of penalty and liquidated damages clauses

The courts play a huge role in the enforcement of penalty clauses. In India, S. 74 imposes a **statutory duty** on the courts not to enforce the penalty clause but only to award reasonable compensation. Therefore, in all cases where there is a stipulation in the nature of penalty, the court not only has jurisdiction but a statutory duty to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract.¹⁵⁵

The **jurisdiction of the court to award compensation is unqualified** except as to the maximum amount stipulated, but the compensation has to be reasonable.¹⁵⁶ But that does not mean that the discretion is unlimited. There is duty on the Court to decide reasonableness according to settled principles. Thus, the court has **wide discretionary power** to decide what amounts to reasonable compensation in the matter of assessment of damages.¹⁵⁷ But the power is subject to two caveats: (i) the court can in no case exceed the amount previously agreed upon by the parties, and (ii) reasonableness has to be determined according to the settled principles and cannot be arbitrary. This would essentially be a mixed question of law and fact.¹⁵⁸

Also, the higher courts have vast **powers to interpret the law**, subject to the rules of interpretation and precedents. S. 74 is no exception. One of the crucial interpretations with regard to S. 74 has been in relation to the words “*whether or not actual damage or loss is proved to have been caused*”. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. The court has said that these words should not mislead to think that actual loss is not necessary.¹⁵⁹ The section, thereby, merely dispenses with

¹⁵⁴ See International Institute for the Unification of Private Law, “UNIDROIT Principles of International Commercial Contracts” Art 7.4.13; UN Commission on International Trade Law (UNCITRAL), “Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance”, Art. 8 (UN Doc. A/CN.9/243, annex I.).

¹⁵⁵ See *Fateh Chand Case*, *supra* note 107.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Macbrite Engineers v. Tamil Nadu Sugar Corp. Ltd.*, AIR 2002 Mad 429 (DB).

¹⁵⁸ *A.S. Motors Pvt. Ltd. vs. Union of India (UOI) and Ors.* (21.02.2013 - SC): MANU/SC/0191/2013.

¹⁵⁹ *Maula Bux Case*, *supra* note 108.

proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

In *Praveen Talwar v. Naresh Kumar Mittal and Ors.*:¹⁶⁰ the appellant agreed to sell a Flat to respondent. The respondent paid him Rs 2 Lakh as earnest money. A clause was entered in the contract that if the seller commits the breach, he will pay Rs 4 Lakh, and if the buyer commits the breach the earnest money of 2 Lakh will be forfeited. This was held to be unreasonable by the court.

Thus, in *Kailash Nath Case*¹⁶¹ it was said: "It is important to note that like Ss. 73 and 75, compensation is payable for breach of contract under s.74 only where damage or loss is caused by such breach". The court in this case as well as *ONGC case*¹⁶² also formed a link between 73 and 74, propounding that these sections must be read together.

However, in *B.S.N.L v. Reliance Communication Ltd.*¹⁶³ the court noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorise as penalties the clauses described as liquidated damages.

In *Parasram Agarwal v. Food Corporation of India*¹⁶⁴ it was held that where there is a contract between the parties providing for specific provision for payment of penalty on account of breach of contract s.74 of the Contract Act authorise the plaintiff to demand penalty but however when the matter comes to court, the claim based on the agreement would not be allowed, unless the court satisfies that the amount claimed is reasonable.

¹⁶⁰ *Praveen Talwar v. Naresh Kumar Talwar*, MANU/DE/4393/2018 (India, Del.).

¹⁶¹ *Supra* note 112.

¹⁶² *Supra* note 111.

¹⁶³ MANU/SC/1000/2010 : (2011) 1 SCC 394,

¹⁶⁴ *Parasram Agarwal v. Food Corporation of India*, AIR 1994 Ori. 290, 292.

Thus, so far in India the Courts have exercised significant judicial control over penalty clauses and in a plethora of cases reduced the amount to reasonable compensation. Also, in cases where no injury/loss has been occurred to the party the courts even refused to give any compensation.

The Role of Penalty Clauses in Government Contracts

Penalty Clauses are generally incorporated in Government Contracts most commonly by way of forfeiture clauses. However, they receive the same treatment as those between private parties.

S.74 do carve out an exception for bail-bond, recognizance or other instruments of the same nature for breach of which the guilty party will be liable to pay the whole sum mentioned in the instrument. Similar is the case when any person under the order of Central/State Government gives any bond for the performance of any public duty or act in which public are interested. However, the explanation attached to this section clarifies clearly that a person entering into a contract with the Government does not by that reason only undertake any public duty or promise to do an act in which the public are interested.¹⁶⁵

Thus, the Government contracts and private contract are governed by the same principles. For e.g. In *Maula Bux vs. UOI*¹⁶⁶ where the appellant contracted to supply food to military headquarters, but persistently defaulted in making the delivery, his contract was rescinded, and the deposited money was forfeited. The Supreme Court observed that “The plaintiff was guilty of breach of the contract. Considerable inconvenience was caused to the Military authorities because of the failure on the part of the plaintiff to supply the food-stuff contracted to be supplied”.¹⁶⁷ But since there was no proof of actual loss or damages the penalty clause was not enforced.

*G. Ram v. DDA*¹⁶⁸: In an auction of a plot by the respondent Delhi Development Authority where the appellant being the highest successful bidder and paid an earnest money of Rs. 7, 33,750/- and when the tender granted in favour of the appellant was found contrary to the terms and

¹⁶⁵ S. 74 Indian Contract Act, 1872.

¹⁶⁶ *Maula Bux Case*, *supra* note 108.

¹⁶⁷ *Ibid.*

¹⁶⁸ *G. Ram v. Delhi Development Authority*, AIR 2003 Delhi 120, 125.

conditions of the auction, the DDA is entitled to forfeit the earnest money on the ground that holding a fresh auction would involve extra expenditure.¹⁶⁹

In *Hind Construction Contractors v. State of Maharashtra*¹⁷⁰ it was held that where the State Govt., which had taken a security deposit for the execution of a work within a certain time, had itself committed a breach of the contract the security deposit of the contractor cannot be forfeited.¹⁷¹

In *Jai Durga Finevest Pvt Ltd. V. state of Haryana*¹⁷² where mining of sand failed due to omissions and commissions of state authorities, it was held that the respondent cannot forfeit the security amount on the ground that the appellant has agreed to such contract with open eyes.

In *State of Gujarat v. Dahyabhai Zaverbhai*,¹⁷³ where a work contract provides a clause entitling the Govt to rescind the contract and forfeit the security money deposited by the contractor in the event of breach, the contractor abandoning the work renders himself liable to pay compensation amounting to the whole of security deposit.

In *State of A.P. v. Singnam Setty Yellananda*,¹⁷⁴ where the Forest Authorities in consequence of the breach of contract committed by the plaintiff contractor whose highest bid was accepted forfeited the money deposited by the plaintiff, the defendant authorities in the absence of any serious damage suffered by them as result of breach of contract are liable to refund the actual deposit money paid by the plaintiff without costs.

In *Kailash Nath Associates vs. Delhi Development Authority*¹⁷⁵ the court reiterated and clarified the position of law established earlier. It was found that there was no breach of contract. No loss was shown to be incurred by the DDA. Instead they made a huge profit in a subsequent auction. Under such circumstances the forfeiture of earnest money was deemed unreasonable. And thus was not allowed.

¹⁶⁹ G. Ram v. Delhi Development Authority, AIR 2003 Delhi 120, 125.

¹⁷⁰ Hind Construction Contractors v. State of Maharastra, AIR 1979 SC 720.

¹⁷¹ *Ibid.*

¹⁷² Jai Durga Finevest Pvt Ltd. V. state of Haryana AIR 2004 SC 1484

¹⁷³ State of Gujarat v. Dahyabhai Zaverbhai, AIR 1997 SC 2701.

¹⁷⁴ State of A.P. v. Singnam Setty Yellananda, AIR 2003 AP 182, 187

¹⁷⁵ Kailash Nath Case, *supra* note 102.

In *Philips Electronics India Ltd. v. UOI and Ors*¹⁷⁶:there was a delay of five months by the appellant to supply the equipment related to Cardiac Catheterisation, at JIPMER Puducherry, The court observed that the site for installation was not ready at the time, and no loss was caused to JIPMER. Thus, in this case also the court refused to enforce the Liquidated Damages clause *in toto* and awarded only reasonable compensation.

However, a glimpse of attempt of departure from the above principles was seen in *Oil & Natural Gas Corporation Ltd. vs. SAW Pipes Ltd.*¹⁷⁷ where the court while holding that in the present case it would be difficult to prove exact loss or damage and awarded the mentioned amount as “genuine pre-estimate of loss”, also took notice of the larger interests of the society and state by way of the following illustration:

“Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within stipulated time, then it would be difficult to prove how much loss is suffered by the Society/State.”

It would be interesting to see how the Court develops the law in regard to government contract post Cavendish case decision in the UK¹⁷⁸. However, the final Report on the project will conclusively suggest the reform in s. 74 of the Indian contract Act to render penalty clauses enforceable.

Objective Achieved:

After thorough perusal of the case laws, theoretical underpinnings, and comparative analysis related to enforcement of penalty clauses it is suggested that s. 74 of the Act should be amended to make the penalty clauses enforceable to the extent they are not manifestly unreasonable. This will resonate with the objectives and changes brought by the Specific Relief (Amendment) Act, 2018. A conclusive draft clause will be submitted in the Final Report.

¹⁷⁶ *Philips Electronics India Ltd. v. UOI and Ors.*, MANU/DE/4382/2018.

¹⁷⁷ ONGC Case, *supra* note 111.

¹⁷⁸ See Cavendish case, *supra* note 133.

REVIEW OF 35 CASE LAWS

S. No.	case	Citation	Contract Amount/Type	Claim	Award/Decision	Reason
1.	Suresh Kumar Wadhwa v. State of M.P. and Ors.	A.I.R. 2017 S.C. 5435	Rs. 3 Lakhs (Security)	Rs. 3 Lakhs + interest @ 18% p.a.	Rs. 3 lakhs + interest @ 9% p.a.	For forfeiture there need to be a express forfeiture clause; Additional terms and conditions must have told in verbatim; the State fetched higher price from the re-auction; no loss/damage
2.	Kailash Nath Associates v. Delhi Development Authority	2015(1) S.C.A.L.E. 230	Rs. 78 Lakhs (earnest money)	Rs. 78 Lakhs	Rs. 78 Lakhs + interest @9% p.a.	No breach of contract; DDA did not suffer any loss or damage as they fetched 11.78 Crores in re-auction against original bid of 3.12 Crores.
3	A.S. Motors Pvt. Ltd. V. Union of India and Ors.	(2013) 10 S.C.C. 114	Rs. 2.20 Crore (performance security) + Rs. 2.20 Crore (Bank guarantee)	Recovery of Rs. 2.20 Crore(PS) + Rs. 2.20 Crore(BG) + Rs. 2.41 Lakhs (penalty paid)	Rs. 2.20 Crore	Though Plaintiff breached the contract and charged excess Toll fee; State not entitled to forfeit Bank Guarantee when it has recovered Rs. 9.55 Crores

						against the contracted amount of Rs. 8.80 Crore.
4	Phulchand Exports Ltd. V. OOO Patriot	(2011) 10 S.C.C. 300	Rs. 12,450,000,00 (total Price)	USD 285,569.53 (price already paid)	USD 138.402.03 + USD 2,562 (interest) + USD 4,869 (penalty)	Breach by the seller; Delay by the buyer in enforcement; Loss was split in equal parts.
5	Gian Chand and Ors. V. York Exports Ltd. And Ors.	A.I.R. 2014 S.C. 3584	Rs. 39.20 Lakhs (price already paid)	Rs. 39.20 Lakhs + interest @9% p.a.	Rs. 39.20 Lakhs + interest @6% p.a.	Frustration of Contract; No breach committed; no loss suffered; cannot forfeit
6	Oil & Natural Gas Corporation Ltd. V. Saw Pipes Ltd.	A.I.R. 2003 S.C. 2629	US \$ 3,04,970.20 + Rs. 15,75,559 (deducted from the bills)	US \$ 3,04,970.20 + Rs. 15.75,559	0	agreed genuine pre-estimate of damages; difficult to prove the actual loss; Liable to deducted.
7	B.S.N.L. V. Reliance Communication Ltd.	2010 (12) S.C.A.L .E. 586	ISD calls Rs. 5.65 per minute	Rs. 9.89 Crores	N/A (matter remitted to be decided de novo)	Need to Consider Telecom as a Service; clause 6.4.6 represents genuine pre-estimate of reasonable compensation for loss suffered.
8	Fateh Chand v. Balkishan Das	A.I.R. 1963 S.C. 1405	Rs 1000 (earnest money) +24000	Forfeiture of Rs. 25000 + 6,500 as mense	can retain only Rs 1000/- + compensation @ Rs. 140 per	no loss caused, only entitled to forfeit

				profits.	mesem +interest @6% p.m.	earnest money and mense profits.
9	Maula Bux v. Union of India	A.I.R. 1970 S.C. 1955	Rs. 10000 + Rs. 8,500 (Security for due performance)	Rs. 20,000 (security) + interest @6% p.a.)	Rs. 18,500 + interest @ 3% p.a.	loss determinable ; no proof of loss; can not forfeit.
10	Union of India v. Rampur Distillery and Chemical Co., Ltd.	A.I.R. 1973 S.C. 1098	Rs. 18,332/- (security deposit)	Rs. 18,332/- (forfeiture of entire sum)	Rs. 7,332/-	only entitled to reasonable compensatio n; no loss caused or suffered on account of breach.
11	Harbans Lal v. Daulat Ram	(2007) ILR 1 Delhi 706	Rs. 100,000 (50,000 (earnest money) + 50,000(penalty))	Rs. 151,000/- (100,000 + interest @ 18%)	Rs 100,000 + interest @6% p.a.	defendant did not grudge the entire amount stipulated in the contract; however, interest 18% not justified;
12	Maharashtra State Electricity ... vs Sterilite Industries (India) and Anr.	A.I.R. 2001 S.C. 2933	Rs. 78,28,572.05	Rs. 78,28,572.05 + interest 18%	NIL	Petitioners did not suffer any damage or loss
13	State of Saurashtra v. Punjab National Bank	A.I.R. 2001 S.C. 2412	Rs. 75,83,12,500 + Rs. 26,82,00,000	Rs. 249, 19,00,549 (Original amount + interest @24%) + interest @17.5%	Rs. 212 Crore (Original amount + pre suit interest) + pendente lite and future interest @17.5%	Held entitled to sum from the date of the breach at the rate of current lending Rate

14	Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.	A.I.R. 2018 S.C. 4773		Rs. 447,21,06,315 + \$ 2,380,000 + EUR 121,723,214 + pendente lite and future interest @18%	Multiple awards under various heads amounting to Rs 60,53,76,011 + Euro 23,717,437 + interest @9%	The dual rate of interest made by the arbitrator of 9% for 120 days and 15% thereafter is arbitrary in law and affects the right to appeal of the defendant.
15	Jagdish Singh v. Natthu Singh	A.I.R. 1992 S.C. 1604	Rs. 15,000	Specific Performance	Rs. 1,50,000 (original sum plus cost of litigation)	Damages given in lieu of specific performance
16	P. Radhakrishna Murthy v. N.B.C.C. LTD.	[2013] 3 S.C.C. 747	Rs. 5 Lakhs	Rs. 5 Lakhs + interest @24% + Rs. 32,500 (Arbitration Expenses) + Rebates	Rs. 9,01,871.53 + interest @12%	The Rate of Interest is Excessive and there was no agreement between the parties to award of interest by arbitrator
17	Ghaziabad Development Authority v. Union of India	A.I.R. 2000 S.C. 2003	Subscription amount	Subscription amount + interest @18% + Rs. 50,000 (For Mental Agony)	Subscription amount + interest @12%	Mental Agony damages cannot be awarded in the realm of contract law; Rate of 18% too excessive
18	Maharashtra State Electricity Distribution Company v. Datar Switchgear Limited	A.I.R. 2018 SC 529	Tender of installation of Units with Rs. 9000 per unit cost	incurred cost of installed objects + Object manufacture d but not installed + Raw material purchased + interest @21 %	Rs. 185,97,86,399 + interest @10%	nominal interest awarded.

19	Herbicides (India) Ltd. v. Shashank Pesticides Pvt. Ltd.	180 (2011) DLT 243	7000 litres of weedicide@Rs. 10 per litre	Price of goods @Rs. 10 per litre + interest @18% on price	Rs. 11,14,160 + proportionate costs and pendente lite and future interest @12%	seller entitled to price of the goods plus interest as per Sale of Goods Act
20	Nandganj Sirohi Sugar Co. Ltd. v. Badri Nath Dixit	1991 SCR (2) 468	appointment as "Instrumentation Foreman"	Mandatory Injunction for Specific Performance	Dismissed	No valid contract; Personal service cannot be specifically enforced
21	Bala Krishana v. Bhagwan Das	AIR 2008 SC 1786	Reconveyance of Property Transferred Consideration amount Rs. 25,000	Suit for Specific Performance	Dismissed	No Valid contract for reconveyance is made out. (Original suit filed on 10.5.1973 on a Sale Deed executed on 19.7.1952)
22	Sucha Singh Sodhi v. Baldev Raj Walia	AIR 2018 SCC 2241	Transfer of Property for a consideration of Rs. 11,50,000	Suit for Permanent Injunction to not to interfere with the possession	Held Suit is maintainable	The Requirements of the CPC for filing a fresh suit are satisfied; The matter is remitted back to trial Court for speedy disposal within one year (Original suit was filed in 1996; Delay of 22 years)

23	Vijay Kumar & Ors. v. Om Parakash	Civil Appeal No. 1091 of 2018	Sold Shop for a consideration of Rs. 26 Lakhs out of which Rs. 4 Lakhs deposited at Earnest Money	Suit of specific Performance	No specific Performance; Refund of money + interest 10%	Specific Performance is a discretionary Remedy; based on evidence plaintiff not ready and willing to perform his part of the obligation; however, entitled to refund of the money along with interest.
24	Kamal Kumar v. Premlata Joshi	Civil Appeal No. 4453 of 2009	Sale of Land	Suit for Specific Performance	Dismissed	Specific Performance is a discretionary Remedy; based on evidence plaintiff not ready and willing to perform his part of the obligation;
25	Man Kaur(Dead) v. Hartar Singh Sangha	(2010) 10 SCC 512	Transfer of Property for a consideration of Rs. 1,50,000 with Rs. 10,000 as Earnest Money	Suit for Specific Performance	Dismissed the suit and allowed Forfeiture of Earnest Money	No Fault on the part of the defendant; he was ready and willing; breach of contract entitled to forfeit the earnest money as per Agreement

26	Kalawati (D) through LRs & Ors. V. Rakesh Kumar & Ors	Civil Appeal No. 2244 of 2018	Sale of Land @Rs. 1,32,000 per acre with Rs. 30,000 advance payment	Suit for Specific Performance	Dismissed the Suit	Plaintiff Not Ready and Willing to perform himself so not entitled to the decree of specific performance; (Disturbing factor highlighted the Supreme Court: Delay of 31 years in final adjudication of the case; Ease of Doing Business and Enforcement of Contract discussed by the Court; SC Remarkd that this case exemplifies the need for case management system)
27	Food Corporation of India v. Vikas Majdoor Kamadar Sahkari Mandali Ltd.	(2007) 13 SCC 544	Charter of Cargo of 750 MT @Rs. 108 per MT	Suit for Quantum Meruit (The plaintiff handled more Cargo (1200 MT) then originally contracted for) claimed @Rs. 108 per MT for 750 MT and @Rs 215 for overload	Awarded the Relief with 6% interest	Quantum Meruit has no application where specific Agreement is in place; thus, for Agreed Amount of 750 MT the contract rate will be paid; for the extra work (which is outside the scope of

						agreement) Reasonable rates will be applied.
28	Puran Lal Sah v. State of U.P.	1971 AIR 712	Tender Agreement for Construction of 3 mile Road	Claimed remuneration at a higher rate than the original contract total claim of Rs. 66,422 (Quantum Meruit for extra cost incurred)	Awarded the contract Rate Only	The contractor must have made sure the availability of the material before giving the tender amount; Not entitled;
29	Alopi Parshad & Sons, Ltd. v. Union of India	1960 AIR 588	Contract for Supply of Ghee to the Army at @Rs. 1 and 1 Anna per hundred pounds	Claimed quantum meruit for the extra charges incurred due to outbreak of world war II at higher rates than contractually agreed	Held Not entitled	Contract is not frustrated merely because its performance has become onerous on account of an unforeseen turn of events; quantum meruit awarded only if there was not fixed rates contractually
30	Mcdermott International Inc. v. Burn Standard Co. Ltd. & Ors	[2006] 6 SCALE 220	contractual rate of \$1067 per ST	Claimed remuneration at the updated Foreign Exchange Rate plus	US \$ 20,832.108 at contractual rate plus Interest @7%	Loss of opportunity, Eichleay formula, Claim of MII beyond the term of

				Interest @18%		contract;
31	Hind Construction Contractors v. The State of Maharastra	1979 AIR 720	Contract for construction of aqueduct for Rs. 1,07,000; security deposit of Rs. 4,936	claim of Rs. 65,000 for illegal rescission of Contract (Rs. 4,936 Security Deposit + Rs. 10,254 the amount due for actual work + Rs. 7,375 for the materials + Damages + Interest)	Rs. 10, 901 with interest @6%	Time was not the essence of the contract as the extension of time was provided in the contract. Wrongful recision of the contract.
32	Bharat Petroleum Corporation Ltd. v. M/s Jethanand Thakordas Karachiwala	2000 (1) Bom. CR 289	Contract for distribution of Gas Cylinders	suit for permanent Injunction to restrain interfering with the distributorship	Dismissed	No prima facie case; explained the Requirement for grant of injunction;
33	Adhunik Steel Ltd. v. Orrissa Manganese Minerals (P) Ltd.	(2007) 7 SCC 125	Contract for mining of manganese ore	Temporary Injunction for illegal termination and injunction for not to enter with other parties	Allowed Partially: Contract being in violation of law liable to be terminated; Cannot enter into contract with other parties too	Since Regulation is violated contract is liable to be terminated being illegal. OMM cannot enter into contract with other parties as such contract will also violate law; it can mine the manganese with its own resources.

34	M/S Best Sellers Retail(I) Pvt Ltd. v. M/S Aditya Birla Nuvo Ltd.	AIR 2012 SC 2448	Agency Contracts for sell of readymade garments	Temporary Injunction or alternatively Damages of Rs. 20,12,44,398 (Rs. 1,15, 97, 638 net book stock amount + Rs. 44,81,584 Loan Amount + Rs. 20,65,176 Amount due + Rs. 10,31,00,000 Loss of Profits + Rs. 2,00,00,000 loss of goodwill and reputation + Rs. 6,00,00,000 cost of relocating the store with 24% interest)	Relief of Temporary Injunction Refused; Matter remitted for Final disposal	Plaintiff itself has quantified the loss or damage; no irreparable injury sine qua non for temporary injunction is shown
35	Percept D'Mark (India) Pvt Ltd. v. Zaheer Khan	AIR 2006 SC 3426	Contract contained Right of First Refusal	Injunction Restraining defendant to enter into agreement with another agent	Dismissed	No reason for appointing agent in perpetuity when there is no faith or trust by the principal; Granting injunction will result in specific performance of a contract of personal service.

QUESTIONNAIRES FOR EMPIRICAL DATA COLLECTION

1. Questionnaire for Foreigners

Details of the participant:

Name:

Age:

Nationality:

Profession:

Experience:

Questions:

1. Have you ever done business or commercial transaction in India? If yes, please tell us about your experience.
2. Do you think India is a Business-Friendly Country? Please give reasons for your answer.

- 74

7. Do you think Interest should be paid on damages as a matter of right? Kindly provide reasons for your answer.

8. Do you think that higher rate of interest on damages should be awarded as penalties in contractual disputes? Kindly give reasons for your answer?

9. Do you think that In a Commercial Dispute should one be allowed to claim expected loss of profits if a party relies on the promise of other party? Give Reasons for your answer?

10. What do you think should be done to strengthen the enforcement of contracts in India?

MINSITRY OF LAW AND JUSTICE PROJECT
STRENGTHENING LEGAL PROVISIONS FOR THE ENFORCEMENT OF CONTRACTS:
REASSESSING THE QUALITY AND EFFICIENCY OF DISPUTE RESOLUTION OF
COMMERCIAL MATTERS IN INDIA

Questionnaire for Judges/Retired Judges

Details of the participant:

Name:

Age:

Court:

Experience:

Questions:

1. Have you ever adjudicated business or commercial disputes? If yes, please tell us about your experience.

2. Do you think India is a Business-Friendly Country? Please give reasons for your answer.

3. Are you aware of the recent Ease of Doing Business Rankings and Enforcement of Contract Ranking?

4. Does your Court have a dedicated Commercial Court/Division/Bench?
5. Does your court adhere to the timeline stipulated for time bound disposal of commercial disputes as per various Laws? Do you think India should also have a dedicated law for setting time frame for commercial disputes?
6. In your opinion what are factors that leads to delay in final adjudication of commercial disputes? Please give reasons for your answer.
7. In your opinion what steps should be taken to reduce the time taken by the courts to finally adjudicate a commercial dispute? Please give reasons for your answer.

8. Do you think parties should be allowed to claim Liquidated damages without showing any loss or damage?
9. Do you think penalty clauses should be made enforceable in India to strengthen enforcement of contracts?
10. Do you think that for intentional breach of contracts there ought to be a stricter law? Please give reasons for your answer.
11. Do you think for intentional breach of contracts penalties shall be imposed? Please give reasons for your answer.

12. Do you think Interest should be paid on damages as a matter of right? Kindly provide reasons for your answer.

13. Do you think that higher rate of interest on damages should be awarded as penalties in contractual disputes? Kindly give reasons for your answer?

14. Do you think that in a Commercial Dispute should one be allowed to claim expected loss of profits if a party relies on the promise of other party? Give Reasons for your answer?

15. What do you think should be done to strengthen the enforcement of contracts in India?

MINSITRY OF LAW AND JUSTICE PROJECT

**STRENGTHENING LEGAL PROVISIONS FOR THE ENFORCEMENT OF CONTRACTS:
REASSESSING THE QUALITY AND EFFICIENCY OF DISPUTE RESOLUTION OF
COMMERCIAL MATTERS IN INDIA**

Questionnaire for Practicing Lawyers

Details of the participant:

Name:

Age:

Nationality:

Courts Practiced In:

Experience:

Questions:

1. Have you dealt with business or commercial matters? If yes, please tell us about your experience.

2. Do you think India is a Business-Friendly Country? Please give reasons for your answer.

3. Are you aware of the recent Ease of Doing Business Rankings and Enforcement of Contract Ranking?
4. Does the Court(s) you practiced in have a dedicated Commercial Court/Division/Bench?
5. Does the court(s) adhere to the timeline stipulated for time bound disposal of commercial disputes as per various Laws? Do you think India should also have a dedicated law for setting time frame for commercial disputes?
6. In your opinion what are factors that leads to delay in final adjudication of commercial disputes? Please give reasons for your answer.
7. In your opinion what steps should be taken to reduce the time taken by the courts to finally adjudicate a commercial dispute? Please give reasons for your answer.

8. Do you think parties should be allowed to claim Liquidated damages without showing any loss or damage?
9. Do you think penalty clauses should be made enforceable in India to strengthen enforcement of contracts?
10. Do you think that for intentional breach of contracts there ought to be a stricter law? Please give reasons for your answer.
11. Do you think for intentional breach of contracts penalties shall be imposed? Please give reasons for your answer.

12. Do you think Interest should be paid on damages as a matter of right? Kindly provide reasons for your answer.

13. Do you think that higher rate of interest on damages should be awarded as penalties in contractual disputes? Kindly give reasons for your answer?

14. Do you think that in a Commercial Dispute should one be allowed to claim expected loss of profits if a party relies on the promise of other party? Give Reasons for your answer?

15. What do you think should be done to strengthen the enforcement of contracts in India?

MINSITRY OF LAW AND JUSTICE PROJECT
STRENGTHENING LEGAL PROVISIONS FOR THE ENFORCEMENT OF CONTRACTS:
REASSESSING THE QUALITY AND EFFICIENCY OF DISPUTE RESOLUTION OF
COMMERCIAL MATTERS IN INDIA

Questionnaire for Academicians

Details of the participant:

Name:

Age:

Nationality:

Experience:

Questions:

1. Have you taught/researched Law of Contracts or Commercial Dispute Resolution? If yes, please tell us about your experience.

2. Do you think India is a Business-Friendly Country? Please give reasons for your answer.

3. Are you aware of the recent Ease of Doing Business Rankings and Enforcement of Contract Ranking?
4. Do the courts in India adhere to the timeline stipulated for time bound disposal of commercial disputes as per various Laws? Do you think India should also have a dedicated law for setting time frame for commercial disputes?
5. In your opinion what are factors that leads to delay in final adjudication of commercial disputes? Please give reasons for your answer.
6. In your opinion what steps should be taken to reduce the time taken by the courts to finally adjudicate a commercial dispute? Please give reasons for your answer.

7. Do you think parties should be allowed to claim Liquidated damages without showing any loss or damage?
8. Do you think penalty clauses should be made enforceable in India to strengthen enforcement of contracts?
9. Do you think that for intentional breach of contracts there ought to be a stricter law? Please give reasons for your answer.
10. Do you think for intentional breach of contracts penalties shall be imposed? Please give reasons for your answer.

11. Do you think Interest should be paid on damages as a matter of right? Kindly provide reasons for your answer.

12. Do you think that higher rate of interest on damages should be awarded as penalties in contractual disputes? Kindly give reasons for your answer?

13. Do you think that in a Commercial Dispute should one be allowed to claim expected loss of profits if a party relies on the promise of other party? Give Reasons for your answer?

14. What do you think should be done to strengthen the enforcement of contracts in India?

5. Questionnaire for Businesspeople

Details of the participant:

Name:

Age:

Nationality:

Profession:

Experience:

Questions:

1. Do you think India is a Business-Friendly Country? Please give reasons for your answer.

2. Have you ever faced a commercial Dispute? If yes, which forum did you preferred to seek relief/resolution? please tell us about your experience.

3. How long did the dispute took to finally resolve?

4. What were the major causes for the delay?

5. As a Businessman, please mark the following remedies/relief in order of preference:
 - a. Unliquidated Damages
 - b. Liquidated Damages
 - c. Specific performance
 - d. Substituted performance
 - e. Penalty clause enforcement
 - f. Penalty damages for intentional breach

6. Please give reason for most preferred remedy/relief?

7. Does the court/Forum adhere to the timeline stipulated for time bound disposal of commercial disputes as per various Laws? Do you think India should also have a dedicated law for setting time frame for commercial disputes?

8. Are you aware of the recent Ease of Doing Business Rankings and Enforcement of Contract Ranking?
9. In your opinion what are factors that leads to delay in final adjudication of commercial disputes? Please give reasons for your answer.
10. In your opinion what steps should be taken to reduce the time taken by the courts to finally adjudicate a commercial dispute? Please give reasons for your answer.
11. Do you think parties should be allowed to claim Liquidated damages without showing any loss or damage?

12. Do you think penalty clauses should be made enforceable in India to strengthen enforcement of contracts?

13. Do you think that for intentional breach of contracts there ought to be a stricter law? Please give reasons for your answer.

14. Do you think for intentional breach of contracts penalties shall be imposed? Please give reasons for your answer.

15. Do you think Interest should be paid on damages as a matter of right? Kindly provide reasons for your answer.

16. Do you think that higher rate of interest on damages should be awarded as penalties in contractual disputes? Kindly give reasons for your answer?

17. Do you think that in a Commercial Dispute should one be allowed to claim expected loss of profits if a party relies on the promise of other party? Give Reasons for your answer?

18. What do you think should be done to strengthen the enforcement of contracts in India?

PART D:

**FUTURE RESEARCH AND
ACTIVITIES IN RELATION
TO AND IN CONNECTION
TO THE PROJECT**

QUESTIONS YET TO BE RESEARCHED UPON

1. What should be the formula for award of damages?

Currently there is no statutory general formula for calculating and awarding damages. The Court follows general principles set by case laws and precedents, which leads to lengthy litigation process. The Project will explore the possibility and desirability of deriving a general and standard formula for calculation of damages after a comparative study of law of various countries in this regard

2. What steps can be taken to reduce the time taken by the courts in final adjudication of commercial litigation?

The time taken by the courts is the Achilles heel in contractual enforcement in India. According to ease of doing business report, courts of first instances in India on an average takes 1445 days to finally adjudicate a commercial dispute.¹⁷⁹ Further, as the matter goes to appeal to the High Court and finally to the Supreme Court, the parties are up for a lengthy litigation process. And in an exceptional case the court took 31 years to dispose the matter.¹⁸⁰ The Arbitration Act has also not resolved the situation as after the arbitration the parties goes to the court and exploiting loopholes and appeal opportunities again a tiresome litigation ensues. This lengthy litigation process is the primary reason why the contractual enforcement rank of India is so low despite performing well on the other indicators. Minor tweaks here and there will not remedy the dire situation; radical substantive and procedural readjustment is need of the hour. This project will explore the possibility of reform in substantive as well as procedural law to reduce the time taken by the judiciary in contractual enforcement.

3. What steps should be taken to operationalize Order XLI Rule 11A of Code of civil Procedure, 1908?

Under Order 41 Rule 11A the courts shall endeavor to conclude the hearing of appeals within 60 days from the date on which the memorandum of appeal is filed. This Research will analyses

¹⁷⁹ *Supra* note 2, ease of doing business report 2019. (The ideal time which the report sets is 120 days which no country in the world has reached. The closest is Singapore with 164 days).

¹⁸⁰ Kalawati (D) through LRs & Ors Vs. Rakesh Kumar & Ors , Civil Appeal No. 2244 of 2018.

what steps can be taken to materialize this section into practical reality. It will also endeavor to look into the possibility of making this special provision a general rule of law.

4. Whether the enactment of commercial courts act has provided the desired result?

The Commercial Courts Act as deliberated upon earlier establishes commercial courts to adjudicate upon commercial dispute. The Recent amendment of the Act further expands this hierarchy by introducing commercial appellate courts sandwiched between commercial courts and commercial division of High Courts. Further, the amendment also decreased the minimum value of dispute from 1 Crore Rupees to 3 Lakh Rupees, so as to bring vast number of commercial litigations under the purview of commercial courts. The present project will examine the working of this commercial courts structure and the Act as a whole to assess its efficiency in resolving the commercial disputes.

5. Whether the amendment to the Specific Relief Act in 2018, bringing substituted performance will help in enforcement of contracts?

As discussed earlier the Specific Relief (Amendment) Act 2018 brought in the concept of substituted damages into Indian contract law enforcement mechanism. This was done with a specific aim of increasing the ease of doing business in India. The present research will study the effect of this reform and analyze its efficacy.

6. What should be the different avenues for commercial dispute resolution in India?

Currently the Indian legal regime provides a number of avenues for private commercial disputes including ordinary civil courts, special commercial courts, Arbitration, Mandatory mediation. The Final report will submit the thorough review of the working of these forums and look into the possibility of reform in this area.

7. What parameters should be set for assessing the quality and efficiency of dispute resolution in India?

Inherent to the issue of improving the contractual enforcement in India is the setting of standards and parameters against which the quality and efficiency of dispute resolution can be measured.

Will evaluating Indian dispute resolution system against the parameters set by World Bank provide a genuine assessment of quality of the system in India or do sui-generis standards needs to be set taking into account the socio-economic circumstances in India? This project will answer this critical question.

8. Whether Limitation of time of 12 months under the Arbitration Act, will help in speedier resolution of commercial disputes in India?

The Arbitration Act sets a 12 months strict timeline for adjudication of disputes, which can be extended further the court. Will this system help in the speedier resolution of dispute? There are chances that it will be prone to the prevailing delaying tactics by the economically powerful party against the weaker party? Further, should this time limit be further brought down is also relevant query which will be focused upon.

9. Whether “Reliance Loss” consequential damages should be introduced as remedies in contract law?

Reliance loss is a type of restitutory damages. It relates when a party to the contract placing reliance on the performance of the contract by the other party incurs some out of pocket expenditure. The present project will critically examine the possibility of their inclusion as consequential damages and the effect it will have on the improving the contractual enforcement in India.

**Brochure of the National
Seminar to be Organized on
21st and 22nd August 2019.**



NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BENGALURU

In association with

DEPARTMENT OF JUSTICE, MINISTRY OF LAW AND JUSTICE

Organises

NLSIU NATIONAL SEMINAR ON

**“Strengthening Legal Provisions for the Enforcement of Contracts:
Reassessing the Quality and Efficiency of Dispute Resolution of
Commercial Matters in India”**

Dates: 21st and 22nd August, 2019.



Venue: International Training Centre
National Law School of India University
Nagarbhavi, Bengaluru, India 560072

About National Law School of India University, Bengaluru

The National Law School of India University, the Nation's premier law university, came into existence through a Notification under the National Law School of India University Act (Karnataka Act 22 of 1986). It signified the culmination of efforts by the Judiciary, the Bar Council of India, the Karnataka Bar Council, the Bangalore University and the Government of Karnataka to reform legal education and to establish a centre of excellence for legal education and research in India.

The Chief Justice of India is the Chancellor of the University. The Chairman, Bar Council of India, is the Chairman of the General Council. These connections lend a stature and prestige to the School which is unparalleled in the history of legal education in India. The Karnataka Act confers complete administrative and academic autonomy which facilitates innovation and experimentation in the pursuit of excellence in legal education. The Law School has undertaken many research projects funded by the UGC, the Government of India, the Government of Karnataka, the Department of Women and Child Development, UN agencies, the World Bank, HIVOS etc. These have served to strengthen research and teaching at the Law School. The National Law School of India University since its inception has taken proactive steps in organizing conferences, seminars, workshops, refresher courses and certificate courses to update academicians, law teachers, students, industry personnel in different subject areas.

About CEERA

The Centre for Environmental Law Education, Research and Advocacy (CEERA) established in 1997 is the leading centre in the field of Environmental Law and enjoys the support of Ministry of Environment and Forest (MoEF), Government of Karnataka, the Bar and the Bench in India and several Institutions and Universities abroad.

Though Primarily concerned with environment, the centre has forayed into various areas of Law including Contract Law. Prof. (Dr.) Sairam Bhat, Professor Law & Coordinator for Centre for Environmental Law Education, Research and Advocacy (CEERA), NLSIU is responsible for several publications on Contracts and Commercial Agreements such as the "Law Relating to Business Contracts in India, SAGE, India 2009", "Contracts, Agreements and Public Policy [NLSIU Book Series -1] which covers, in depth, various aspects relating to contractual obligations, commercial disputes, arbitration clauses in commercial contracts etc.

The Centre is involved in arbitration matters, by not only organizing certification's courses but by also drafting legal opinions, drafting arbitration agreements, advising clients on arbitral matters and also has undertaken a major research projects for a public sector organisation on such matters. The Centre is involved in preparing briefs for arbitration matters and the team members from the centre have also appeared in arbitral proceedings

The Centre has also organised an International Conference on Liberalization Privatisation and Globalisation – Changing Legal Paradigm in the year 2016 and a book on the same was

published by the Eastern Law House, which was an amalgamation of the articles that were presented at the Conference. Recently the centre published “Public Private Partnership: A Sectoral Analysis, NLSIU Book series 5”.

About the National Seminar

India ranked 142nd in 2015 Ease of doing business rankings published on 29 October 2014 by the World Bank. Since then it has jumped 65 places to reach its current 77th position in 2019 rankings, published on 31 October 2018. One of the factors considered to calculate the rankings is the contract enforcement indicator. However, on this indicator the country has not been able to register that good a performance. In 2015 ranking India was 186th among 189 countries. In the 2019 Rankings it ranked 163rd among 190 countries in relation to contract enforcement by the World Bank in its ease of doing business report of 2018.

To remedy this dire situation the Parliament of India enacted the Specific Relief (Amendment) Act, 2018. The amendment brought radical changes in the area of contract enforcement. Most important were limiting the discretion of the court in granting the remedy of specific performance and injunctions in disputes related to infrastructures and introducing the right to substituted performance. However, more such radical adjustments are required to be made in the future to improve the contracting environment of India.

In India several legislations deal with various aspects of contractual enforcement viz. The Indian Contract Act, 1872; The Specific Relief Act, 1963; The Sales of Goods Act, 1930; The Arbitration and Conciliation Act, 1996; The Commercial Courts Act, 2015; and, The Competition Act, 2002; The Code of Civil Procedure, 1908. In the Seminar the various issues related to strengthening and simplifying the provisions related to contractual enforcement will be deliberated upon.

The National Seminar is in pursuance of the Project undertaken by CEERA under the Ministry of Law and Justice, Department of Justice, Government of India, titled “*Strengthening Legal Provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial Matters in India*”. The Project is an effort to explore possible avenues of reformation in the Contractual and Commercial Law to uplift the dire situation of contractual enforcement in India. The Project will undertake a thorough survey and analysis of laws dealing with contractual enforcement in India through the review of various legislations, case laws, comparative legal research, and will also conduct empirical research by organizing seminars, surveys, interviews with the experts on the field.

The Seminar will invite presentations and papers on the following themes:

1. Performance of Contractual Obligations Law and Practice:

- a. Effectiveness of the remedy of Substituted Performance under Specific Relief (Amendment) Act, 2018. Enforceability of ‘Risk and Cost purchase’ clause
- b. Specific Performance: Rule rather than exception.

- c. Substantial Performance: Effective defence. e.g.: in Construction contracts.
- 2. **Remedies and Relief:**
 - a. Penalty Clauses and Penalty Damages
 - b. Indirect loss/Damages: Whether loss of profit can be claimed?
 - c. Whether Interest on damages can be claimed?
 - d. Exemplary Damages
 - e. Temporary Relief Measures: *Ad Interim* Injunctions
 - f. “Reliance Loss” Consequential Damages
 - g. Formula for calculation of Damages
- 3. **Contractual Enforcement**
 - a. Enforcing Indemnity v Damages
 - b. Non-Disclosure Agreements: Testing its enforceability in Commercial Contracts
 - c. Breach of IP Licensing agreements: Relief and remedies
 - d. Liquidated damages and *Force majeure* clause
- 4. **Commercial Dispute Resolution**
 - a. Interpretation and Construction of Contracts
 - b. Alternate Dispute Resolution in commercial Disputes
 - c. Commercial Court Act

Who Can Attend:

All interested legal practitioners, arbitrators, academicians, research scholars, solicitors, attorneys, advocates and students are invited to submit papers and participate in the seminar.

Important Dates:

- **Abstract Submission: 5th August 2019**
- **Communication for Acceptance of Abstract: 7th August 2019**
- **Last Date for Registration: 9th August 2019**
- **Submission of Full-Length Papers: 19th August 2019**
- **Date of Seminar: 21st and 22nd August 2019.**

Submissions - Details and Guidelines:

Abstracts of not more than 500 words, for original research papers on the above-mentioned themes are invited. Authors of shortlisted abstracts shall be required to send their full-length papers. Authors of accepted papers shall have the privilege of presenting their paper at this seminar. Papers of outstanding quality shall be published. There can be maximum only one Co-author. The full-length research papers in case of short articles should be 3500 – 5000 words (inclusive of foot notes), and around 8000 words (inclusive of foot notes) in case of long articles. Potential contributors are required to adhere to a uniform mode of citation (20th edition of The Bluebook: A Uniform System of Citation is recommended). Abstracts and papers should be submitted as Word documents, with a covering letter containing the name and designation of the author(s) and should be emailed to the email addresses listed below.

After peer review, select papers/articles will be published by NLSIU at www.nlspub.ac.in in the form of a online Handbook.

Please send all Abstracts to vikasgahlot@nls.ac.in

Registration Charges: Rs. 1500/- (One Thousand Five Hundred Only) per author/participant. [Non- Residential]

Last Date for Registration for participants and paper presenters: 9th August 2019.

Registration fee covers the following: Admission to all sessions, Conference material, Tea/Coffee and lunch during the designated breaks for the duration of the conference.

Registration fees may be paid by DD drawn in favour of National Law School of India University and sent along with the Registration Form attached herewith or through NEFT transfer, as per the bank details given below. Once the NEFT is done, the participant(s) must send the BANK TRANSACTION ID to susheela@nls.ac.in

Dr. Sairam Bhat

Professor of Law, NLSIU

NLSIU National Seminar on
Strengthening Legal Provisions for the Enforcement of Contracts: Reassessing the Quality
and Efficiency of Dispute Resolution of Commercial Matters in India

Date

REGISTRATION FORM

Full Name: Dr./Mr./Ms. Mrs.	
Company/ Organization/ School/ College:	
Designation:	
Office Address:	
Email	
Contact No: a) Mobile:	
b) Work:	
Payment Details:	DD NO. and Date: NEFT Transaction ID and Date:

Please send the bank Transaction ID to:

Ms. Susheela

Secretary

Ph: [m] 9448690903

National Law School of India University, Nagarbhavi, Bengaluru 560072

**ELECTRONIC CLEARING SERVICE (CREDIT CLEARING) / REAL TIME GROSS
SETTLEMENT (RTGS) FACILITY FOR RECEIVING PAYMENTS**

DETAILS OF ACCOUNT HOLDER:

NAME OF ACCOUNT HOLDER	DIRECTOR NLSIU SCHEMES AND PROJECTS
COMPLETE CONTACT ADDRESS	NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, P.B.NO.7201, NAGARBHAVI, BANGALORE - 560 072
TELEPHONE NUMBER/FAX/MAIL	23213160, 23160532, 23160533 / Fax 23160534 / registrar@nls.ac.in
PAN	AAAJN0185F

BANK ACCOUNT DETAILS: -

BANK NAME	CORPORATION BANK
BRANCH NAME WITH COMPLETE ADDRESS, TELEPHONE NUMBER AND EMAIL	NLSIU BRANCH, NLSIU CAMPUS, NAGARBHAVI, BANGALORE - 560 072, Ph: 080- 23218130 & 23218115 EMAIL - cb2144@corpbank.co.in
IFSC CODE / NEFT CODE / RTGS CODE / BRANCH CODE	CORP0002144
TYPE OF BANK ACCOUNT (SB/CURRENT/CASH CREDIT)	SAVINGS BANK
COMPLETE BANK ACCOUNT NUMBER (LATEST)	520101045115075
MICR CODE OF BANK	560017060

Brochure:

**THREE DAY RESIDENTIAL PROFESSIONAL
CERTIFICATE COURSE ON PUBLIC
PROCUREMENT, TENDERING AND LAW
RELATING TO GOVERNMENT CONTRACTS
12th to 14th September 2019**



NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BENGALURU

In Collaboration with

THE NATIONAL PRODUCTIVITY COUNCIL,

NEW DELHI

Organizes a

THREE DAY RESIDENTIAL

PROFESSIONAL CERTIFICATE COURSE ON

**PUBLIC PROCUREMENT, TENDERING AND LAW RELATING TO
GOVERNMENT CONTRACTS**

12th to 14th September 2019



**Venue: International Training Centre
National Law School of India University
Nagarbhavi, Bengaluru, Karnataka, India 560 242**

About National Law School of India University, Bengaluru

The National Law School of India University, the Nation's premier law university, came into existence through a Notification under the National Law School of India University Act (Karnataka Act 22 of 1986). It signified the culmination of efforts by the Judiciary, the Bar Council of India, the Karnataka Bar Council, the Bangalore University and the Government of Karnataka to reform legal education and to establish a centre of excellence for legal education and research in India.

The Chief Justice of India is the Chancellor of the University. The Chairman, Bar Council of India, is the Chairman of the General Council. These connections lend a stature and prestige to the School which is unparalleled in the history of legal education in India. The Karnataka Act confers complete administrative and academic autonomy which facilitates innovation and experimentation in the pursuit of excellence in legal education. The Law School has undertaken many research projects funded by the UGC, the Government of India, the Government of Karnataka, the Department of Women and Child Development, UN agencies, the World Bank, HIVOS etc. These have served to strengthen research and teaching at the Law School.

Prof. (Dr.) Sairam Bhat, Professor Law & Coordinator for Centre for Environmental Law Education, Research and Advocacy (CEERA), NLSIU is responsible for several publications on Contracts and Commercial Agreements such as the "Law Relating to Business Contracts in India, SAGE, India 2009", "Contracts, Agreements and Public Policy [NLSIU Book Series -1] which covers, in depth, various aspects relating to contractual obligations, commercial disputes, arbitration clauses in commercial contracts etc. CEERA, under the guidance of Dr. Bhat has also undertaken multiple project assignment in drafting, vetting and reviewing of contracts for Departments and various central and State Public sector undertakings. The Centre is involved in arbitration matters, by not only organizing certification's courses but by also drafting legal opinions, drafting arbitration agreements, advising clients on arbitral matters and also has undertaken a major research projects for a public sector organisation on such matters. The Centre is involved in preparing briefs for arbitration matters and the team members from the centre have also appeared in arbitral proceedings.

The Centre had also organized an International Conference on *Liberalization, Privatization and Globalization- Changing Legal Paradigm* in the year 2016 and a book on the same was published by the Eastern Law House, which was an amalgamation of the articles that were presented at the Conference. The second International seminar was on 'Enforcement Trends in Arbitral awards' organised in July 2018.

About the National Productivity Council:

NPC is national level organization to promote productivity culture in India. Established by the Ministry of Industry, Government of India in 1958, it is an autonomous, multipartite, non-profit organization with equal representation from employers' & workers' organizations and Government, apart from technical & professional institutions and other interests. NPC is a constituent of the Tokyo-based Asian Productivity Organisation (APO), an Inter-Governmental Body, of which the Government of India is a founder member.

NPC teams up with its clients to work out solutions towards accelerating productivity, enhancing competitiveness, increasing profits, augmenting safety and reliability and ensuring better quality. It provides reliable database for decision-making, improved systems and procedures, work culture as well as customer satisfaction both internal & external. The solutions can be all-encompassing or specific depending on the nature of the problem. The council also helps monitor, review and implement the identified strategies. Promotional and catalytic in nature, NPC's services have bearings on economic growth and quality of life. The Council promotes a comprehensive view of productivity focused on improving triple bottom line – economic, environmental and social and adds value for all the stakeholders through generation & application of advanced knowledge for inclusive Growth.

About the Course

A contract is an agreement enforceable by law which offers personal rights, and imposes personal obligations, which the law protects and enforces against the parties to the agreement. A contract to which The Central Government or a State Government is a party is called a 'Government Contract'.

In India, under the Indian Contract Act 1872, no prescribed form of entering into contracts is mentioned. But the position with regard to Government Contracts is different. In respect to Government Contracts in India, formalities as prescribed by Article 299 of the Indian Constitution need to be complied with. This does not necessarily mean that the provisions of the Indian Contract Act have been superseded. But the formalities as imposed by Article 299 and the strict compliance of the same have been regarded by some as being extremely inconvenient and restrictive to government operations in practice. Consequently, the courts have somewhat mitigated the rigours of the formalities contained in Article 299(1), and have enforced contracts even when there have not been full, but substantial, compliance with the requirements of Article 299(1).

Irrespective of whether it is private or Government, contracts in India are governed by the Indian Contract Act, 1872, Specific Relief Act, Sale of Goods Act, Competition Act, CVC, CAG Guidelines and various Supreme Court Judgements forming the so called law on tenders'. Awarding of high value contracts by the government, though, is an administrative function, the number of cases challenging the procedure adopted while awarding such contracts in order to validate the legality and fairness are growing. Insofar as the awarding of commercial contracts to the private entities is concerned, government is duty bound to observe certain procedures like the tender process while exercising their administrative powers, which involves the distribution of public resources. Nevertheless, parties to the contract are bound by the contractual terms which confer rights and duties to each party and the same can be made enforceable against the defaulting party. The fundamental principles underlying the government contracts are reasonableness and rationality, which form a part of the essential element as provided for under Article 14 of the Constitution of India wherein, the government exercising administrative power even in contractual matters must avoid arbitrariness bearing the objective of larger public interest in mind.

State and its instrumentalities are vested with the duty to act fairly and reasonably for the benefit of public and therefore, cannot act arbitrarily by entering into contractual relationship with any person by negating the norms of fairness and objectivity. The interest of public being paramount, its departure, without reason, amounts to arbitrary action. Violations or breach of contractual terms by the State can be a matter of challenge before the court of law and in several cases the

High Courts and the Supreme Court have intervened to rectify the actions of the state. The contractual liability of the State cannot be waived off and the government is not immune to the liabilities arising out of the contracts, wherein the state is a defaulting party. In such cases, the state may be held liable to compensate the aggrieved party for the damages suffered. Therefore, it is indispensable for the state to act in fairness even in contracts with private parties, where there is an involvement of administrative machinery.

The Government, post liberalisation and globalisation, is venturing into practises that were hitherto unexplored such as Public-Private Partnerships. Increase in private partaking with the governments in areas such as oil fields exploration contracts, defence equipment manufacturing, infrastructure and other key fields has thrown open several challenges.

Some major areas that have witnessed key issues in procurement issues and contractual irregularities, furthering them into long legal battles have been those of Highways, Power Sector, Airports, Defence Procurements and Manufacturing, Oil and Gas et. Cetera. A new sector that has opened up recently to a very few manufacturing units is the Nuclear Energy sector. These few companies supply minor key components in the building of civil nuclear facilities in the country. Tendering and bidding procedures are held in each case and since the opening of the tenders, the procurement process starts for all government contracts. This course also aims chiefly to work on the better understanding of the participants in the respective manner.

The aim is to introduce and facilitate the understanding of the subject by means of Case Studies which will enable the better understanding of technical know-how and catering to the specialised needs of the participants from the government sectors, have an exercise session as well, which shall delve into how to read, analyse and identify important sections and components of a government contract and tenders.

Taking into account the increasing participation of private players in such areas and multiple Government contracts being executed, it becomes essential to understand the processes, legal perspectives and challenges faced by multiple stakeholders while entering into and in the execution of such contracts.

THE THREE-DAY PROFESSIONAL CERTIFICATE COURSE ON ‘PUBLIC PROCUREMENT, TENDERING AND LAW RELATING TO GOVERNMENT

CONTRACTS' WOULD BE ANALYSING THE ABOVE MENTIONED ISSUES AND LOOK AT MATTERS RELATING TO GOVERNMENT CONTRACTS FROM A LEGAL, CONSTITUTIONAL, INDUSTRY AND COMPLIANCE SPECIFIC PERSPECTIVE.

Some of the Areas that the Course shall be focussing on are:

- **Introduction to Law application to Contracts with Government**
- **Government Contracting in India (Application for Government Contracts, Law on Tender, Bidding Process, etc.)**
- **Requirements of a Government Contract: Disputes in Tender**
- **Government as a Contracting Party and the Contractual Liability of the State: Constitutional and Legal Perspective**
- **Negotiation in Contracts, L1, MOU/LOI as contracts.**
- **Drafting Challenges in Contracts**
- **Issues in EMD, SD, LD, BG.**
- **Important Clauses and their Interpretation.**
- **Amendment, Modification and Re-negotiation of Contracts**
- **Public Private Partnership Contracts in India**

Who Should Attend?

Government Officers, PSU Officers, Legal Managers, Advocates, Practitioners Lawyers, Corporate Trainers, personnel from Government Organisations, Business Professionals, Relevant Industry personnel, Transaction lawyers and like.

Important Dates:

Date of Course: 12th, 13th and 14th September 2019

Last Date for Registration: 31st August 2019

Course Fee: INR 20,000 /-per person

Limited Seats, First Cum First Serve Basis.

Registration fee covers the following: Accommodation, Admission to all sessions, Conference material, Tea/Coffee, Breakfast, lunch and dinner during the duration of the conference.

Participants should arrive not before 11th September evening and must leave the training centre latest by 15th morning. Any early arrival and late departure will be charged extra. Participants are not encouraged to travel with their spouse and request for family accommodation shall not be entertained. If a participant has been admitted to the course on twin sharing room basis, no request for single accommodation will be entertained.

Code of Conduct expected from the participants: NLSIU does not permit smoking or consumption of liquor on campus. Attendance to all the sessions is mandatory for issue of certificate. Any request for sightseeing/local shopping will not be encouraged. During the sessions, all mobile phones should compulsorily be in the power off mode. Reading material shall be sent only in softcopy format. Presentation made by the speakers may be shared only if the speakers agree for the same.

Registration fees may be paid by DD drawn in favour of National Law School of India University and sent along with the Registration Form attached herewith or through NEFT transfer, as per the bank details given. Once the NEFT is done, the participant/s must send the BANK TRANSACTION ID to susheela@nls.ac.in.

Course Co-ordinators:

Dr. Amita Prasad, IAS

*Additional Secretary (GoI) and Director General, National Productivity Council,
New Delhi.*

Dr. Sairam Bhat

*Professor of Law and Coordinator for Centre of Environmental Law Education,
Research and Advocacy, National Law School of India University, Bengaluru*

For Registration and Other Details:

Ms. Susheela Suresh

susheela@nls.ac.in

NLSIU

THREE DAY PROFESSIONAL CERTIFICATE COURSE ON

PUBLIC PROCUREMENT, TENDERING AND LAW RELATING TO

GOVERNMENT CONTRACTS”

12th-14th September 2019

REGISTRATION FORM

Full Name: Dr./Mr./Ms./ Mrs.:	
Company/ Organization/School/College	
Designation:	
Office Address:	
Email:	
Contact No.:	
a) Mobile:	
b) Work:	
Payment details	DD No. and Date: NEFT Transaction ID and Date:

Please send the bank transaction ID to:

Ms. Susheela

Secretary

EMAIL: susheela@nls.ac.in

Ph: [m] 9448690903

National Law School of India University, Nagarbhavi, Bengaluru 560072

**ELECTRONIC CLEARING SERVICE (CREDIT CLEARING) / REAL TIME GROSS
SETTLEMENT (RTGS) FACILITY FOR RECEIVING PAYMENTS**

DETAILS OF ACCOUNT HOLDER: -

NAME OF ACCOUNT HOLDER	DIRECTOR NLSIU SCHEMES AND PROJECTS
COMPLETE CONTACT ADDRESS	NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, P.B.NO.7201, NAGARBHAVI, BANGALORE - 560 072
TELEPHONE NUMBER/FAX/MAIL	23213160, 23160532, 23160533 / Fax 23160534 / registrar@nls.ac.in
PAN	AAAJN0185F

BANK ACCOUNT DETAILS:-

BANK NAME	CORPORATION BANK
BRANCH NAME WITH COMPLETE ADDRESS, TELEPHONE NUMBER AND EMAIL	NLSIU BRANCH, NLSIU CAMPUS, NAGARBHAVI, BANGALORE - 560 072, Ph: 080-23218130 & 23218115 EMAIL - cb2144@corpbank.co.in
<u>IFSC CODE / NEFT CODE / RTGS CODE / BRANCH CODE</u>	CORP0002144
TYPE OF BANK ACCOUNT (SB/CURRENT/CASH CREDIT)	SAVINGS BANK
COMPLETE BANK ACCOUNT NUMBER (LATEST)	520101045115075
MICR CODE OF BANK	560017060

Annexure: Project Proposal



Department of Justice
Ministry of Law and Justice
Government of India



**Department of Justice
Ministry of Law and Justice**

**Proposal under the Scheme for Action Research and Studies on
Judicial Reforms**

RESEARCH TITLE

**Strengthening Legal Provisions for the Enforcement of
Contracts: Reassessing the Quality and Efficiency of Dispute
Resolution of Commercial Matters in India**



NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

Nagarbhavi, Bengaluru

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

Research Title for the Proposed Study: Strengthening Legal Provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial Matters in India

Implementer/Organisation: Centre for Environmental Law Education,
Research and

Advocacy (CEERA)

National Law School of India University, Nagarbhavi

Bengaluru – 560072

Phone: 080 23160532-35 / 080 23213160 / 080 23160527

Fax: 080 23160535 / 080 23160527

Description of Project Coordinator: Prof. (Dr.) Sairam Bhat

Professor Law

National Law school of India University

Nagarbhavi, Bengaluru 560072

Email: bhatsairam@nls.ac.in

Research Team:

1.Mr. ManjeriSubin Sunder Raj

Assistant Professor

National Law school of India University

Nagarbhavi, Bengaluru 560072

Email: subin@nls.ac.in

2.Ms. RaagyaZadu

Teaching Associate
National Law school of India University
Nagarbhavi, Bengaluru 560072
Email: raagya@nls.ac.in

3.Ms. Architha Narayanan

Teaching Associate
National Law school of India University
Nagarbhavi, Bengaluru 560072
Email: architanaarayanan@nls.ac.in

Research Objective:

The objective of the study would be to:

1. Review the existing laws on Contracts in India
2. Ascertain whether the remedies and relief for the breach of contracts in India are globally competent (evaluating the efficiency of the remedies in a globalized economic environment)
3. Applicability [enforceability] of remedies in Contract and assessing the quality of the remedies in commercial disputes
4. Dispute Resolution in Contracts: Use of Alternative Dispute Resolution in India and whether one can measure its success, especially Arbitration
5. Is the alternate use of the Commercial Courts, Commercial Division and Commercial Appellate Division Of High Courts Act, 2015 viable
6. To look into the Legal Reforms required in Law and practice to improve the ease of doing business in order to make India a viable Investment destination

Project Budget: Rs 25, 00, 000 (Rupees Twenty Five Lakh) for two financial years.

Proposed Start and End Date:

Proposed Start Date of Project: February, 2018	Estimated end date of project: June, 2020
---	--

Costs divided across the Financial Year:

2018-19	Rs. 12, 20, 000 (Twelve Lakh Twenty Thousand)
2019-20	Rs 12, 80, 000 (Twelve Lakh Eighty Thousand)

Research Methodology:

1. Doctrinal as well as empirical
2. Questionnaire method – Sample of 20 cases of dispute (Purposive Sampling: samples will include cases where there is a commercial dispute existing between the parties)
3. Survey of commercial dispute in the Country's Infrastructure Sector

Data Collection:

- **Primary Data:** Relevant Statutes (Constitution of India, Civil Procedure Code, 1908, Limitation Act, The Arbitration and Conciliation Act, 1996, The Indian Contract Act, 1872, The Specific Relief Act 1963, The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, Sale of Goods Act, Competition Act, Information Technology Act etc.) Court decisions, Tribunal Awards, Commercial Contracts and other legal documents.
- **Secondary Data:** Legal Reference Books, Law Journals, Articles, Legal news etc.

Main Activities:

Activities in the 1st Year

S. No	Activity	Outcome
1.	Review of all existing laws relating to Remedies for Breach of Contract (Doctrinal)	Ascertaining the Loopholes, hurdles and Implementation challenges
2.	Empirical work (Interviewing Judges, lawyers, legal councils, arbitrators etc.)	Understanding the existing practices and issues relating to Remedies in Commercial Disputes
3.	Comparative Study of Remedies for Breach in India and Remedies provided in other jurisdictions	Ascertaining Global Best Practices in relation to Remedies for Breach in Commercial Disputes and the position in India with regard to the same.

Activities in the 2nd Year

S. No	Activity	Outcome
1.	2 Day Workshop	Publication containing the Papers and feedback

	(On the Best Practices with regard to Remedies for Breach in Commercial Disputes [would involve feedback from participants and experts])	received during the workshop
2.	To suggest Legal Reforms based on the Study and Research work conducted	Report on Legal Reforms regarding Dispute Resolution of Commercial Matters in India

Key Deliverables:

- Compilation of Research containing existing practices, issues, global best practices and implementation challenges relating to Dispute Resolution in Commercial matters and the remedies provided for breach
- Publication containing the Papers and feedback received during the Workshop on Best Practices with regard to Remedies for Breach in Commercial Disputes
- Report on Legal Reforms regarding Dispute Resolution of Commercial Matters in India

Background of the Institution and the Project:

About NLSIU

The National Law School of India University, the Nation's premier law university, came into existence through a Notification under the National Law School of India University Act (Karnataka Act 22 of 1986). It signified the culmination of efforts by the Judiciary, the Bar Council of India, the Karnataka Bar Council, the Bangalore University and the Government of Karnataka to reform legal education and to establish a centre of excellence for legal education and research in India.

Prof. (Dr.) Sairam Bhat, Professor Law, National Law School of India University is responsible for several publications on Contract and Commercial Agreements such as the "***Law Relating to Business Contracts in India, SAGE, India 2009***", "***Contracts, Agreements and Public Policy [NLSIU Book Series -I]***" which covers, in depth, various aspects relating to contractual obligations, commercial disputes, arbitration clauses in commercial contracts etc.

NLSIU, under the guidance of Dr. Bhat, has organised a **Three Day Bridge Course on the 'Law and Practice of Arbitration in India'** at NLSIU and the Bishop Cotton's Women Christian Law College, Bengaluru, which saw tremendous participation and enthusiasm from the participants.

About CEERA

The Centre for Environmental Education, Research and Advocacy (CEERA) established in 1997 enjoys the support of the Ministry of Environment and Forest (MoEF), Government of Karnataka, the Bar and the Bench in India and several Institutions and Universities abroad. Building an environmental law database, effectively networking among all stakeholders, building up an environmental law community and policy research in the area of environment are

CEERA's main objectives. To achieve these, CEERA attempts to build functional and professional linkages with government agencies and non-governmental organisations in India, the South Asian Region and at International levels.

Apart from handling and furthering India's environmental conservation work involving policy analysis, campaigning, community capacity building and strategic level intervention on critical environmental issues, CEERA serves as a rich resource centre for environmental law teaching and research for both the bachelors and masters courses at NLSIU.

CEERA has also brought out many publications in the area of environmental law along with Newsletters, CEERA March of the Environmental Law, NLSIU's first e-Journal – Journal on Environmental Law, Policy and Development and manages a website www.nlsenlaw.org.

About the Project:

Problem Statement

The Justice Delivery system with regard to adjudication of commercial disputes needs to be seriously reassessed and studied in order to realize the gaps that are currently present in the legal and procedural framework. The various issues that crop up in the matter of dispute resolution in commercial matters are:

1. Currently there are more claims for 'damages' rather than specific performance in commercial disputes in India
2. Critical Reforms are necessary to revitalize the remedy of specific performance rather than damages in commercial disputes
3. Interest on Damages are very rarely given and the issue of delay in giving the damages is also present
4. The Courts in the Country frequently grant 'interim injunction' in cases of commercial disputes, which can stop the continuation of the business of the parties involved and also stop the parties from fulfilling their contractual obligations.
5. The increase of litigation in commercial matters does not give an impression of a robust business environment. The Court System has been unable to deliver speedy and quality justice in this regard.
6. Though the use of ADR is quite standard in commercial dispute resolution (especially arbitration), the quality of Arbitral Awards is still an issue (despite the 2015 Amendment to the Arbitration and Conciliation Act, 1996 [**Section 29A and 29B**] that sets a time limit for giving an arbitral award and also talks about Fast Track Procedures). There is also the issue of easy appeal of the Arbitral Awards to the Courts with no finality which results in a protracted process that is not conducive to a good business environment.

7. The Justice Delivery System should aim at a Win-Win rather than a Win-Loss situation. The resolution of disputes should be given more importance in commercial matters rather than adjudication.

What is required

We need to:

1. Strengthen the existing legislative framework dealing with Dispute resolution of Commercial matters.
2. Identify the existing loopholes in the application and execution of the Law.
3. We need to strengthen the capacity of Arbitrators and Judges to apply the law so as to render quality and efficient/timely resolution of disputes.

This Project aims to acknowledge the above proposed points.

Activity Based Budget:

Year 1

S. No	Activities	Amount
1.	Honorarium for the Research Staff	7,20,000
2.	Project Co-ordination	2,00,000
3.	Centre expenses	1,00,000
4.	Library books/TA and other incidental expenses	2,00,000
	Total Budget for Year 1	Rs. 12,20,000

Year 2

S. No	Activities	Amount
1.	Honorarium for the Research Staff	7,20,000
2.	Project Co-ordination	2,00,000
3.	Two Day Workshop	2,60,000
4.	Centre expenses including TA	1,00,000
	Total Budget for Year 1	Rs. 12,80,000

Total Budget for Year 1 and 2 (12,20,000 + 12,80,000)	Rs. 25,00,000 (Rupees Twenty Five Lakhs)
---	---

--	--

Research and Development projects undertaken by CEERA

TITLE	YEAR STARTED	DURATION	FUNDING AGENCY
Environmental Law Capacity Building Project	1998	2003	Under MoEF funded by the World Bank
ENVIS Project	2003	2011	MoEF
Property Rights to the Urban Poor	2010	2013	Ministry of Housing and Urban Poverty Alleviation, Government of India
Preparing the draft Rajasthan Water Resources Management Act,2012	May, 2011	Till January 2012	Government of Rajasthan
Pocket Guide: Compliance of Environmental Regulations by the Industry	2012	till 2014	Environment Management, Policy & Research Institute(EMPRI),Bangalore, the Environmental Law Institute, Washington D.C (ELI)
Handbook on Enforcing Hazardous Wastes Rules in India: Strategies and Techniques for Achieving Increased Compliance	2012	Till 2014	Environmental Law Institute, Washington D.C (ELI)
United Nations Framework Convention on Climate Change (UNFCCC): Strategic blueprint for negotiating the 2015 Climate Change Agreement and to evolve a legal architecture for climate change negotiations	February 2014	till October 2014	Ministry of Environment and Forests, Govt. of India
Karnataka Agriculture Pricing			

Commission (KAPC): Legal Strategies for addressing the farmers' distress over "Price"	May 2015	10 months	Karnataka Agriculture Pricing Commission
--	----------	-----------	---

ONGOING RESEARCH PROJECTS			
University Grants Commission – Major Research Project Scheme (UGC – MRP): Drafting a comprehensive Law Manual for stakeholders, administrators and policy makers dealing with e-waste/waste electrical and electronic equipment (WEEE) management in India.	2015	Till 2018	University Grants Commission
“Institutional and Market Innovations Governing Sustainable Use of Agricultural Water under Water Governance & Policy, Agri-Consortia Research Platform on Water	2016	2018 (20 months)	Indian Council of Agricultural Research (ICAR)
NLSIU as the lead technical agency for the GoI-UNDP-GEF Project: Strengthening human resources, legal frameworks, and institutional capacities to implement the Nagoya Protocol (Global ABS Project	November 2017	December 2019	Government of India UNDP-GEF