CONTRACT ENFORCEMENT AND EASE OF DOING BUSINESS IN INDIA

A Report By:

Centre for Environmental Law, Education, Research and Advocacy, National Law School of India University, Bengaluru (CEERA-NLSIU)

For the Project Strengthening Legal Provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial Matters in India undertaken by CEERA, NLSIU under the aegis of Department of Justice, Ministry of Law and Justice, Government of India under the Scheme for Action Research and Studies on Judicial Reforms

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FINAL REPORT for the Project - Strengthening Legal Provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial Matters in India

A Joint Publication By:

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EXECUTIVE SUMMARY

This Final Report marks the culmination of the two-year research project titled "*Strengthening Legal Provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial Matters in India"* granted to Centre for Environmental Law, Education, Research and Advocacy (CEERA) by the Department of Justice, Ministry of Law and Justice, Government of India under the Scheme for Action Research and Studies on Judicial Reforms.

To strengthen contract enforcement and improve ease of doing business in India, reforms are required in both substantive as well as procedural law. The substantive law reforms will have an indirect impact on the Ease of Doing Business rankings (as conceptualized by the World Bank). It will help in creating a robust legal regime that can instill confidence in the investors and other parties, and in ensuring that their rights are protected. The procedural law reforms will have a direct impact on the Ease of Doing Business rankings as the parameter of contract enforcement take into account only the procedural aspects of law. To this end the following recommendations are made:

1. The Indian Contract Act, 1872 and the Sale of Goods Act, 1930 are pre-independence legislations and do not provide for 'Rule Making Power'. The Indian Contract Act, 1872 should be amended and a provision Section 76 should be inserted to provide delegation of Rule Making Power to the Government (Ministry of Law and Justice) to make rules and issue notifications. This will facilitate a flexible adoption of the law to contemporary challenges, especially in the area of international contracts and commercial disputes.
2. To ease the burden of the Courts, trade bodies like FICCI or CII should be empowered to issue 'Force Majeure Certificates'. Once the certificate is issued, the parties can seek extension of time to perform obligations under a contract, and the same should not be questioned in a court of law in India. For this purpose, a notification should be issued by the Government u/s 76 of the Indian Contract Act, 1872 (*See Point 1)*.
3. To make the Indian Contract Act, 1872 a more robust law – profiteering from damages should be prohibited and the principle of unjust enrichment must be strictly applied in awarding damages in case of breach of contract.
4. One of major shortcomings of the Indian Civil Courts machinery is the awarding of lesser damages as compared to other avenues. Alternatives such as arbitration are preferred over suits in normal civil courts. This is, *inter alia*, due to the fact that arbitral awards typically allow a higher amount of damages for breach of contract. Further, in matters before higher courts, especially in stages of appeal, evidence in support of quantum of damages is not evaluated which therefore does not guarantee fair damages to the injured party. Thus, we require a stricter regime for awarding damages. To this end, awarding punitive damages for intentional breach of contracts is one such area which should be looked into.
5. The Rule of reasonableness – i.e. awarding damages based on what is deemed reasonable by the courts – is not a proper tool to deter parties from breaching

contracts. Further, as what is reasonable depends on the discretion of the courts, there is no predictability in the outcome. This unpredictability creates an apprehension as to the award of fair and just damages in the event of breach. Awarding punitive damages and restricting the scope of court's discretion will solve this problem.

6. The practice of awarding reasonable damages must be shifted to that of "actual damages" or any other damages such as "economic loss or monetary loss" which ensures objectivity.
7. Section 73 of the Indian Contract Act should be amended to ensure exemplary action as a consequence of intentional or willful breach of contract. The current regime of awarding damages can be described as a "strict liability" regime where the "mental state" of the breaching party is not considered for awarding damages. The aim is not to move towards an absolute liability regime of awarding contractual damages by limiting the number of exceptions, but rather to strengthen contractual enforcement in India by providing a higher quantum of damages in cases where breach of contract is committed knowingly/intentionally/deliberately. However, usage of the term punitive, as used in other jurisdictions, should be avoided as it suggests penal action. Hence, it is recommended to use the term 'exemplary damages' instead. For this we suggest that "exemplary damages" should be awarded for unjustified intentional breach of contracts by amending Section 73.
8. Interest on damages for breach of contract must be awarded as a matter of right. The discretion of the courts to award interest should be limited. The rate of interest should be standardized as per the rate prescribed by the RBI. The award of interest is not part of the compensation awarded but it is separate from that and over and above damages. It is not a penalty but normal accretion of capital to which the innocent party is entitled.
9. The legal position relating to liquidated damages in India under Section 74 of the Indian Contract Act should be revised. It should be shifted from the common law approach to civil law approach. This will strengthen contract enforcement by saving time and cost in the enforcement process. It will also enhance the predictability of legal disputes.
10. Section 74 of the Indian Contract Act should be amended to make liquidated damages and penalty clauses enforceable as they are stipulated under the contract to the extent they are not "manifestly unreasonable".
11. The requirement, imposed by judicial interpretation of Section 74, that some loss/damage needs to be shown to claim liquidated damages needs to be removed. The law in this regard should be brought on par with international instruments, such as UNIDROIT, which do not impose any such requirement and make liquidated damages claimable *ipso-facto* of the breach without the need to show any loss/damage suffered.
12. Considering the public-private partnership scenario in India & its advantages as well as shortcomings, there should be a single formula or set of standard formulae developed nationally. The formula should take into consideration factors such as contract price, clear definition of market price, loss of profits and various other

overhead costs. Development of such a formula followed by compulsory ADR mechanism will surely increase the efficiency of contract enforcement in India.

13. A combined claim of reliance loss and expectation loss should be made recoverable when both losses do not overlap. And in case of overlap, they should be made recoverable barring the double recovery of overlapping loss. Section 73 of the Indian Contract Act should be amended accordingly in this regard.
14. With regard to arbitration, it is recommended that there should be no time limit to submit pleadings. Instead, a period of 12 months should be fixed to complete arbitral proceedings. This time period can be extended to a maximum period of 18 months, upon application submitted by parties to the Court. In case of institutional arbitration, power to permit or refuse any extension of time must be vested with the said institution. This would remedy the delay by reducing the burden and intervention of the Courts in case of international arbitration restricting them to only be concerned with extension applications of ad hoc arbitration proceedings and further promote institutional arbitration in the country.
15. Section 29A of the Arbitration and Conciliation Act, 1996, regarding extension application, should be amended. In this regard it is recommended that: "if the arbitral tribunal is of the view that the proceedings before it would not be completed within 12 or 18 months, then the said tribunal should inform the parties of the same within 30 days before the expiry of the time period". This will provide some time to the parties to reconsider whether or not to seek extension from the court. Upon receipt of such application the Commercial Courts should dispose it within 60 days. Further it is also recommended that: the tribunal, in an extension application, should record and submit the observations with regard to the conduct of the parties and the circumstances that led to delay in proceedings. The report submitted by the tribunal should be reviewed by courts before allowing the extension application.
16. To further strengthen the arbitration process, it is recommended that: (i) In Section 8 of the Arbitration and Conciliation Act, an exception should be inserted whereby a matter before the court can be referred to arbitration by the parties only at the preliminary stage and not at the interim stage; (ii) Prior to the commencement of arbitral proceedings, a time table should be fixed to ensure compliance with the time limit; (iii) Extension of time should be granted by imposing penalty costs on the party which caused delay; (iii) A maximum number of 3 adjournments should be allowed to a party in arbitration proceedings; (iv) A report of the arbitrator should be submitted to the Court on the conduct of the parties during arbitration and the circumstances that led to delay.
17. Institutional Arbitration should be encouraged in the form of Dispute Resolution Boards such as those done by UK and National Highway Authority of India Society for affordable resolution of disputes.
18. Substituted performance clause in a contract should not be a bar to claim the remedy of specific performance – Even if there is a clause of substituted performance in a contract, this should not bar a party from availing specific performance from the contracting party. Specific performance should be a remedy over and above the

contractual clauses of substituted performance in relevant cases. An explanation in this regard should be incorporated in Section 20 of the Specific Relief Act, 1963.

19. Order XLI of the Code of Civil Procedure, 1908 should be operationalised by: (i) ensuring strict enforcement of the prescription of 60 days from the date of filing; (ii) supervision of High Courts; (iii) enforcement of Case Management Hearings; and (iv) encouraging settlement of matters.
20. Parameters to evaluate the performance of courts and judges should be evolved and made publicly available to increase judicial transparency. Similarly for the conduct of parties, a reporting mechanism should be evolved.
21. Information Technology should be adopted as the primary means of serving summons in commercial disputes. In case of failure to deliver summons, or to contact the defendants, substituted service by way of postal service, utilisation of process servers appointed by courts or newspaper publications should be implemented.
22. One of the most time consuming pre-trial stage of a dispute is Framing of Issues. Under Order XIV of Code of Civil Procedure, 1908 no specific timeline has been prescribed to complete framing of issues. In this regard, an amendment should be made in the Code to prescribe a specific timeline within which issues must be framed by the court. Subsequent to the filing of written statement by the defendant, or failure to do so, the court shall frame issues subject to the provisions contained in the Code.
23. Pre-Institution Mediation (PIM) is one of the most important innovations in dispute resolution mechanism. However, non participation of parties, and unwillingness of the parties to participate and co-operate in the PIM process are the major reasons for its failure. Hence, the PIM provisions should be strengthened to make the process more efficient. The Commercial Courts Act, 2015 should be amended and a new provision Section 12B should be inserted prescribing that: "(1) If the mediator is of the view that the mediation is failing or that it will not result into a successful settlement between the parties, he shall offer a final settlement offer to the parties. (2) If the final decision of the Court is similar to the settlement offer made by the mediator, costs should be imposed on the party who has declined the offer, even if the final decision of the Court is in favour of that party."
24. Successful implementation of Case Management Hearings (CMH) is essential to ensure timely resolution of commercial disputes. Firstly, Case Management Hearings Guidelines or Rules should be framed to supplement CMH provisions under the Commercial Courts Act, 2015. Secondly, judges and lawyers taking up commercial matters must be well trained in the CMH process. Thirdly, the data related to implementation of CMH, should be published regularly on the website of Commercial Courts. Fourthly, a sense of discipline is required to ensure that the provisions of CMH are strictly adhered to. The High Courts should exercise their supervisory powers to ensure that lower courts are strictly following the procedural mandate and not deviating from it.
25. Infrastructure development, upgradation of technology and *modus operandi*, and providing the required human resource, especially at the lower level, is required to make the Commercial Courts a robust dispute resolution forum. Requisite number of judges, supportive staff, equipment and other necessary infrastructure facilities

should be made available to strengthen the implementation of Commercial Courts Act. This also includes the training facilities to be provided for the judges of the Commercial Courts.

26. Clear guidelines should be issued for the disposal of cases which are pending before the enactment of Commercial Courts Act and have been classified as commercial matters. It is recommend that only such matters which are still in the stage of summons should be classified as 'commercial matters' and transferred to Commercial Courts. Other matters which are in advanced stages of trial should not be classified as 'commercial matters' and should not be transferred to Commercial Courts for the purpose of adjudication.
27. There should be a strict adherence to the statutory timelines prescribed. The High Courts should undertake a periodical review to ensure that the matters are not pending for a long period of time. High Courts must direct the lower courts to abide by the timelines prescribed, as this will bring in accountability and reduce frequent adjournments granted by the courts during the course of trial.
28. To successfully improve contract enforcement in India for Ease of Doing Business ranking the "Quality of Judicial Process Index (QJPI)" is the key. QJPI is a set of best practices followed globally in commercial dispute adjudication. Improving QJPI score of India will have a direct bearing on improving the "time" and "cost" paraments for contract enforcement in India.
29. Exorbitant costs of litigation or arbitral proceeding should not become a hurdle for parties with insufficient financial resources to have access to justice. In this regard, Third Party Funding (TPF) Contracts are becoming prevalent. However, there is an urgent need to regulate TPF Contracts owing to increase in demand for the same. The Parliament should take steps to introduce an overarching framework to regulate TPF Contracts and address concerns such as public policy, conflict of interest, confidentiality, etc. The said framework should ensure that the motive behind funding is not malicious and the rights of the other party to the dispute are not jeopardised in any way. It should also provide the criteria of eligibility for funding and limit the role of the financier in the adjudication or resolution process. Though the Arbitration and Conciliation Act, 1996 to an extent addresses issues of conflict of interest and confidentiality, the framework should also specifically provide for disclosure of existence of TPF and the identity of financiers along with their duties and penalties for dereliction of the same.

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DECLARATION

The present report is an independent and original piece of academic legal research carried out in pursuance of the activities and deliverables for the Research Project titled **"STRENGTHENING LEGAL PROVISIONS FOR THE ENFORCEMENT OF CONTRACTS: REASSESSING THE QUALITY AND EFFICIENCY OF DISPUTE RESOLUTION OF COMMERCIAL MATTERS IN INDIA"** granted to CEERA, NLSIU by the Department of Justice, Ministry of Law and Justice, Government of India under the "Scheme of Action Research and Studies on Judicial Reforms".

It is further declared that:

1. The work contained in the report is original and has been done by the CEERA Team.
2. The work has not been submitted to any other Institution for any purpose whatsoever and has been solely done in pursuance of activities under the project.
3. Materials (data, theoretical analysis, and text) used from other sources for the purpose of research and preparing this report have been duly credited by providing references in footnotes.

Prof. [Dr.] Sairam Bhat
Professor of Law & Coordinator, CEERA
National Law School of India University, Bengaluru

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Prof. [Dr.] Sairam Bhat
Professor of Law & Co-ordinator, CEERA
National Law School of India University, Bengaluru

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PART A

RESEARCH REPORT

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

Apart from Constitutional, Penal and Family Laws, the Law of Contract is among the fundamental laws of any given society. It is the foundation of business, trade, commerce and the basis of any economic transaction. It is of day-to-day application in the ordinary lives of people and due to this, many a time, quite complex and vexed questions arise out of the contracts entered into by individuals, firms and corporate bodies or governments. The present-day e-commerce and e-transactions further add to such complexities.[1] Understanding and finding solutions to these complexities are of paramount importance.

Business, trade and commerce in any economy cannot thrive without a strong and robust contract enforcement and commercial dispute resolution mechanism. The quality and efficiency of contractual enforcement and dispute resolution reinforce the faith of the parties in the efficacy of the legal system and allows them to carry out commercial transactions with confidence that their rights and interests will be protected.

The present state of contractual enforcement in India is reflected in the Ease of Doing Business (EoDB) Index which has been published annually by the World Bank since 2003. Apart from contract enforcement, the Index ranks countries on a variety of indicators such as starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, and resolving insolvency.[2] The 2003 report brought to the world's notice that it takes more than 10 years to resolve a bankruptcy proceeding in India and with regard to contractual enforcement, it mentioned that it takes about 365 days, involves 22 different procedures and cost about 95% of income per capita to enforce a contract in India.[3] It also gave India a "Procedural-complexity Index" of 50 (a very high number) in relation to contractual enforcement. This index indicated how heavily dispute resolution is regulated by measuring substantive and procedural statutory intervention in civil cases by the courts. A high procedural-complexity index is associated with greater corruption and indicates delay.[4]

The successive EoDB reports portrayed an even grimmer picture of the contractual enforcement scenario in India. In 2015, India ranked 142nd among 189 countries and its contract enforcement rank was 186.[5] According to the 2015 report, contractual enforcement in India involved 46 different procedures, took 1420 days and costed 39.6% of the claim

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[1] Dr. Justice GC Bharuka, *Preface to Twelfth Edition* of MULLA, THE INDIA CONTRACT ACT (Anirudh Wadhwa ed., 15th ed. 2019).

[2] WORLD BANK GROUP, DOING BUSINESS 2020 (Oct. 2019), https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf.

[3] WORLD BANK GROUP, DOING BUSINESS IN 2004: UNDERSTANDING REGULATIONS (Sept. 2003), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB04-FullReport.pdf.

[4] *Id.*

[5] WORLD BANK GROUP, DOING BUSINESS 2015: GOING BEYOND EFFICIENCY (Oct. 2014), http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf.

value.[6] Since then, India has jumped 65 places to reach the 77th position in the 2019 ranking.[7] However, this substantial improvement in the overall ranking was not supplemented by a good performance on the contract enforcement front. From standing 186th among 189 countries in 2015, India was only able to jump to 163rd position among 190 countries in 2019 ranking.[8] India's improvement in ease of doing business index continued in 2020 Report as well with India jumping 14 places to reach the 63rd position among 190 countries.[9] However, the scenario with respect to contractual enforcement remained unchanged for India as it remained at the 163rd position.[10]

The contract enforcement rank is calculated on the basis of three criteria namely – **time taken** by the court of first instance to dispose of the case (calculated from the moment the plaintiff decides to file the lawsuit in court until payment and includes both the days when actions take place and the waiting periods in between. It is calculated in terms of number of days), **Cost** incurred in the dispute (calculated as percentage of the claim value and based on court fees, attorney fees and enforcement fees), and the **quality of judicial process index** (which varies from 0 to 18, the higher number indicating better quality of judicial process and is based on parameters of court structure and proceedings, case management, court automation and alternative dispute resolution).[11]

A brief comparison of the Indian position with the best performing economy, Singapore, along with United Kingdom and United States of America based on Ease of Doing Business 2020 Report is provided in the table below:

TABLE 1: Contract Enforcements parameter comparison of India with other countries				
Country	Singapore	United States	United Kingdom	India
Time Taken (in Days)	164	370	437	1445
Filing and service	6	30	30	45
Trial and judgment	118	240	345	1095
Enforcement of judgement	40	100	62	305
Cost (% of Claim value)	25.8	22.9	45.7	31.1
Quality of Judicial Process Index (0-18)	15.5	15	15	10.5
Enforcement of Contract Rank	1	17	34	163

As the table above shows, India lags very much behind on the time factor as legal disputes in India are infamous for their lengthy time duration. The quality of judicial process also needs to be strengthened. To remedy this dire situation, radical substantive and procedural reforms are the need of the hour.

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[6] *Id.*

[7] WORLD BANK GROUP, DOING BUSINESS 2019: TRAINING FOR REFORM (Oct. 2018), http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf.

[8] *Id.*

[9] WORLD BANK GROUP, DOING BUSINESS 2020, *supra* note 2.

[10] *Id.*

[11] World Bank Group, *Doing Business: Enforcing Contracts Methodology*, http://www.doingbusiness.org/en/methodology/enforcing-contracts. (last visited May 1, 2020).

One such reform initiated by the Indian Government was the enactment of The Commercial Courts Act, 2015 which established dedicated Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts for the speedy resolution and adjudication of high value commercial disputes.[12] It was the understanding of the Parliament that early resolution of commercial courts will create a positive image to the investor world about the independent and responsive Indian legal system.[13] Originally the Courts under this enactment were given jurisdiction over commercial disputes above the threshold of one crore rupees.[14] The Act was amended significantly in 2018 by which the threshold value was reduced to three lakh rupees.[15] The Amendment also established Commercial Appellate Courts and introduced the provisions for Pre-Institution Mediation and Settlement.[16] The concept of mandatory pre-institution mediation is one of the most interesting and remarkable reforms in commercial litigation and provides for, as the name suggests, compulsory mediation before institution of a suit where there is no urgent interim relief contemplated by the parties.[17] If successful, this will reduce the burden and workload of the courts significantly.

Another significant reform brought out by the Parliament was the Specific Relief (Amendment) Act, 2018. This amendment to the Specific Relief Act, 1963 brought radical changes in the arena of contractual enforcement in India. The most important change brought about was limiting the discretion of the court in granting the remedy of specific performance and injunctions. Earlier, the courts were conferred with wide discretionary powers to decree specific performance and grant or refuse injunctions. The result of this wide discretionary power was that the courts used to award damages as a general rule in majority of cases and grant specific performance as an exception.[18] To facilitate smoother contractual enforcement, the discretionary powers of the court were taken away and it was made obligatory on the courts to grant specific performance as a matter of right subject to certain limited grounds.[19] Further the Amendment also made provisions to provide for substituted performance i.e. where a contract is broken, the party who suffers was 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 of contract.[20] The remedy of substituted performance is an alternative remedy made available to the party who suffers the broken contract.[21] Another important feature of the 2018 Amendment was the insertion of new section, 20A dealing with infrastructure projects. It

[12] The Commercial Courts Act, 2015, Statement of Objects & Reasons.
[13] *Id.*
[14] *Id.*, §2(1)(i).
[15] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, cl. 4(II).
[16] *Id.* cl. 7 and cl. 11.
[17] The Commercial Courts Act, 2015 §3A.
[18] The Specific Relief (Amendment) Act, 2018, Statement of Objects & Reasons.
[19] The Specific Relief Act, 1963, §10 ("The Specific Performance of a contract **shall** be enforced by the court…").
[20] The Specific Relief (Amendment) Act, 2018, Statement of Objects & Reasons; *See also* The Specific Relief Act, 1963, § 20.
[21] The Specific Relief Act, 1963, §20.

bars the court from granting injunction in any suit where it appears to the court that granting injunction would cause hinderance or delay in the continuance or completion of the infrastructure project.[22]

Many such radical substantive and procedural reforms will be required in the future to keep the contractual law in India at par with the challenges posed by economic and technological developments. This will require a serious assessment and study of the justice delivery system with regard to adjudication of commercial disputes in order to realize the gaps that are currently present in the legal and procedural framework. We need to carefully identify the existing loopholes in the application and execution of the law and strengthen the existing legislative framework of commercial dispute resolution as well as strengthen the capacity of arbitrators and judges in applying the law so that the Indian legal system can become capable of rendering quality and efficient/timely dispute resolution.

1.2 ABOUT THE PROJECT

The Centre for Environmental Law, Education, Research and Advocacy (CEERA) at the National Law School of India University, Bengaluru (NLSIU) submitted a research proposal for a two year project titled "***Strengthening Legal Provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial Matters in India***" to the Department of Justice, Ministry of Law and Justice, Government of India under the "Scheme of Action Research and Studies on Judicial Reforms" on 14.11.2017 (initial proposal) and on 31.12.2017 (revised proposal). The proposal highlighted the following gaps and issues that crop up in the matter of dispute resolution in commercial matters-

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 is very rarely given.
4. There is delay in awarding damages.
5. The courts in the country frequently grant 'interim injunctions' 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.
6. The increase of litigation in commercial matters does not give an impression of a robust business environment as the courts have been unable to deliver speedy and quality justice in this regard.
7. 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 specifies a fast track procedure).

[22] *Id.*, §20A.

8. There is also the issue of easy appeal against the arbitral awards to the courts with no finality which results in a protracted process that is not conducive to a good business environment.
9. The justice delivery system should aim at a win-win rather than win-loss situation. The resolution of disputes should be given more importance in commercial matters rather than adjudication.

The objectives of the Research project were –

1. To review the existing laws on Contracts in India
2. To ascertain whether the remedies and reliefs for the breach of contracts in India are globally competent i.e. to evaluate the efficiency of contractual remedies in a globalized economic environment.
3. To assess the applicability and quality of contractual remedies in commercial disputes.
4. To measure the use and success of ADR (especially arbitration) in resolving contractual matters.
5. To study and assess the implementation and viability of Commercial Courts Act, 2015.
6. To look into legal reforms required in law and practice to improve the ease of doing business in order to make India a viable investment destination.

Key deliverables under the project were –

1. 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.
2. Publication containing the papers and feedback received during the Workshop with regard to remedies for breach in commercial disputes.
3. Report on Legal Reforms regarding Dispute Resolution of Commercial Matters in India.

The Proposal was accepted by the Department of Justice, Ministry of Law and Justice, Government of India and a two-year project was sanctioned and commenced on 24.12.2018. The first installment under the project was received on 1.1.2019 and second installment was received on 16.03.2019.

1.3 ACTIVITIES CONDUCTED UNDER THE PROJECT

1.3.1 Review of the Existing Laws

We have undertaken a thorough review of the major legislations dealing with contract enforcement in India. The legislation that we have dealt with are – The Indian Contract Act, 1872, The Specific Relief Act, 1963, The Sale of Goods Act, 1930, The Arbitration and Conciliation Act, 1996, The Commercial Courts Act, 2015, The Competition Act, 2002 and The Code of Civil Procedure, 1908. The review of the existing legislations was taken with a view to identify and formulate research question in a precise manner. The summary of the legislations is incorporated in Chapter 2 of this Report.

1.3.2 Identified Research questions

No research can be undertaken without a clear formulation of the research questions to guide the research. For this purpose, we have identified the following research questions:

1. Whether Indian contractual remedies can include punitive or exemplary damages for intentional/ deliberate/ knowingly/ committing the breach of contract? - Under this Research question we have deliberated upon the possibility of including the remedy of punitive and exemplary damages statutorily in the Indian Contract Act by amending Section 73 of the Act.

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 Section 74 of the Contract Act, 1872. 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 we have looked into.

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 a lengthy litigation process. We have explored the possibility and desirability of deriving a general and standard formula for calculation of damages.

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. 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. In an exceptional case, the court took 31 years to dispose the matter. The Arbitration Act, 1996 has also not resolved the situation as after the arbitration, the parties approach the court and exploit loopholes and appeal opportunities which ensue in a a tiresome litigation . 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. We have explored 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? – As per Order 41 Rule 11A, the courts are to endeavor to conclude the hearing of appeals within 60 days from the date on which the memorandum of appeal is filed. We have analyzed what steps can be taken to materialize this section into practical reality.

6. Whether the enactment of Commercial Courts Act, 2015 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 in 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 has examined the working of this commercial courts structure and the Act as a whole to assess its efficiency in resolving the commercial disputes. For this we have undertaken a thorough doctrinal and empirical research.

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 the Indian contract law enforcement mechanism. This was done with a specific aim of increasing the ease of doing business in India. The present research has studied the effect of this reform.

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. We have undertaken a review of the working of these forums and looked 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 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 need to be set considering the socio-economic circumstances in India? The present Report has attempted to 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-month strict timeline for adjudication of disputes, which can be extended further by 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 a relevant query which we have focused upon.

11. Whether "Reliance Loss" consequential damages should be introduced as remedies in contract law? - Reliance loss is a type of restitutionary damages. It relates to 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 has examined the possibility of their inclusion as consequential damages and the effect it will have on the improving contractual enforcement in India.

1.3.3 Submission of Interim Report, Mid-Term Report and Monthly Progress Reports

Under the Project, we have submitted one Interim Report to the Department of Justice, Ministry of Law and Justice in the month of February, 2019. A Mid-term Report was also submitted to the Ministry on 16.05.2019.

Upon the Submission of the Mid-term Report, Prof. (Dr.) Sairam Bhat was invited to make a presentation on the progress of the Project before the Secretary Shri. GR Raghavender in the month of May 2019. In this meeting, we were directed to submit monthly progress report to the Ministry each month. Thereupon, we have been submitting regular monthly progress reports to the ministry.

1.3.4 Empirical work conducted

Under the Project we have conducted three Empirical Studies. Two of them were conducted in the year 2019 while the third one was conducted in the year 2020.

In the first empirical study, we prepared questionnaires for academicians, judges, arbitrators, practicing lawyers and business people to take their inputs on the status of contract enforcement in India, Ease of Doing Business and suggestions for improvement. It focused mainly on the possibility of reform on Penalty clauses and Liquidated damages.

The second empirical study related to the implementation of the Commercial Courts Act, 2015 in the State of Karnataka. We Prepared a Data tool in the form of an Excel Sheet and carried out the study by visiting the commercial courts in the city of Bengaluru (which is the host for two commercial courts out of three commercial courts in Karnataka). Courts were visited on a regular basis to collect data, view court records and proceedings and interact with the judges and lawyers. This study provided us with the necessary insights in the day to day functioning of the commercial courts and the challenges faced by them.

The third empirical study was conducted via a survey using google forms. The form was circulated online, posted on our websites and sent to eminent personalities in the field of arbitration. The purpose of the survey was to take inputs of the legal community on the reforms that we intend to purpose in our report.

1.3.5 Organization of Two-Day National Seminar

In pursuance of the activities under the project, a Two-Day National Seminar was organized by CEERA, NLSIU from 21st-22nd August, 2019. The seminar was conducted over the course of two days and was divided into 18 sessions comprising of Inaugural, 4 Plenary Sessions, 12 Parallel Sessions and Valedictory. The seminar invited research papers on themes such as: Performance of Contractual Obligations Law and Practice, Remedy and Relief, Contractual Enforcement, and Commercial Dispute Resolution. The National Seminar was a grand success and saw presentations on 147 abstracts from 251 participants from various parts of the country. We were overwhelmed and delighted to see the enthusiasm and interest which the participants have shown on the topic. Apart from paper presentations, we also had panel discussions from eminent personalities such as Prof. (Dr.) M K Ramesh, Prof. (Dr.) A Jayagovind, Prof. (Dr.) Purvi Pokhariyal, Prof. (Dr.) Nilima

Bhadbhade, Prof. (Dr.) Uday Shankar Mishra, Prof. (Dr.) Ravindra Kumar Singh and Prof. (Dr.) Bindu Ronald. A Report of the conduction and proceedings of the seminar was also sent to the Ministry.

Out of the several research papers that we have received in pursuance of the Seminar, we have finally selected 10 papers for publication. Part B of this Report contains the research papers that have been selected for publication.

1.4 ABOUT THE REPORT

This Final Report marks the culmination of the research that was undertaken in the Project. It presents every activity and research that we have undertaken under the project in a lucid manner.

The Report is divided in an Executive Summary (for the Ministry) and two parts. Part A is Research Report and it contains the research carried out by CEERA under the Project. It has 16 Chapters which includes an Introduction, Review of Major Legislations, and thereinafter research on the identified research questions. Part B is the compendium of selected research papers that we have selected for publication as an outcome of the National Seminar.

1.4.1 Overview and Summary of Chapters

Chapter 1 is the Introductory chapter. It highlights the background in which the Project was undertaken. It discusses the research gap analysis, objectives and key deliverables under the project and the various activities that were conducted in pursuance of the project. It also presents a brief summary of the other chapters that are contained in this report.

Chapter 2 of the Report deals with the major legislations related to contractual enforcement in India. In this chapter we have reviewed and provided a bird's-eye view of contract enforcement law under the Indian Contract Act, 1872; the Specific Relief Act, 1963; the

Sale of Goods Act, 1930; the Arbitration and Conciliation Act, 1996; the Commercial Courts Act, 2015; the Competition Act, 2002; and the Code of Civil Procedure, 1908. Under the Contract Act we have looked into Sections 73-74 and the grant of damages. Under the Specific Relief Act we have discussed Chapter II, specific performance and the newly inserted Section 20A. Under the Sale of Goods Act, we have pointed out at Sections 55, 56 and 58, and also made a comparison between Section 55 of the Act and Section 73 of the Contract Act. We have also discussed the recent developments made under the Arbitration and Conciliation Act and also the recent changes brought under the Commercial Courts Act. The link between Competition Act and contractual enforcement is also highlighted. Lastly, we have elaborated on the various provisions of the Civil Procedure Code from the perspective of contract enforcement starting from the stage of filing of suit till execution of decrees and interrelated matters. This chapter formed the basis of identifying the research questions that we have taken up for research in the subsequent chapters.

Chapter 3 deals with the research question that we have identified with regard to grant of punitive/exemplary damages in cases where the breach is committed intentionally, deliberately, or knowingly. In this chapter we have looked into the origin of the principal of damages in common law as well as civil law countries and the recent albeit rare phenomenon of granting exemplary damages for intentional breach of contracts. We have discussed various arguments both for and against the award of punitive damages and also highlighted the role played by intention of parties in a contractual relationship. We have also made a comparative study of common law and civil law countries on the provisions for punitive damages. More specifically we have looked at the legal position in France, United Kingdom, United States and Canada. Thereinafter, we have deliberated on the test that can be adopted for grant of punitive damages and have concluded that Section 73 of the Indian Contract Act should be amended and an explanation should be provided thereunder for grant of punitive damages.

In Chapter 4 we have dealt with another research question with regard to possibility of enforcement of liquidated damages and penalty clauses as agreed by the parties to a contract. This is in line with and in continuation of our research in the previous chapter. Keeping in mind the radical changes brought about by the Specific Relief (Amendment) Act, 2018 (making specific performance as a matter of right) we have looked for another avenue of reform in contractual enforcement viz. liquidated damages and penalty clauses that will not only resonate with India's philosophical past but also echo the radical transformation that is sought in the present. We have looked at penalty clause enforcement in India through a study of various landmark cases on the subject, we have also discussed the theoretical underpinnings behind penalty clauses. Deliberating upon the legal positions in various countries we have also undertaken a comparative study of penalty clause enforcement in United Kingdom, United States, Singapore, France, Germany, Spain and Switzerland. We have also discussed the framework under international instruments such as UNIDROIT Principles. We have concluded that the wide discretion of the courts in granting pre-agreed damages under Section 74 of the Indian Contract Act can be curbed. This will be similar to the removal of court discretion in granting specific performance.

In Chapter 5 we have explored the possibility and desirability of deriving a general and standard formula for calculation of damages as, presently, there is no statutory general formula for calculating and awarding damages and the court follows general principles set by case laws and precedents, which leads to a lengthy litigation process. In this pursuit, we have deliberated upon the essentials of damages under Section 73 of Indian Contract Act, 1872, the developments in formula for award of damages, the Lex Mercantoria & TransLex principles, infrastructure projects and building contracts. We have also discussed the established formulas such as Hudson, Emden & Eichleay's Forumulas, FIDIC's Red, Yellow & Silver books. Award of damages under various other Indian statutes as well as several judicial pronouncements in this regard have also been dealt with. We have suggested that, considering the public-private partnership scenario in India & its advantages as well as shortcomings, there should be a single formula or set of standard formulas developed nationally. The formula should take into consideration factors such as contract price, clear definition of market price, loss of profits and various other overhead costs. We are of the opinion that development of such a formula followed by compulsory ADR mechanism will surely increase the efficiency of contract enforcement in India which in turn will help in improving the ease of doing business index of the country.

Chapter 6 of this Report explores the possibility of claiming combined claims of reliance loss and expectation loss in India. In this endeavor, the chapter discusses what is meant by reliance loss and expectation loss, protection of reliance loss from the perspective of both pre-contractual and post-contractual reliance, protection of reliance loss in India, protection of expectation loss, recovery of expectation loss in India and also recovery of combined claims of reliance and expectation loss. We have concluded that a combined claim of reliance & expectation loss can be made recoverable in India statutorily by amending Section 73 of the Indian Contract Act and also by adding definitions of reliance loss and expectation loss either in Section 73 itself or in Section 2 of the Act.

In Chapter 7 of this report we have dealt with another research question i.e. Whether Limitation of time of 12 months under the Arbitration Act, will help in speedier resolution of commercial disputes in India? In this pursuit, we have looked at various reports of the Law Commission of India, the Limitation Act, 1963, Appeals under the Commercial Courts Act, 2015, and the recent amendments in the Arbitration & Conciliation Act. We have also looked at international practices such as International Chamber of Commerce Arbitration Rules, UNICTRAL Model laws etc. as well as several judicial pronouncements. We have also conducted an online survey through the use of google forms to take opinions from the stakeholders and have analyzed the data obtained through them. We are of the opinion that the 12 months strict timeline set by the Arbitration Act for adjudication of disputes, which can be extended further by the court will surely help in the speedier resolution of dispute provided that some additional steps should be taken such as fixing of timetable, extension of time on a penalty basis, curbing number of adjournments to 3, encouraging institutional arbitration and providing for a Court Monitored Reporting Mechanism. These steps will reduce the chances of the system becoming prone to the prevailing delay tactics resorted to by the economically powerful party against the weaker party. We have also concluded that commercial disputes of all kinds should be made a subject of arbitration except those related

to public order & policy, bankruptcy, consumer rights, employment issues & IP. This will contribute in improving the Ease of Doing Business Index in India as it is directly related to the Quality of Judicial Process Index.

In Chapter 8 of the Report we have dealt and discussed the concept of substituted performance which was introduced by the Specific Relief (Amendment) Act, 2018. We have discussed the meaning of substituted performance, the need, background and objectives of the legislature while introducing substituted performance. We have analyzed the concept of substituted performance by referring to the Anand Desai Committee Report, the law laid down by the Amendment Act, and also similar provisions of substituted performance in the international jurisdictions such as Europe, Japan, Germany, Spain, Ethiopia, Australia, United States, France and United Kingdom. The benefits of the provisions will be pan-industry no doubt, especially infrastructure and construction industries and governmental projects. However, we are of the opinion that, the true impact of the law in this regard will be revealed in the coming times as case will be brought before the courts post the amendment.

Chapter 9 relates to another question which we have identified for research i.e. What steps should be taken to operationalize Order XLI Rule 11A of Code of Civil Procedure, 1908? The issue discussed in this chapter stems from the fact that courts, right from the stage of filing till its disposal are faced with situations of not being able to dispose a matter in timely manner. As per Order 41 Rule 11A the courts are to endeavor to conclude the hearing of appeals within 60 days from the date on which the memorandum of appeal is filed. In this chapter, we have endeavored to identify the steps that can be taken to materialize this section into practical reality. In pursuit of this objective, we have discussed the definitions of judgements and decrees under CPC, provisions of appeals form original decrees and right to appeal. After this basic discussion, we have analyzed Order XLI in detail. Reports and recommendations given by various committees and the data available from the National Judicial Data grid have also been reviewed. In Conclusion we have recommended some steps which can be taken to operationalize Order XLI such as ensuring strict enforcement of prescription of 60 days, need supervision by the higher courts, enforcement of case management for all types of matters and encouraging settlement of disputes even after judgement of trial courts and at appellate stage.

In Chapter 10 we have endeavored to answer another question that we had identified for research i.e. What should be the different avenues for commercial dispute resolution in India? The need to pursue this question arises as currently the Indian legal regime provides a number of avenues for private commercial disputes including ordinary civil courts, special commercial courts, arbitration, mandatory mediation. In this chapter we have looked at the definition and meaning of the key terms such as commercial, trade & commercial disputes. The chapter then proceeds to analyze the scope of Section 89 of Code of Civil Procedure, 1908 and the modes of settlements of disputes mentioned therein viz. Arbitration, Conciliation, Mediation, Judicial Settlement. Further, it highlights the problems associated with the implementation of Section 89. We are of the opinion that the results obtained from a comparative analysis of United Kingdom and United States can be looked into to establish new avenues for commercial dispute resolution in India.

In continuation of the discussion of commercial dispute resolution of the previous chapter, Chapter 11 endeavors to identify the parameters which can be adopted to measure the quality & efficiency of dispute resolution in India. For this purpose, we have scrutinized the various dispute resolution mechanisms in India and have also looked at the Commercial Courts Act, 2015 and the Ease of Doing Business Index. The chapter also deliberates the recommendations of Law Commission reports and international legislations. We have concluded that parameters to measure the quality and efficiency of dispute resolution in India should include: Technological responsiveness of Infrastructure, Institution & Disposition ratio, Quality of the judgement rendered, No. of Adjournments, and Encouragement given to ADR. We have also listed the benefits of adopting these parameters.

In Chapter 12 we have tried to identify steps that can be taken for speedier adjudication of commercial disputes. For this purpose, we have reviewed the recommendations of various reports of Law Commission of India. We have also discussed the enactment of Commercial Courts, Act, 2015, the changes that it brought in the Code of Civil Procedure, 1908, and the issues still prevailing even after the enactment of the Commercial Courts Act, 2015. We have concluded that for speedier adjudication of commercial disputes, use of technology should be adopted as the primary means of delivery of summons, specific duration for framing of issues should be made, judges should more actively participate in the matters, by-passing of mandatory mediation should be checked, the provisions of Case Management Hearings should be adhered to, appropriate infrastructural reforms should be made, clear guidelines for classifying already pending cases as commercial disputes should be adopted, and lastly, for strict adherence to the timelines, a periodical review mechanism by higher courts should be considered.

Chapter 13 looks at contract enforcement from management perspective and specifically deals with contracts in infrastructure-PPP projects. It deliberates upon various issues such as risk management, remedies in PPP projects and efficacy of these remedies, and lastly, it suggests reforms that can strengthen contractual enforcement by improving contractual management.

In Chapter 14, we have looked at the implementation of the Commercial Courts Act, 2015. Thematically, the chapter is divided into doctrinal and empirical study that we have undertaken. In the doctrinal part, first we have dealt with the legislative history of the Commercial Courts in India by discussing Law Commission Reports and the 2009 Bill. Secondly, we have dealt with the Commercial Courts Act, 2015 by discussing its key provisions and major drawbacks. Thirdly, we have dealt with the Commercial Courts (Amendment) Act, 2018. Next, we have focused on the interpretation of term 'commercial dispute' and the concept of mandatory pre-institution mediation. We have also discussed some recent judicial pronouncement pertaining to the Commercial Courts. The doctrinal study is followed by our empirical research on the functioning of the commercial courts in the State of Karnataka.

Chapter 15 is devoted to the Ease of Doing Business and Enforcement of Rankings. In this chapter, we have analyzed the Ease of Doing Business Rankings, Enforcement of Contract

Indicator and its sub-factors and Indian Performance under them. We have also looked in the Rule of Law Index and its link with ease of doing business. We have concluded the chapter with our suggestions and recommendations on how to improve ease of doing business in India by improving and strengthening the legal regime in India both substantively and procedurally.

Chapter 16 deals with Third Party Funding "TPF". TPF is a champertous agreement that enables a person or entity who is not a party to the dispute to provide funds or any other type of material support to a party to the dispute which is used to finance the costs of the litigation or proceedings and is reimbursed depending on the result of the proceeding. The chapter deals with the validity of such agreements under different jurisdictions including UK, UK, Hong Kong, Singapore and India. So long as one of the parties to the contract is not an advocate/lawyer and the TPF agreement is in consonance with the public policy of India, it is not illegal. However, owing to the increase in demand for such external funding in litigation and arbitral proceedings, it is the need of the hour to regulate TPF and introduce a legal framework for the same.

1.4.2 Overview and Summary of the Research Papers

The first paper by Dr. Ravindra Kumar Singh titled *Specific Performance of Contract: The Journey from Being an 'Exception' to 'General Rule'* provides a critical appraisal of the Specific Relief (Amendment) Act, 2018, and discusses the amendments brought forth by it, while highlighting how it has positively impacted the current law on specific performance of contract in the country. The major change that has been dealt with through the paper is the change brought about in the nature of specific performance by the Amendment Act of 2018. This deals with the fact that, post the enactment of the Amendment, specific performance of the contract can be demanded by an aggrieved party as a matter of right, under the Indian law of Contracts, as opposed to it earlier being dependent on the court's discretion in that regard. In doing so, the differences between common and civil law countries have also been highlighted throughout the paper.

The second paper by Divyansh Nayar & Arth Singhal on *Strengthening Contractual Enforcement in Commercial Arbitration: A Leap Forward* deals with the arbitration regime in India, in so far as it considers the ad hoc and institutional modes of arbitration, while also discussing the "Contract" and "Status" theories of arbitration. Evidence suggests that there exists a lopsided preference for ad hoc arbitration amongst disputants, despite the problems associated with the same and the existence of numerous arbitral institutions in the country. It is the paper's focal suggestion that the existence of an arbitration-friendly regime is of the utmost importance in India, especially in the current times, as arbitration is the most preferred form of Alternate Dispute Resolution (ADR), in opposition to litigation. The problems that plague the amendments brought forth in the law, aimed at encouraging the growth of institutional arbitration in India, have also been analysed in the course of this paper and reforms suggested that can be adopted for remedying the same.

The third paper is by Amrutha Shankar & Harshini S which titled *A Pragmatic Perspective to the Commercial Courts Act, 2015*. This paper provides a pragmatic view of the Commercial Courts Act, 2015. It delves into the reasons behind the enactment of this legislation, the

position of law before its enactment, how it was impacted after the Act came into force, and also provides a critical analysis of the developments brought about in the Indian sphere of contract enforcement, post the 2015 Act. Certain other developments were brought about through the Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts (Amendment) Act, 2018. This paper also deals with these developments and provides an overview of the current regime of contract enforcement in India. The rationale behind the enactment of these legislations has also been delved into and commented upon, as triggered by India's rank in the Ease of Doing Business Index of the World Bank.

An Assessment of Liquidated Damages and Penalty Clauses in Contracts is the title of the paper by A.P. Shree Kalaivanee & S Shiva Sundharri. This paper provides an in-depth analysis of two types of clauses that can be found in contracts, added in to ensure the performance of one's contractual obligations. These are the liquidated damages clauses and the penalty clauses. While liquidated damages are recognized in both common and civil law countries, penalty clauses largely remain unenforceable in common law countries, as they are considered to be more punitive than deterrent in their nature and scope. The paper undertakes the task of highlighting the rationale behind the inclusion, as well as the benefits and demerits, of both of these types of clauses. They are analyzed across various jurisdictions around the world, and the Indian position under The Indian Contract Act, 1872 is also provided. The authors also comment on whether, in their opinion, the Indian regime of contract enforcement would benefit from the inclusion of penalty clauses in its contracts.

The fifth paper by Aarvi Singh & Swantika Kumar Rajvanshi deals with *Class Arbitration: Prospects and Problems*. This paper, as its name suggests, envisages the possibility of having class arbitration in the Indian regime, as it lays down its advantages and disadvantages, providing a critical analysis of the concept. Class arbitration involves a collective submission by multiple parties, sharing a common interest, to participate as a single entity in arbitration proceedings. The authors believe that India could benefit from class arbitration due to its characteristic feature of restoring the imbalance of unequal bargaining power between the transacting parties. It is a novel concept and has socialist implications, which are not always addressed in the settlement of commercial disputes. In advocating class arbitration in commercial disputes, the authors also provide a range of suggestions that can help ameliorate the problems currently plaguing class arbitration.

The next paper by Pruthvirajsinh Zala & Nandini Goyal is titled *Drafting: A Precautionary Measure to the Interpretation of Contracts*. This paper discusses the process of drafting of contracts and how that plays a significant role in the interpretation of ambiguous clauses found in the contract. Improper and careless drafting has been cited as one of the major reasons for the increasing number of commercial disputes. The author states that one can prevent a host of problems by exercising greater caution and remaining attentive at the initial stage of drafting or construction of the contract. Doing so also strengthens the enforcement of contracts and could help India in the segment of contract enforcement of the Ease of Doing Business Index of the World Bank, while generally reinforcing the Indian contractual regime. Problems faced in the interpretation of contracts have been explored by the authors through the course of this paper. Some of the provisions of the Indian Contract Act, 1872 have also been considered in this regard.

The paper of Siddharth Jain & Sridutt Misra is titled *Force Majeure and Adaptation: Exigencies for Contract Enforcement*. The authors attempt to provide a renewed understanding of the concept of Force Majeure clauses, when clubbed with adaptation, and advocate for its inclusion in the Indian legal contractual framework, as they believe that the existing mechanism is bound by a static approach. The remedy of Force Majeure, as provided under the Indian Contract Act, 1872, is critically analyzed through the course of this paper. Combining adaptation with the Force Majeure clause, in the process of commercial dispute resolution, brings into it an element of ADR, something that can benefit the currently restrictive approach of contract enforcement in India, in the opinion of the authors. The importance of the principle of party autonomy in contract enforcement has been emphasized herein. This recommended model is also in consonance with the international mandate, as can be observed through the UNIDROIT Principles of International Commercial Contracts. These suggestions have been deliberated upon and examined by the authors in this paper.

The next paper on *Mandatory Arbitration: A Plausible Solution for the Resolution of Commercial Disputes* by Gururaj S M & Ann Clara Tomy discusses the evolution of the currently existing frameworks of commercial dispute resolution as well as alternate dispute resolution while recommending a combination of some of the elements from both for a successful and effective resolution of commercial disputes. Ordinarily, commercial disputes fell under the jurisdiction of ordinary civil courts, before the advent of the Commercial Courts Act, 2015. This Act led to the creation of special "Commercial Courts" purposed specifically for the settlement of commercial disputes. The latest developments brought about by the Commercial Courts (Amendment) Act, 2018 have also been analysed by the authors. In the provision of such an analysis, a recommendation for the introduction of mandatory arbitration in the resolution of commercial disputes has been made by the authors. While providing jurisprudential justifications for such an inclusion, the authors attempt to provide an amicable solution for the resolution of commercial disputes through the employment of the ADR technique of arbitration. This would give the disputant parties the option of choosing from ad-hoc or institutional arbitration for resolving their dispute.

The penultimate paper by Kaushik Chandrasekaran & Sanjana Rebecca on *The Ambit of Force Majeure and the Role of Liquidated Damages in Commercial Contracts* provides detailed scrutiny of the Force Majeure and liquidated damages clauses. The authors have suggested that the Force Majeure clauses, as found to be part of standard commercial contracts, have been widely interpreted in the domain of commercial dispute resolution, as opposed to their traditional understanding dictated by the Indian Contract law. A further discussion surrounds the role played by liquidated damages in contract enforcement and has focused specifically on the interplay between Force Majeure and liquidated damages clauses. Evolution and development of the current legal position have been traced through this paper by the authors and they have also highlighted the lacunas in the law concerning Force Majeure and liquidated damages clauses. An overview of the international position in this regard is stated by the authors, as they have opted for a different line of reasoning in their suggestions for the reformation of the law and tackling the problems associated with it.

The last paper by Dr. Misha Bahmani & Yashdeep Lakra on *Recent Amenments to the Commercial Courts Act, 2015: An Indian Perspective* provides a comprehensive overview of and focuses solely on the Commercial Courts Act, 2015. The authors have provided a detailed analysis of the Act, by tracing the rationale behind its initial implementation in 2015, to the latest developments effected within the law through the enactment of the Commercial Courts (Amendment) Act, 2018. The implications of these amendments have been discussed and elaborated upon. The legislative histories of these enactments have also been enumerated by the authors to comment on the scope and limitations of the provisions contained therein. A further comment is made on the functioning of the Commercial Courts, as established by the Commercial Courts Act, 2015, in the country. The same has been analyzed to underscore the problems being faced in their operations and recommendations and suggestions have been made by the authors accordingly.

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CHAPTER 2: MAJOR LEGISLATIONS RELATED TO CONTRACTUAL ENFORCEMENT IN INDIA

In India, the Parliament and the State Legislatures are empowered to enact laws on the subject of contracts as it is listed as a subject of legislation under the Concurrent List.[1] This results in the enactment of a number of legislations which deals with various aspects of contractual enforcement. The Indian Contract Act, 1872[2] is the primary and the foundational legislation which governs the basic aspects of contract law in India. It is supplemented by a plethora of legislations but chief among them are: The Specific Relief Act, 1963;[3] The Sale of Goods Act, 1930;[4] The Transfer of Property Act, 1882;[5] The Indian Partnership Act, 1932;[6] The Arbitration and Conciliation Act, 1996;[7] The Commercial Courts Act, 2015;[8] The Competition Act, 2002;[9] and The Code of Civil Procedure, 1908.[10] Apart from these central legislations, we have a host of state legislations which deals with taxation and other aspects related to contract,[11] and also, various usages and customary practices in the respective fields.[12] In this chapter we will take a bird's-eye overview of the major legislations which govern enforcement of contracts in India.

2.1 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

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[1] India Const. sched. VII, list III, item 7 ("7. Contracts, including partnership, agency, contracts of carriage, and special forms of contracts, but not including contracts relating to agricultural land.").
[2] The Indian Contract Act, 1872.
[3] The Specific Relief Act, 1963.
[4] The Sale of Goods Act, 1930.
[5] The Transfer of Property Act, 1882.
[6] The Indian Partnership Act.
[7] The Arbitration and Conciliation Act, 1996.
[8] The Commercial Courts Act, 2015.
[9] The Competition Act, 2002.
[10] The Code of Civil Procedure, 1908.
[11] *See, e.g.*, Arunachal Pradesh Sales Tax Act, 1999; Delhi Sales Tax on Works Contracts Act, 1999; Punjab Forward Contracts Tax Act, 1951; Bombay Cotton Contract Act, 1932.
[12] *See,* e.g. Dhondu v. Narayan, (1863) 1 BHC 47; Harilal v. Nagar, (1896) 21 Bomb. 48; Saundanappa v. Shivbasava, (1907) 31 Bom 354; Nobin Chunder v. Romesh Chunder, (1887) 14 Cal 781 (highlighting the Hindu rule of *damduput* according to which interest in excess of principal cannot be recovered at any time); *See also* Bechuanaland Exploration Co. v. London Trading Bank, (1898) 2 QB 658; Irrawaddy Flotilla Co. v. Bugwandas, (1891) 18 IA 121; Moothora Kant Shaw v. Indian General Steam Navigation Co., (1883) 10 Cal 166, 185.

awarding damages for breach is to put the injured party in the position in which he would have been had there been performance and not breach.[13]

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.[14] Section 73 follows the principles given in *Hadley v. Baxendale*.[15] 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. Baxendle*,[16] 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 the 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 such a long time suggests that it responds to a need in contractual law with considerable success.[17] 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.[18] This means that the suitability and efficiency of the rule of compensatory damages needs to be relooked 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 default rule have to be identified and assessed. One such possible avenue is intentional breach of contracts, especially when they adversely affect the prices.[19] Another such avenues could be intentional breach of infrastructural contracts where 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

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[13] *See* M. KRISHNAN NAIR, THE LAW OF CONTRACTS 213 (5th ed. 1997, Reprint 2004).
[14] The Indian Contract Act, 1872, §73.
[15] Hadley v. Baxendale, (1854) 9 Exch 341.
[16] *Id.*
[17] 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. eds., 2005)).
[18] I Ayres and R Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 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. eds, 2005)).
[19] *Id.* (Gilo has identified this area and assessed the applicability of deterrent damages as a default rule. However, its suitability in Indian Context needs to assessed).

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.[20] 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 Section 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.[21] 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.[22]

2.2 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.[23] 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 grant specific performance if prayed by the parties.[24] 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.[25] But, the grant of compensation in addition to specific performance is discretionary.[26]

Apart from removing the discretionary power in granting specific performance, the 2018 amendment also provides for substituted performance.[27] 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.[28] This is an alternative remedy at the option of the party who suffers breach.[29]

Another important feature of the amendment is the introduction of Section 20A. Section 20A prohibits the court form granting injunctions in contracts relating to infrastructure projects where the grant of injunction would cause impediments or delay in the progress or

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[20] BS RAMASWAMY, CONTRACTS AND THEIR MANAGEMENT 80 (2003).
[21] *Id.* at 81
[22] *Infra* Chapter 3: Possibility of Reform in s.74 of the Contract Act.
[23] The Specific Relief (Amendment) Act, 2018.
[24] The Specific Relief Act, 1963, §10 ("The specific performance of a contact **shall** be enforced the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16").
[25] Specific Relief Act, 1963 § 21(1) ("In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach in addition to such performance").
[26] *Id.*
[27] *Id.*, §20.
[28] *Id.*
[29] The Specific Relief (Amendment) Bill, 2017, Annex (containing the statement of object and reasons).

completion of such infrastructure projects.[30]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.[31] 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 can be extended by a further period of 6 months for which reasons have to be recorded in writing.[32]

These amendments were made after the recommendations of the Expert Committee[33] constituted in this behalf by 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.[34]

2.3 THE SALE OF GOODS ACT, 1930

The Sale 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.[35] 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.[36] 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 Section 55 of the Sales of Goods Act speaks of more specific case sold moveable property. Thus, Section 55 being a special provision prevails over Section 73 of the contract act, though both the sections are based on the same general principles.[37] 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

[30] The Specific Relief Act, 1963, §20A.
[31] *Id.*, §20A (3).
[32] *Id.*, §20C.
[33] The Expert committee Report, https://drive.google.com/file/d/0B-ZUXtJuPbi3ak0wbENVdUdjQTZWcTNQSW5vNWpUSWVNYnc0/view (last visited Jan. 5, 2019) (also called the Anand Desai Committee Report).
[34] Nilima Bhadbhade, *The Specific Relief (Amendment) Act 2018: a Hurried Legislation*, https://barandbench.com/specific-relief-amendment-act-hurried-legislation/ (last visited Jan. 10, 2019).
[35] The Sale of Goods Act, 1930, §55.
[36] *Id.*, §55(2).
[37] Mysore Sugar Co. Ltd v. Manohar Metal Industries, AIR 1982 Kant. 283 at 287.

and claim the price. Further, if the buyer refuses to take delivery, the seller can sue for the price of goods.[38]

Specific performance of the contract of sale of goods: Under Section 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.[39]

2.4 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 law suits 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 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 cost, 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 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.[40]

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, 2015. 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,

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[38] 2 POLLOCK & MULLA, THE INDIAN CONTRACT ACT & SPECIFIC RELIEF ACTS 1154 (15th ed., R Yashod Vardhan & Chitra Narayan eds. 2017).
[39] The Sale of Goods Act, 1930 §58.
[40] The Arbitration and Conciliation Act, 1996; *See also* LAW COMM'N OF INDIA, REP. NO. 246, at 4, http://lawcommissionofindia.nic.in/reports/Report246.pdf. (last visited Jan. 10, 2019).

including the relief of interim injunctions.[41] 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 2015 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.[42] 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.[43]

The 2018 amendment bill further proposes major amendments into the Act. Most important of which is the establishment of Arbitration Council of India (ACI)[44] to institutionalize the arbitration process and make India a hub for commercial arbitration.

2.5 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.[45] Further, those High Courts which did not have original jurisdiction over commercial contracts will now have a commercial division within itself to do so.[46] Further, Commercial Appellate Divisions of High Courts are also constituted to hear appeals.[47] By 2018 amendment a new Section, 3A has been inserted in the act to establish commercial appellate courts.[48]

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.[49]

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[41] Arbitration and Conciliation Act, 1996, §17.
[42] *Id.*, §29A.
[43] *Id.*, §29B.
[44] *See* The Arbitration and Conciliation (Amendment) Bill, 2018.
[45] The Commercial Courts Act, 2015, §3.
[46] *Id.*, §4.
[47] *Id.*, §5.
[48] *See* The Commercial Courts (Amendment) Act, 2018, §7(inserting section 3A).
[49] *Id.*, §4 (amending § 2(i) of the principal Act).

Further, Section 12A of the Act which was inserted by 2018 Amendment Act[50] 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 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.[51] 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.[52]

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.[53]

Under Section 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 Section 30 of Arbitration and Conciliation Act, 1996.

The Schedule of the Act amends certain provisions of CPC.[54] The commercial courts shall follow this amended procedure in relation to a commercial dispute notwithstanding any other law in force.[55] 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),[56] 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).[57]

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[50] *See* The Commercial Courts, Commercial Division and Commercial Appellate Division of High Court (Amendment) Ordinance, 2018.
[51] *See Mandatory Mediation under Commercial Courts Act- A Boost to Effective and Efficient Dispute Resolution in India,* https://barandbench.com/mandatory-mediation-commercial-courts-act/ (last visited Jan. 14, 2019).
[52] *Id.*
[53] *Id.*
[54] The Code of Civil Procedure, 1908.
[55] The Commercial Courts Act, 2015, §16.
[56] *Id.*, sched. §2.
[57] *See* http://www.indialaw.in/blog/blog/law/commercial-courts-act-2015-changes-in-provisions-of-cpc/ (last visited Jan. 15, 2019).

2.6 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.[58] 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 of the economic development of the country.[59] It establishes a Commission called the Competition Commission of India[60] whose objective and mandate, *inter alia*, is to prevent practices which have an adverse effect on the competition in India.[61] 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.[62] 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 tend to generate an anti-competitive effect *ex-post*.[63] This creates a conflict between contract law and competition law. Strengthening of the contractual enforcement might result in dilution of competition law or a strong competition law might have adverse effect on contractual enforcement and thereby negatively influence ease of doing business in India.[64]

2.7 CODE OF CIVIL PROCEDURE, 1908

The general procedures for enforcement of civil rights including contractual obligations are embodied in the Code of Civil Procedure, 1908. It deals with various aspects such as filing of suits, place of institution, manner of filing, content of pleadings etc. The following summary provides an overview of the major provisions of Code of Civil Procedure, 1908 related to contract enforcement.

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[58] Preface to the First Edition, D.P. MITTAL, COMPETITION LAW AND PRACTICE (3rd ed. 2011).
[59] *See* the Competition Act, 2002, long title ("An Act to provide, keeping in view of the economic development of the country…").
[60] The Competition Act, 2002, §7.
[61] *Id.*, long title.
[62] D.P. MITTAL, COMPETITION LAW AND PRACTICE 408 (3rd ed. 2011).
[63] *See* Lewis Evans and Neil Quigley, *The Interaction between Contract and Competition Law*, Draft Paper prepared for 20th Pacific Trade and Development Conference, http://researcharchive.vuw.ac.nz/xmlui/handle/10063/3870 (for a brilliant exposition on the interface between Contract law and competition law).
[64] *See id.* (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).

2.7.1 Filing of Suit

Filing of suit - A civil suit should be filed before the lowest court which is competent to try it,[65] provided that the plaintiff is not prohibited under any law or rules from filing such suit.[66] With regard to *Place of filing suit* – A suit to obtain relief pertaining to an immovable property shall be instituted in Court within the local limits of whose jurisdiction any portion of the property is situated.[67] On the other hand, suit pertaining to immovable property and persons can be filed at the option of plaintiff before the court either in jurisdictional limit of which the cause of action has arisen or within the local limits of the jurisdiction of the court within which the defendant resides, or carries on business, or personally works for gain.[68]

Exercising of jurisdiction by court- All courts within the territory of India have the jurisdiction to entertain suits civil suit unless they are expressly or impliedly barred from the same.[69] However, court will not proceed with any suit if same has been instituted & pending[70] or already decided[71] between same parties and pertaining to same issue before any competent court in India. The rule of ***res judicata*** shall also extend to judgments of foreign courts if the same has been decided by competent court, is based upon correct principles of law and is not in breach of any law in force in India.[72] Such judgments of foreign courts will be assumed valid and binding unless contract is proved.[73]

2.7.2 Manner of Filing and Orders thereafter

The plaintiff should file a suit by presentation of plaint before the court stating facts proved by affidavit in the form as prescribed.[74] The court after receiving of plaint within 30 days of filing will issue summons to the defendant to appear before the court and answer the claim.[75] In addition to the above, the court can also make necessary orders for matters relating to interrogation, admission of documents & facts, discovery, inspection, producing of evidences etc. or summons for attendance or order to prove facts on affidavit.[76]

2.7.3 Costs Imposed by Court on Parties

The court before which a civil suit has been filed will possess absolute discretionary power to determine the extent of costs that can be imposed on any party to the suit with regard to fees and legal expenses incurred or any other expenditure incurred regarding to proceeding by the other party.[77] Such discretionary powers of court in relation to any commercial dispute will include reasonable cost payable by one party to another, extent of cost and time

[65] CODE CIV. PROC. §15.
[66] *Id.*, § 12.
[67] *Id.*, §16-18.
[68] *Id.*, §19-20.
[69] *Id.*, §9.
[70] *Id.*, §10.
[71] *Id.*, §11.
[72] *Id.*, §13.
[73] *Id.*, §14.
[74] *Id.*, §26.
[75] *Id.*, §27-29.
[76] *Id.*, §30.
[77] *Id.*, §35.

of payment.[78] In addition, the court possesses the power to impose cost on parties who knowingly file a false or vexatious claim, up to Rs 3000/- or may also impose cost on any party for causing delay in proceedings in order to reimburse the other party.[79]

2.7.4 Execution of Decree

A decree i.e. decision of court once passed can be executed by the court which passes it or it may be sent to other court of competent jurisdiction for the purpose of proper execution of the same.[80] Sending of decree for execution to another court could be required if the defendant resides or carries out his work outside the jurisdiction of court passing the decree or the immovable property required for execution is outside the limits of jurisdiction of the court passing such order.[81] The court to which the decree has been sent for execution will execute the same as if it had been passed by itself and also will possess similar powers as of the court which originally passed the decree to punish such person disobeying his order of execution.[82] In execution of decree, upon application by decree-holder, the court which passed the decree may also issue percept to court executing the same to attach any property of judgment debtor as specified. If judgment debtor dies before full execution of decree, then his/her legal representatives shall be made liable by the court originally passing the decree to execute the same by them.[83] However, their liability to execute the same extends only up to the property received by such legal representatives.[84]

The court executing the decree have all powers and may issue orders for delivery, attachment,[85] sale of property,[86] or even order for arrest or detention[87] or appointing a receiver or any such orders for the purpose of execution of decree on the application of decree holder.[88]

2.7.5 Filing Suit Against the Government or Alien Enemies

The title of suit filed against Central government or State government will be the union of India or the State respectively.[89] Any such suit filed against the public officer for any of his acts committed in official capacity should be preceded by 2 months written notice delivered to such officer stating the cause of action, relief claimed and details of the plaintiff.[90] A suit can also be filed against alien enemies residing in India with permission of central government.[91]

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[78] CODE CIV. PROC. §35.
[79] *Id.*, §35A-B.
[80] *Id.*, §§38-39.
[81] *Id.*, §§ 39(a)-(d), 40.
[82] *Id.*, §§42, 82.
[83] *Id.*, §50.
[84] *Id.*, §§50(2), 52, 53
[85] *Id.*, §§60, 63, 64.
[86] *Id.*, §§65, 67.
[87] *Id.*, §§55, 58. ,
[88] *Id.*, §§ 51, 52, 54.
[89] *Id.*, §79.
[90] *Id.*, §80.
[91] *Id.*, §83.

2.7.6 Procedure for Institution of Suit & Written Statement (Pleadings)

Every suit in court shall be filed by presenting copy of plaint in duplicate to the appointed officers of court.[92] The written statement or pleading should contain material facts,[93] particulars,[94] defenses, description of immovable property which is the subject matter of the suit (if any),[95] amount of money claimed for recovery & interest therein (if any),[96] exemption from limitation (if claimed),[97] preceding conditions[98] & consequent averments, and relief sought and grounds of same[99] being properly paragraphed and numbered along with address[100] for service of notice but not evidence, being duly signed[101] by party & pleader.[102] The pleadings in whole shall be verified by the each party in the suit proving satisfaction of court to be acquainted with the facts of the case.[103] Amendment in pleadings within the due time limit after leave of court is granted, is mandatory for raising any new ground of claims or new allegation against the other party.[104] The plaintiff in pleading shall show defendant's interest or claim to be interested in subject matter & also his liability to be called upon to answer plaintiff's demand.[105] Failure to follow any such procedure will lead to rejection of plaint.[106]

The plaintiff upon direction of court will present as many copies of the plaint on plain paper as there are defendants.[107] Further, if plaintiff sues or relies on documents in support of his claim, the same shall be produced before court when the plaint is presented and a copy thereof to be filed with plaint.[108]

On the other hand, the defendant upon receiving of summon should within 120 days from date of such service present a written statement along with documents[109] of his defense,[110] failing which he will forfeit his right.[111] The defendant must in written statement raise all grounds showing non-maintainability of the suit, pleading of new facts, specifically deny all

[92] CODE CIV. PROC. Order IV Rule1.
[93] *Id.*, Order VI Rule 9.
[94] *Id.*, Order VI Rule 10, Order VII Rule 1.
[95] *Id.*, Order VII Rule 3.
[96] *Id.*, Order VII Rule 2, 2A
[97] *Id.*, Order VII Rule 6.
[98] *Id.*, Order VI Rule 11, 12.
[99] *Id.*, Order VII Rule 7, 8.
[100] *Id.*, Order VI Rule 14A.
[101] *Id.*, Order VI Rule 14.
[102] *Id.*, Order VI Rule 2, 4, 6.
[103] *Id.*, Order VI Rule 15, 15A.
[104] *Id.*, Order VI Rule 7, 17, 18.
[105] *Id.*, Order VII Rule 5.
[106] *Id.*, Order VII Rule 11-13.
[107] *Id.*, Order VII Rule 9.
[108] *Id.*, Order VI Rule 14-17.
[109] *Id.*, Order VIII Rule 1A.
[110] *Id.*, Order VIII Rule 8.
[111] *Id.*, Order VIII Rule1.

allegations,[112] mention counter claims[113] and specify all other possible grounds of defense.[114] Failing any of the above, the court shall pronounce judgment against him.[115]

2.7.7 Issue of Summons & Service

After institution of suit, the court may issue summons to the defendant to appear along an order to produce documents[116] and answer claim of the plaintiff before the court, in person or by a pleader or along with the pleader by another person to answer questions of court within maximum 120 days from its service.[117] However, the court may also order for personal appearance of the defendant & all his witnesses[118] on a fixed date keeping sufficient time to allow him to enable his appearance on such day.[119] The summon so served[120] on all defendants[121] can be delivered to the officer who will serve the same or through courier service[122] or by the plaintiff himself[123]. The summon so delivered will be acknowledged by receiver by signing the same.[124] If the person to whom the summon served is not found, the summon returns back to court which issued the same along with copy of same being affixed on some conspicuous part of the house of defendant.[125] In case if the defendant is of a rank entitling consideration then the summon can be substituted by a letter signed by judge.[126]

2.7.8 Interrogation & Discovery

In a civil suit any of the party[127] by taking leave of the court[128] can deliver interrogatories relating to the matter in question in writing in a prescribed manner[129] to the other party having the other party to answer the same and such interrogatories shall be admissible on oral cross-examination of witness.[130] The party to whom the interrogatory is issued can also raise objections[131] about the same being scandalous, irrelevant, exhibited with mala-fide purpose, or immaterial in his answer on affidavit[132] subsequently which can be set aside by court.[133] The answer of interrogatories shall also be given on affidavit in a prescribed

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[112] CODE CIV. PROC. Order VIII Rule 3, 3A, 4, 5.
[113] *Id.*, Order VIII Rule 6A, Rule 6B.
[114] *Id.*, Order VIII Rule 2.
[115] *Id.*, Order VIII Rule 10.
[116] *Id.*, Order V Rule 7.
[117] *Id.*, Order V Rule 1.
[118] *Id.*, Order V Rule 8.
[119] *Id.*, Order V Rule 3, 4, 6.
[120] *Id.*, Order V Rule 10-15, 21, 25, 26 (Rule 24, Rule 27-28 read with Rule 29).
[121] *Id.*, Order V Rule 11.
[122] *Id.*, Order V Rule 9.
[123] *Id.*, Order V Rule 9A.
[124] *Id.*, Order V Rule 16.
[125] *Id.*, Order V Rule 17, 20.
[126] *Id.*, Order V Rule 30.
[127] *Id.*, Order XI Rule 5.
[128] *Id.*, Order XI Rule 2.
[129] *Id.*, Order XI Rule 4.
[130] *Id.*, Order XI Rule1.
[131] *Id.*, Order XI Rule 6.
[132] *Id.*, Order XI Rule 8.
[133] *Id.*, Order XI Rule 7.

manner[134] and if omitted or not properly answered, the court can order requiring the party to answer or further answer the same.[135]

For the purpose of discovery, a party to the suit can apply to the court for directing the other party to make discovery of documents on oath; the court however can allow or dismiss on any basis[136] such application in the interest of justice.[137] If such an Application is allowed then the other party is mandated to make discovery on oath along with affidavit.[138] The order of discovery can also be made by the court on its own for fair disposal of suit.[139] Any party to the suit on or before its settlement is at liberty to give notice[140] to other party for inspection & making copy of documents, reference of which has been made by the other party in pleadings.[141] The party receiving such notice shall, within 13 days of the same produce such documents for inspection before the other party accordingly.[142] However, upon failure of the other party to comply with such notice, the court may order for compliance of the same by directing inspection accordingly or order for verified-copy[143] of the same to be furnished in the interest of fair disposal of suit.[144] Further, failure on the part of any party for discovery or answering interrogatories or inspection of documents, even on order of court will lead to dismissal to suit[145] subsequent to which defendant will lose his right to defend or plaintiff shall be precluded from bringing fresh suit on same cause.[146]

2.7.9 Provision Regarding Documents

All the parties in suit on or before its settlement are bound to produce all the documentary evidences in original, copies of which have been filed along with the plaint.[147] Any document which has been admitted or rejected as evidence in a suit shall be endorsed with particulars as prescribed[148] subject to certain exceptions.[149] Any document produced before court and placed on record is entitled to be received back or returned.[150] However, if sufficient cause exists, the court may also impound or take temporary possession of any document which is produced before it.[151]

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[134] CODE CIV. PROC. Order XI Rule 9.
[135] *Id.*, Order XI Rule 11
[136] *Id.*, Order XI Rule 20.
[137] *Id.*, Order XI Rule 12.
[138] *Id.*, Order XI Rule 13.
[139] *Id.*, Order XI Rule 14.
[140] *Id.*, Order XI Rule 16.
[141] *Id.*, Order XI Rule 15.
[142] *Id.*, Order XI Rule 17.
[143] *Id.*, Order XI Rule 19.
[144] *Id.*, Order XI Rule 18.
[145] *Id.*, Order XI Rule 21.
[146] *Id.*, Order XI Rule 21(2).
[147] *Id.*, Order XIII Rule 1.
[148] *Id.*, Order XIII Rule 4, 6.
[149] *Id.*, Order XIII Rule 5.
[150] *Id.*, Order XIII Rule 9.
[151] *Id.*, Order XIII Rule 8.

2.7.10 Hearing and disposal of Suit

Disposal of suit - A suit lacking any question of law with one or all defendants is bound to be disposed at once in respect of all such defendants.[152] Further, the judgment in any suit involving question of law will be pronounced when the court is satisfied that no further argument or evidence is required for decision of the suit on issues identified[153] and when findings are not sufficient, the court shall postpone the hearing of the suit for production of further evidence or for arguments.[154] Also, when summons are issued for final disposal of suit and if either party fails to produce evidence, then also court may pronounce the judgment[155] or adjourn the matter.

Witness - The parties to the suit shall present in court a list of their witnesses to obtain summons along with the expenses[156] to be incurred for the attendance by witness before the court.[157] The court may also allow calling witness either by summoning or otherwise, whose name does not appear in the list[158] i.e. a party may without applying for summons bring any witness to give evidence or produce documents.[159] Every such summon issued shall have reasonable description specifying time, place and purpose for attendance of witness.[160] In cases where summons is issued to merely produce documents and not give evidence then such summons will be deemed complied with, when such document is made to be produced[161] i.e. personal appearance in such cases can be done away with.

Serving of summons under these rules shall be according to Order V of CPC and other provisions of code.[162] In addition, the court may also allow the party applying for such summons to deliver or serve the same personally.[163] Every person who is summoned as above stated shall have the responsibility & duty to appear and give evidence in the suit or produce documents at the prescribed time and place.[164] Failure of compliance with such summon by witness will result in release of proclamation or warrant for arrest[165] or order for attachment of property[166] against such person by the court.[167] A fine up to Rs. 500/- can be imposed on witnesses or attached property of witness can be sold who fails to appear before the court or fails to satisfy the court.[168] The responsibility to give evidence or produce

[152] CODE CIV. PROC. Order XV Rule 1, 2.
[153] *Id.*, Order XV Rule 3.
[154] *Id.*, Order XV Rule 3(2).
[155] *Id.*, Order XV Rule 4.
[156] *Id.*, Order XVI Rule 2- 4.
[157] *Id.*, Order XVI Rule 1.
[158] *Id.*, Order XVI Rule 14 (India).
[159] *Id.*, Order XVI Rule 1A.
[160] *Id.*, Order XVI Rule 5.
[161] *Id.*, Order XVI Rule 6.
[162] *Id.*, Order XVI Rule 8-9.
[163] *Id.*, Order XVI Rule 7A.
[164] *Id.*, Order XVI Rule 15-19.
[165] *Id.*, Order XVI Rule 18.
[166] *Id.*, Order XVI Rule 13.
[167] *Id.*, Order XVI Rule 10- 11.
[168] *Id.*, Order XVI Rule 12.

documents when called by the court is also imposed on parties as well, failing which the court may pronounce a judgment or make an order against the said party.[169]

2.7.11 Judgment and decree

The judgment shall be pronounced by reading out the findings of court on each issue[170] and final order shall be passed in open court within 60 days from the conclusion of hearing and same should be done by giving due notice of the day fixed to the parties.[171] After pronouncement, the same shall be signed by judge in open court and saved as per Section 152.[172] Further, the copies of the judgment are made available to the parties immediately after pronouncement, a for appeal.[173] In case the parties are not represented by a pleader, then the court shall inform the parties about the appeal and limitation period for the same.[174] The decree will contain the prescribed particulars and shall be drawn within 15 days from the date of pronouncement.[175]

2.7.12 Execution of Decrees & Orders

The procedure for paying of money payable to the court or to the decree holder under the decree shall be accordingly.[176] In respect of immovable property coinciding in jurisdiction of multiple courts, one of such courts may attach and sell the property.[177] Under CPC the courts also have the power to order for sale of movable property.[178] A party to the suit who desires to execute its decree shall apply for the same before the court which passed the decree.[179] The Code also specifies provisions for execution of cross decrees between same parties or cross claims under the same decree,[180] for payment of two sums of money.[181] The court after inquiry will issue the process for execution of decree[182] and subsequently will choose its mode of execution.[183] The court for execution of decree, for payment of money may arrest the judgment debtor and detain in him civil prison or order for attachment of property.[184] The Code further provides for execution of decree against firm.[185] However, the party to suit can file objection to attachment of property.[186]

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[169] CODE CIV. PROC. Order XVI Rule 20-21.
[170] *Id.*, Order XX Rule 5.
[171] *Id.*, Order XX Rule 1, 2.
[172] *Id.*, Order XX Rule 3.
[173] *Id.*, Order XX Rule 6B, 20.
[174] *Id.*, Order XX, Rule 5A.
[175] *Id.*, Order XX Rule 6-19.
[176] *Id.*, Order XXI Rule 1-2 (India).
[177] *Id.*, Order XXI Rule 3, 64-106.
[178] *Id.*, Order XXI Rule 74-81.
[179] *Id.*, Order XXI Rule 10-17, 22, 23.
[180] *Id.*, Order XXI Rule 19.
[181] *Id.*, Order XXI Rule 18, 20.
[182] *Id.*, Order XXI Rule 24-29.
[183] *Id.*, Order XXI Rule 30-36.
[184] *Id.*, Order XXI Rule 37-57.
[185] *Id.*, Order XXI Rule 50.
[186] *Id.*, Order XXI Rule 58-59.

2.7.13 Abandonment of Suit and Compromise

Abandonment or Withdrawal - At any time post institution of the suit, the plaintiff after taking leave of the court may against one or all of the defendants abandon his suit or part of his claim.[187] The court may allow the same if satisfied that suit may fail by formal reason or if sufficient grounds exist for allowing plaintiff to institute fresh suit[188] for the subject matter.[189] However, if the plaintiff abandons any suit without leave of court, then cost can be imposed on such plaintiff and may also be precluded to file any fresh suit on same subject matter.[190] In case of multiple plaintiffs, abandonment of the suit by one plaintiff requires consent of the other plaintiffs.[191] Upon withdrawal or abandonment of suit, the defendant may be transposed as plaintiff against other defendants.[192]

Compromise – The suit between parties can be compromised or adjusted through lawful agreement in writing and signed by parties.[193] Here, if in satisfaction of the court a compromise or agreement has been arrived between parties, then the same can also be ordered and declared final[194] by the court through its decree.[195]

2.7.14 Furnishing Security by Defendant

If the defendant for the purpose of delaying or avoiding the process of court absconds or prepares to leaves India, then in such case the court may order for arrest of the defendant and call upon to furnish security for appearance in form of money or other property until satisfaction of any decree that may be passed against him in the suit.[196]

Similarly, if at any stage in suit the defendant disposes or removes the property with intent to obstruct or delay execution of decree that may be passed against him, then in such circumstances also the court may direct defendant to furnish security.[197]

2.7.15 Injunction on Persons, Corporation & Interlocutory Orders

Injunction towards property[198]- In a civil suit, if the property in dispute is being wasted, damaged, or alienated by any party or the defendant intends to dispose of the property or cause damage to such property or causes injury to plaintiff in relation to that property, the court may order for grant of temporary injunction to restrain or prevent such acts.[199]

Injunction towards Breach – In a suit, the court can at any time (i.e. before or after the judgment) upon application of the plaintiff, order for injunction on the defendant in order to restrain

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[187] CODE CIV. PROC. Order XXIII Rule 1.
[188] *Id.*, Order XXIII Rule 2.
[189] *Id.*, Order XXIII Rule 1(3).
[190] *Id.*, Order XXIII Rule 1(4).
[191] *Id.*, Order XXIII Rule 1(5).
[192] *Id.*, Order XXIII Rule 1A.
[193] *Id.*, Order XXIII Rule 3- 3B.
[194] *Id.,* XXIII Rule 3A.
[195] *Id.*, Order XXIII Rule 3.
[196] *Id.*, Order XXXVIII Rule 1-4.
[197] *Id.*, Order XXXVIII Rule 5-13.
[198] *Id.*, Order XXXIX Rule 9.
[199] *Id.*, Order XXXIX Rule 1.

him from committing breach of contract or any other kind of injury relating to property or right.[200]

Further, before or after imposing such injunction, the court shall direct notice of the application of injunction to be given to opposite party accordingly.[201] Upon breach of any injunction order by the party, the court may order the property of such party to be attached and if breach still continues, the property can be sold after one year of attachment or the court may order for detention of such party in civil prison for maximum of 3 months.[202] Such order of injunction passed can be discharged, varied or set aside by the court on application by any party dissatisfied by such order.[203]

Similar to above, the court may on the application of any party to the suit, order for the sale of any movable property which is the subject matter of suit or is being attached therein accordingly along with the order for detention, preservation and inspection of the said property. However, before issuing any such direction, the court shall direct notice of application received to the opposite party.[204]

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[200] CODE CIV. PROC. Order XXXIX Rule 2.
[201] *Id.*, Order XXXIX Rule 3.
[202] *Id.*, Order XXXIX Rule 2A.
[203] *Id.*, Order XXXIX Rule 4.
[204] *Id.*, Order XXXIX Rule 8.

CHAPTER 3: EXEMPLARY DAMAGES UNDER SECTION 73 OF THE INDIAN CONTRACT ACT

3.1 INTRODUCTION

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 provisions for punitive damages based on statues of those particular states. In practice, generally punitive damages are awarded for the breach of contract in insurance cases when the insurer's actions are egregiously deceptive. Even in these circumstances, it is granted not for the breach of contract but under 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 good faith or intent or motive or reason to breach the contract which shows application of strict liability standard for breach of contract. Many a times, breach occurs when one of the parties to the contract feels that the outcome of the performance will be less beneficial than from the non-performance of the contract. Damages are generally based on the loss occurred due to non-performance of the contract. 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 others. The traditional view towards compensatory damages for the breach of the contract to compensate the aggrieved party has proved to be inadequate in specific cases where the party at fault has breached the

terms intentionally to cause 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.

Before we dive into the question of punitive damages, it is however pertinent, at this juncture, to look into the various types of breach of contract. The various types of the breach of contract, for the purpose of damages, are:

1. Minor Breach of Contract – It is also known as "Partial Breach" or "Immaterial Breach" of Contract. It refers to those situations where although the deliverables under the contract were received by the other party, but the party in breach failed to fulfil or perform some part of their obligation. In such cases, the innocent party may only be able to pursue a legal remedy if they can prove that the breach resulted in financial losses. In another words, minor breach of contracts can be excused unless loss or damage suffered is proved.
2. Material Breach of Contract – As defined under the Restatement of Contracts, a material breach of contract is defined as the non-performance of a duty that is so material and important so as to justify the injured party in putting the whole transaction at an end.[1] In other words, a material breach means "a breach of contract which is more than trivial, but need not be repudiatory … which is substantial. The breach must be a serious matter, rather than a matter of little consequence".[2] To determine whether or not a material breach has occurred the following test is used:
    a. The extent to which the injured party will be deprived of the benefit which he reasonably expected.
    b. The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived.
    c. The extent to which the party failing to perform or to offer to perform will suffer forfeiture.
    d. The likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account of all the circumstance including any reasonable assurances.
    e. The extent to which the behavior of the party failing to perform or to offer to perform comports with the standards of good faith and fair dealing.[3]
3. Fundamental Breach of Contract – Fundamental breach of contract occurs when the person that has the contract breached against can sue the breaching party for damages incurred as well as terminate the contract if they wish to do so.

[1] Restatement (Second) of Contracts, §241 (1981).
[2] Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd (t/a Medirest), [2013] ECWA Civ 200.
[3] *See* Restatement (Second) of Contracts, §241 (1981).

4. Intentional Breach of Contract – Intentional breach means that the breaching party violated the contract "willfully". That is to say, the breaching party acted knowingly that taking or failing to take an act would reasonably cause a breach of the agreement. Liability for breach is often described as a form of "Strict Liability", in which the measure of damages is unaffected by the culpability of the breach. However, courts sometimes do award higher damages, under various legal doctrines, if the behavior of the breaching party seems especially culpable. When they do, they may describe the breaching party's behavior as "willfully", or "in bad faith", or "fraudulently", or "maliciously". Here, willful breaches or intentional breaches are defined and refer to the breaching party's mental state.[4]

3.2 ARGUMENTS FOR AND AGAINST PUNITIVE DAMAGES

Placing the aggrieved party in the same position, as he would have been in if the contract has not been breached, 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 nation.[5] The philosophy behind compensatory damages for non-performance of the obligation by the parties to a contract is that it is considered to be a private dispute; which means that the award for 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 economic loss and is ready to compensate for the loss.[6] Further, incorporating punitive elements in the award of damages may not be fruitful for the commercial activities as the repercussion of this would be discouraging to those who want to enter into contract which is the very basis of businesses and economic prosperity. The underlying philosophy for making the breach of contract compensatory in nature is that sometimes it is desirable to breach the contract when the performance becomes detrimental to the interest of 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 idea of economic efficiency as the formation of a contract is based upon mutuality of parties and there is always a possibility to break the terms of the contract. The purpose of punitive damages to punish the party at fault and create a deterrence effect for the others, is not in consonance with the underlying principle of the contract. Parties to a contract voluntarily undertake obligations, and it is inappropriate to bring a punitive standard outside the purview of the agreement.[7]

The 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 stated that punitive damages for the breach of contract should be

[4] Richard Craswell, *When is a Willful Breach "Willful"? The Link Between Definitions and Damages*, 107 MICHIGAN L. REV. 1501 (2009).
[5] 2 CHITTY ON CONTRACT, (32nd ed. Sweet & Maxwell 2015).
[6] Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79 (1982).
[7] John Swan, *Punitive Damages for Breach of Contract: A Remedy in Search of a Justification*, 29 QUEEN'S L.J. 596 (2004).

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.[8]

Some scholars[9] 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 can be described as a violation of public interest, in the security of a transaction. They argue that public interest demands for the fulfillment of an obligation under a contract, so 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 result in punitive damages as both parties mutually agree to the terms of a contract whereby, they undertake their respective responsibilities which are self-imposed in nature. The recent development of the philosophy of punitive damages in case of intentional breach is grounded on the basis that when a party to a contract intentionally broke his promises which he has undertaken voluntarily to be performed and he also has the capacity to fulfill them, then 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 respect their obligation under a contract. Punitive elements may be very useful when the breaching party has initiated and brining the other party to enter into the contract. In case of intention breach of a contract, the 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 general nature of a contractual breach is mostly voluntary as the parties promise to undertake some obligation voluntarily and then choose not to perform that obligation which is also a voluntary action.[10] The traditional theories of the contract law in a sense prizes the breach by putting an obligation on 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.

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[8] 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).

[9] 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); *See also* Robert Cooter, *Prices and Sanctions,* 84 COLUM. L. REV. 1523, 1523–24 (1984).

[10] Monu Bedi, *Contract Breaches and the Criminal/Civil Divide: An Inter-Common Law Analysis*, 28 GA. ST. U. L. REV. (2013).

Responding to the breach of contract in the form of punitive damages will be more appropriate by sanctioning the other party who intentionally and wrongfully chooses not to perform his obligation. Such a provision for intentional breach would be in consonance with the subjective norm of contractual obligation.[11]

3.3 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 clauses may contain exclusion of such a liability which may arise due to consequential or indirect losses. Parties to the contract should not benefit from these clauses if their conduct is wrongful or there is a willful default by him. The crucial question in this situation arises in determining whether or not the conducts of the parties are intentional, deliberate, and willful? It has been observed in a case[12] that there is a difference between deliberate act and willful default. The 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 party knows that 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 (rephrase) knowing the nature of their conduct and the consequences of the same breach the contract and are willing to compensate the plaintiff for the loss caused due to the non-performance of the contract. For the Court, it is next to impossible to determine the mental elements in every instance of breach of commercial contracts 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.[13]

3.4 COMPARISON OF COMMON LAW AND CIVIL LAW COUNTRIES ON THE PROVISION OF PUNITIVE DAMAGES

3.4.1 French Law on Punitive Damages

Public policy in France and other civil law countries are against the notion of punitive elements in awarding damages due to the very nature of it being associated with criminal law. The public policy on breach of contract is that compensatory damages is the appropriate remedy. Current developments in the French legal system show 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 is crucial for the French legal system to reform its contract law in line with other legal systems, keeping in mind the commercial relations that France has with other countries that can take a hit due to difference in contract law.[14] Till date, there is no case law found where courts have awarded punitive damages.

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[11] 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.

[12] De Beers UK Limited v. Atos Origin IT Services, [2010] EWHC (TCC).

[13] Michael B. De Leeuw & Brian J. Howard, *"What Is a Willful Breach of Contract?"*, N. Y. L.J., Apr. 3, 2006.

[14] Georges Cavalier, *Punitive Damages and French Public Policy*, LYON SYMPOSIUM, Oct 2007, Lyon, France.

3.4.2 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 courts which is supplemented by some legislations on 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 usages in medieval period throughout Europe. While entering into the contract, each party gets a legal duty of 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 damages is to compensate the victim for the loss. They are intended to make good, so 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.[15] In a case[16] 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 Under English law, two landmark cases, i.e. *Rooks v. Barnard*[17] and *AB v. South West Water Services Ltd*[18] have laid down settled principles of law that punitive damages can be awarded only when the case satisfied the cause of action test[19] and categories test[20]. 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

[15] *See* Rookes v. Barnard, [1964] AC 1129; AB v. South West Water Services Ltd, [1993] QB 507.
[16] 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).
[17] Rookes v. Barnard, [1964] UKHL 1, [1964] AC 1129.
[18] AB v. South West Water Services Ltd, CA 1993 1 All ER 609.
[19] *Id.* (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).
[20] Rooks v. Barnard, [1964] AC 1129 (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).

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 Appeals in the 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 Rooks 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.

If one compares French and English law, there are significant differences concerning the punitive damages. The point where French law and English law finds similarity, is that both nations accept that 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 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 in France where the immediate effect of the termination is not possible unless approved by the court and the party at fault gets a grace period to perform the obligation under the contract in question. English law is more favorable to 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 yet 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.[21] The current trend under the French legal system reflects that judges are willing to grant and have granted punitive damages without referring the same as punitive damages.

3.4.3 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 contractual relation and the rules are largely based on the common law legal system. In some of the states, there is federal contract law, i.e. Uniform commercial Code[22] which governs the contractual relations between the private parties. Even after the adoption of the Uniform Commercial Code, different interpretations evolved over a period of time depending upon the extent to which a state has codified the common law system of contract and the Restatement of Contracts.[23] Traditionally punitive damages for the breach of contract have been avoided

[21] It is called the doctrine of "*full compensation for losses*" "*réparation intégrale*".

[22] 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.

[23] 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.

by courts in the Unites 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 dispute.[24] The reason for not accepting punitive damages in the U.S. is indeterminable. Gradually theory of efficient breach[25] became the established norm in the US due to the analysis and works undertaken by their economic scholars 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.[26] The U.S. Supreme Court has observed that the U.S. Constitution has put a restriction on excessive punitive damages. But despite the limit put by U.S Constitution, punitive damages have been awarded in the U.S as well.

3.4.4 Canadian Law on Punitive Damages

In a Canadian case[27] it was observed by the Supreme Court of Canada that punitive damages should be awarded in exceptional cases of 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 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 case[28] 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, has committed an "independent actionable wrong".[29] The Court 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.

This legal position is starkly different from the position taken by England and Wales High Court have observed in a recent case[30] that generally punitive damages cannot be awarded

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

[25] 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.

[26] 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.

[27] Whiten v. Pilot Insurance Company, [2002] 1 RCS 595.

[28] Whiten v. Pilot Insurance Company, (2002) 209 DLR (4th) 257.

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

[30] IBM United Kingdom Holdings Ltd v. Dalgleish, (Rev 1) [2015] EWHC 389 (Ch) (Obiter dicta).

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.

3.5 INDIAN LAW ON PUNITIVE DAMAGES

The 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.*[31]

The Calcutta High Court in a case[32] 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 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 case[33] 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 leading case[34] it was held that 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 fair procedure and principles of natural justice.

3.6 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 statutes.[35]

[31] Organo Chemical Industries v. UOI, (1979) 4 SCC 573.
[32] Sheikh Jaru Bepari v. AG Peters, AIR 1942 Cal. H.C. 493.
[33] Alexander Brault v. Indrakrishna Kaul, AIR 1933 Cal. H.C. 706.
[34] General Motors (l) Pvt. Ltd. v. Ashok Ramnik Lal Tolat, (2015) 1 SCC 429.
[35] For 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.

2. Breach of a contract which occurred due to the fraudulent inducement by the defendant.[36]
3. Breach of a contract which also results in the breach of fiduciary duty.[37]
4. Breach of a specialized contract wherein the obligation is towards the public by a public company.[38]

Coming to the first criterion where a breach of contract also results in the breach of a legal duty imposed by a statute. The first criterion 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 contractual 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 case[39] the Delhi High Court 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 considered 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

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[36]. 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 induces 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.

[37] 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.

[38] 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.

[39] Time Incorporated v. Lokesh Srivastava, (2005) 30 PTC 3 (Del).

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.

TABLE 1: Analysis of Landmark Cases Law and the nature of damages awarded

Case	Damages	Award of damages (Nature)	Ratio decidendi
Sheikh Jaru Bepari v. A.G. Peters, 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 (l) 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. v. Books (India) Pvt. Ltd., 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.
Time Incorporated v. Lokesh Srivastava, 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	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

	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 considered view that a distinction has to be drawn between compensatory damages and punitive damages.		criminal propensity also 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 Courts dealing with 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 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 v. Mr. P. Bhoominathan, 2009 (39) PTC 658 (Del.)	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 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.	Punitive	The court justified the grant of punitive damages by flagrancy of infringement which is the doctrine derived from US law.

Honeywell International Inc. v. Pravin Thorat & Ors. (CS (OS) 3684/2014)	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 *'shocks the conscience'*, and has an element of '*wilful and wanton disregard'*, 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.

TABLE 2: Award of Nominal and Punitive Damages on Different factors

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.

3.7 INTEREST AS PUNITIVE DAMAGES

Section 61 of the Sale of Goods Act, 1930 states as follows:

> 61. Interest by way of damages and special damages – (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

Section 61 of the Sale of Goods Act, 1930 coupled with the tendency of the courts to grant higher rates of interest in some cases (rate which in some cases has gone above 20 percent)[40] has led to the emergence of the belief that this higher rate of interest is granted as a form of penalty or punitive or special damages. A division bench of Supreme Court of India comprising of S. B. Sinha & Markandey Katju, J.J. cleared the air in this regard in the case of *Alok Shanker Pandey v. Union of India*[41] by stating the following:

> "**It may be mentioned that there is a misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital**. For example, if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B." (**emphasis added**)

3.8 RECOMMENDATIONS AND CONCLUSION

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. On the basis of the foregoing research we suggest the following recommendations:

30. To make Indian Contract Act a more robust law – profiteering from damages should be prohibited and the principle of unjust enrichment must be strictly applied in awarding damages in case of breach of contract.
31. One of major shortcoming of Indian Civil Courts Machinery is award of less damages as compared to other avenues. Alternatives such as arbitration are preferred over suits in normal civil courts is, inter alia, due to the facts that arbitral awards typically allow a higher amount of damages for breach of contract. Further in matters before higher courts, especially in stages of appeal, evidence in support of quantum of damages is not evaluated which therefore does not guarantee fair

[40] *See infra* Chapter 4.

[41] Alok Shanker Pandey v. Union of India & Ors, Unreported Judgements, Civil Appeal 1598 of 2005, decided on Feb. 15, 2007 (SC).

damages to the injured party. Thus, we require a stricter regime for awarding damages and a such punitive damages for intentional breach of contracts is one such area which should be looked into.

32. The Rule of reasonableness – i.e. awarding damages based on what is deemed reasonable by the courts – is not a proper tool to deter parties from breaching contracts. Further, since what is reasonable depends on the discretion of the courts, there is no predictable outcome which creates a fear in the mind of the parties of not being awarded fair and just damages in the event of breach. Awarding punitive damages and restricting the scope of court's discretion solves this problem.
33. The practice of awarding reasonable damage must be shifted to that of "actual damages" or any other damages such as "economic loss or monetary loss" which ensures objectivity.
34. Section 73 should be amended to ensure exemplary action as a consequence of intentional or willful breach of contract. The current regime of awarding damages can be described as a "strict liability" regime where the "mental state" of the breaching party is not considered for awarding damages. The aim and central argument of this chapter is not to move towards an absolute liability regime of awarding contractual damages by limiting the number of exceptions, but rather, to strengthen contractual enforcement in India by providing a higher quantum of damages in cases where breach of contract is committed knowingly/intentionally/deliberately. However, we have decided to avoid using the term punitive as used in other jurisdictions and to use the term 'exemplary' instead. For this we suggest the following:
    a. In Section 73 before the first explanation the following words should be inserted "**Exemplary compensation for intentional breach of contract.** – Where it is established by the plaintiff that the breach of contract was committed intentionally or deliberately or knowingly or willfully, and the breach is unjustified in the opinion of the court, in such cases a higher quantum of compensation than actual loss should be awarded.
    Provided that this higher quantum should not exceed twice the amount of actual loss suffered.
    Provided further that for Infrastructure projects, as defined under the Specific Relief Act, 1953 the knowledge, intention, deliberation or will should be presumed unless proven otherwise."
    b. After illustration (r) of Section 73 the following illustrations shall be inserted:
    "(s) A enters into a contract with B to supply a machinery on a certain date. B fails to supply the machinery on that date due to which A suffers losses amounting to Rupees 20,000. It was established by A that the breach was committed intentionally by B and the court is satisfied that B was unjustified in committing the breach. A is entitled to recover from B exemplary compensation of not more than Rupees 40,000.
    (t) A contracts B for the construction of a Shipyard for the price of Rupees 200 Crore by a certain date. B fails to do so. It should be presumed that the

breach was committed intentionally by B and A is entitled to exemplary compensation not exceeding Rupees 400 Crores."

35. The award of interest on damages for breach must be made the rule and as a matter of right and should not be left to court's wide discretion. The rate of interest should be standardized as per the current Lending RBI rates. The award of interest is not part of the compensation awarded but it is separate from that and over and above damages. It is not a penalty but normal accretion of capital which the innocent party is entitled to.
    a. For this purpose, an illustration should be inserted in Section 73 stating that "(u) A contracts B for the delivery of a machinery for the price of Rupees 10,000. B fails to deliver the machinery intentionally. A is entitled to recover from B damages not exceeding Rupees. 20,000. A is also entitled to recover interest from B on the quantum of damages awarded as per the current RBI rates."

In conclusion, 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 that 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. Doing so will provide statutory recognition to the award of punitive damages and will strengthen the substantive law of contractual enforcement in India. This will provide predictability in court decision and deter contractual breaches thus boosting confidence in commercial transactions and relationships which in turn will improve ease of doing business in India.

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CHAPTER 4: ENFORCEMENT OF LIQUIDATED DAMAGES AND PENALTY CLAUSES

4.1 INTRODUCTION

From antiquity the moral obligation to keep a promise has been a cardinal tenet of ethical philosophers, publicists, and philosophical jurists.[1] 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".[2] 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.[3] 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]

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.[5] The limitation of Court's discretion in granting the remedy of specific performance is a significant reform to strengthen contractual enforcement. Now specific performance can be claimed as a matter of right by the parties.[6] 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

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[1] Pound, *Promise or Bargain?*, 33 TUL. L. REV. 455, 455 (1959).
[2] TULSIDAS RAMAYANA, Ayodhya Kand, http://estudantedavedanta.net/The-Ramayana-Of-Tulasidasa.pdf.
[3] WORLD BANK GROUP, EASE OF DOING BUSINESS REPORT: 2015, http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf.
[4] WORLD BANK GROUP, DOING BUSINESS 2019: TRAINING FOR REFORM, http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf.
[5] *See* Specific Relief (Amendment) Act, 2018 §§ 3, 10 (amending Section 10 & 20 of the principal Act and inserting Section 20A).
[6] *See* Specific Relief (Amendment) Act, 2018 § 3 (which amends §10 of the Specific Relief Act making Specific Performance as a statutory right and minimizing the discretion vested in the Courts).

point in Indian contractual law. However, more such radical adjustments are required to 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 summarize and provide concluding remarks.

Remedies for breach of contract in 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.[7]

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.[8]

4.2 PENALTY CLAUSES ENFORCEMENT IN INDIA

In India, at present, the enforcement of penal clauses in a contract is hit by Section 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."[9]

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,*[10] *Maula Bux v. Union of India,*[11] *Rampur Distillery Case,*[12] *Raman Iron Foundry Case,*[13] *and ONGC Case*[14] and recently in

[7] DOUGLAS G. BRAID, ECONOMICS OF CONTRACT LAW, at xii (2007).
[8] *Id.*
[9] The Indian Contract Act, 1872 §74.
[10] Fateh Chand v. Balkishan Das, AIR 1963 SC 1405.
[11] Maula Bux v. Union of India, AIR 1970 SC 1955.
[12] Union of India v. Rampur Distillery and Chemical Co. Ltd., AIR 1973 SC 1098.
[13] Union of India v. Raman Iron Foundry, AIR 1974 SC 1265.
[14] Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629.

Kailash Nath Case.[15] 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.[16] 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. Section 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.[17] In both the cases the innocent party is only entitled to reasonable compensation.

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 reasonable[18] 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 forfeiture.[19]

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.[20]

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.[21]

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

[15] Kailash Nath Associates v. Delhi Development Authority, 2015 (1) SCALE 230; (2015) 4 SCC 136.
[16] Fateh Chand v. Balkishan Das AIR 1963 SC 1405.
[17] *Id.*
[18] Fateh Chand v. Balkishan Das AIR 1963 SC 1405.
[19] *Id.*
[20] Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629 para 64.
[21] Kailash Nath Associates v. Delhi Development Authority, 2015 (1) SCALE 230; (2015) 4 SCC 136, ¶ 43.

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.[22] The effect of Section 74, Contract Act of 1872, is to disentitle the plaintiffs to recover *simplicitor* the sum agreed whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.[23] **The words in Section 74 "whether or not actual loss or damage is proved to have been caused thereby" should not mislead to think that actual loss is not necessary**. The above referred words in Section.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.[24]

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.[25]

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.[26]

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.[27]

4.3 THEORETICAL UNDERPINNINGS BEHIND PENALTY CLAUSES

The position against contractually agreed penalties 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 analysists in favor of enforcing penalty clauses.

Just Compensatory Principle: the just compensatory principle is a central tenet 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.[28] The compensation has to be just. However, in India, commercial litigation consumes a lot of time as we have seen in the Ease of Doing business report. Also, commercial transaction goes through several stages of negotiations and

[22] *Id.,* para 43.
[23] Bhai Panna Singh and Ors v. Bhai Arjun singh and Ors. AIR 1929 PC 179.
[24]Maula Bux v. Union of India, AIR 1970 SC 1955.
[25] Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629 para 67.
[26] *Id.*
[27] *Id.*
[28] Mindy Chen-Wishart, *Controlling the Power to Agree Damages, in* WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY at 272 (Peter Birks ed. 2006).

bargaining and considerable amount is spent in attorney's fees. And, if after such a lengthy and time-consuming process no legal certainty is achieved, then that itself leads to injustice. A trade-off needs 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.[29] 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.[30] 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.[31] 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."[32] Arguing on this line, the economists 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 failure results in under-compensation of a party who has stipulated for a measure of damages in the first place.[33]

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.

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[29] *Id.*
[30] *Id.*
[31] *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.)
[32] *Id.*
[33] *Id.*, at p. 588.

4.4 OTHER JURISDICTIONS

4.4.1 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 a '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 cases on the matter is Dunlop Pneumatic Tyre Case,[34] 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.[35] However, Recently the UK Supreme Court by its judgment in the cases of *Cavendish Square Holding BV v Makdessi*[36] and *ParkingEye Ltd v. Beavis (Consumers' Association intervening)*[37] have changed the legal position radically. The Court rejected the old and traditional test of determining whether the clause is LDC or a penalty.[38] It was held, *inter alia,* that:

> "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).

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.

Proactive Sports Management Ltd v. Wayne Rooney, Colleen Rooney et al[39] dealt with a dispute between the two parties regarding the rights of the professional footballer W. Rooney. An image rights representation agreement between a company providing management and agency services to Rooney and the company to which his image rights had been assigned was held by the Court as unenforceable by the management company as being an unreasonable restraint of trade. Whilst the management company was thereby unable to recover arrears of commission under that agreement, it was, nevertheless, entitled to remuneration for the services which it had provided to the second company on a *quantum meruit* basis. The Court found that the terms were significantly determined by one of the

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

[35]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 , at 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).

[36] Cavendish Square Holding BV v. Makdessi, [2015] UKSC 67.

[37] ParkingEye Ltd v. Beavis (Consumers' Association intervening), [2015] 3 W.L.R. 1373.

[38] 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).

[39] Proactive Sports Management Ltd v Wayne Rooney, Colleen Rooney et al, [2010] EWHC 1807 (QB) (U.K.).

parties to the contract and that there existed a substantial imbalance in the bargaining power of the parties. Moreover, the contract in question was considered to be a peculiarly unfair one. Numerous factors such as Rooney's age, their access to proper professional legal services, the duration of the contract, were considered by the Court in holding it unenforceable in law. The judgment also quoted Lord Diplock's comments on the public policy to protect those with weak bargaining power. This also underscores the attention paid by the Court in protection of relative weaker parties against terms that unfairly restrict economic freedom.[40]

4.4.2 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 and 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.[41]

The Common law of contract in the US is codified under "Restatement of the Law – Contracts" under which § 356 states about 'Liquidated Damages and Penalties' as *"(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."*[42]

In addition to above, the "Uniform Commercial Code" (UCC) regulating commercial transactions also mentions about liquidated damages under '§ 2-718 - Liquidation or Limitation of Damages, Deposits' as *"(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty."*[43]

Under both laws, parties under a contract are free to provide the 'liquidated' or 'fixed amount' of damages for breach in advance. However, the amount of money fixed as damages had to be reasonable to the extent that it approximates the actual loss that results from the anticipated breach. Any amount fixed which is unreasonably larger than the resultant damage shall be unenforceable and void under the public policy as a penalty. In short, US courts refuse to enforce contract provisions that are found to be 'penalties. The courts generally enforce the liquidated damages if found reasonable in situations where there arises difficulty in measuring the loss.

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[40] Mary Catherine Lucey, *Europeanisation and the Restraint of Trade Doctrine,* 32 LEGAL STUDIES 4, 623-641 (2012).
[41] U.C.C., §2-718; Restatement 2d Contracts §356.
[42] Restatement (Second) of Contracts §356 (1981).
[43] Uniform Commercial Code, §2-718 (2003).

The penalty doctrine is used by courts to determine whether damages that have been predetermined by the parties at the time of contracting will be enforced or not. The test to determine the validity of the liquidated damages clause was laid down in *Wassenaar v. Panos*[44] wherein the employee sued a former employer for enforcement of stipulated damages clause in the employment contract. In this, the Supreme Court allowed the employee's petition in view of evidence that employee did suffer harm in being unemployed for approximately two and half months after his discharge. Further, the employer failed to carry the burden of proving that stipulated amount of damages was grossly disproportionate to actual harm and thus unreasonable. Hence, in light of the above, it was held that liquidated damages provision in the matter was reasonable. The factors that were considered included the following: -

(1) Whether the clause we meant to provide for damages or for a penalty?
(2) Whether damages would be readily ascertainable?
(3) Whether the stipulated damages provision was a reasonable forecast of compensatory damages? and
(4) Public policy

The US Supreme court in *Priebe & Sons v. United States*[45] observed that "*Where liquidated damages provision in contract is fair and a reasonable attempt to fix just compensation for anticipated loss caused by breach of contract, the provision is enforceable*".

Amount fixed as liquidated damages in contract if turns out to be actual loss, then such stipulated amount shall not be declared as 'penalty' – The US court in *Mahoney v. Tingley*[46] wherein a vendor sued the purchasers to recover damages for breach of earnest money agreement. In this particular case, the parties entered into an earnest money agreement in which the plaintiff agreed to sell the residential property to the defendants for $20,250. Defendants deposited $50 as earnest money with the real estate broker and, subsequently, deposited $150 as additional earnest money. The agreement contained the following clause: "*If title is so insurable and purchaser fails or refuses to complete purchase, the earnest money shall be forfeited as liquidated damages unless seller elects to enforce this agreement.*"

The Supreme Court in its judgment observed that "*A penalty exists where there is an attempt to enforce an obligation to pay a sum fixed by agreement of the parties as a punishment for the failure to fulfill some primary contractual obligation*". It was held that clause in earnest money contract providing for forfeiture of earnest money as liquidated damages unless did not constitute a penalty and upon defendants' breach of the agreement, the extent of defendants' liability was fixed by the liquidated damages clause.

In *South West Engineering Co. v. The United States of America*[47] - A suit was brought by a contractor for amounts withheld as liquidated damages for delay in performance. The government stipulated that there had been no damages, but the court held that the damage clause would

[44] Donald Wassenaar v. Theanne Panos, 111 Wis. 2d 518 (1983).
[45] Priebe & Sons, Inc v. United States, 68 S.Ct. 123 (1947).
[46] Laura E. Mahoney v. Claude W. and Nancy J. Tingley, 85 Wash.2d 95 (1975).
[47] South West Engineering Co. v. United States of America, 341 F.2d 998 (1965).

be enforced against the contractor as long as the damages were reasonable ex-ante. In this, the Court of Appeals held that though it was determined administratively that some delays in completion of the contracts were caused by the government and some other delays were excusable, the government was nevertheless entitled to liquidated damages under contract provisions, with respect to delays which were not excusable. The same approach was applied in other states as well such as New York and California.

In *Holloway automotive group v. Steven Giacalone (2017)*[48] in which an authorized dealer of manufacturer's automobiles sued the buyer who purchased a new vehicle from the dealer, alleging that it was entitled to liquidated damages under the parties' agreement because defendant exported the vehicle outside North America within a year of purchasing it.

In this case, the Supreme Court of New Hampshire held that the liquidated damages provision was enforceable under Restatement Second of Contracts § 356, because dealer's damages resulting from the breach were not easily ascertainable, and the parties agreed to liquidate damages in an amount representing a reasonable estimate of damages at the time they entered into the agreement.

4.4.3 Singapore

In Singapore, liquidated damages clauses may be enforced if they represent a genuine pre-estimate of loss and if they aim to estimate in advance the loss likely to result from a breach of contract. However, penalty clauses which serve to coerce the breaching party into performing the primary obligation are not legally enforceable and will be struck down by the courts.[49]

The law on penalty clauses in Singapore, as a common law jurisdiction, is largely based on the treatment of penalty clauses in the UK, borrowing from the principles laid down in the landmark case of *Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd*[50] (hereafter referred to as *Dunlop*). The UK Supreme Court, in this case, had laid down that the question of whether the payable sum under a contract is a penalty or in the form of liquidated damages is a question of construction, to be decided upon the terms and inherent circumstances of each contract, and judged at the time of making the contract, not at the time of breach. Thus, the test laid down in *Dunlop*, in determining if a contractual provision would be considered as a penalty clause, was to assess whether the consequence that follows the breach of that provision is a genuine pre-estimate of the innocent party's loss. Moreover, it was held that if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach in question, such a stipulated sum will be considered as a penalty.[51]

[48] Holloway automotive group v. Steven Giacalone, 169 N.H. 623 (2017).
[49] Yin Hui Lim, *SMU Lexicon: The Protection of Contractual Interest- A Comparison between Singapore and Taiwan*, Asia Law Network (2019), https://learn.asialawnetwork.com/2019/02/12/smu-lexicon-protection-contractual-interest-comparison-singapore-taiwan1/.
[50] Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd, [1915] AC 79 (U.K.).
[51] *Id.*

Recently, the law on penalty clauses in the UK has been reconsidered by their Supreme Court in *Cavendish Square Holding BV v. Makdessi and Parking Eye v Beavis*[52] (hereafter referred to as *Cavendish*), wherein the majority formulated a new rule for determining whether a specified amount will be considered as a penalty clause. The first step would be to ascertain whether the provision is a secondary obligation or not. A secondary obligation is one that arises on the breach of a party's primary obligation under the contract. If it is determined to be a secondary obligation, it will further be inquired whether it is within the innocent party's legitimate interests to impose such a secondary obligation. Lastly, a balancing exercise must be carried out to determine whether the secondary obligation is disproportionate to the innocent party's legitimate interests. In assessing this, the Court considers whether the clause is unconscionable, exorbitant, or extravagant. If it is unconscionable, exorbitant, or extravagant, it will not be enforceable.[53]

Consequently, while on the one hand, the law relating to penalty clauses in the UK has undergone a significant transformation post-*Cavendish*, the Singapore Court of Appeal (highest court of law in Singapore) has not delivered a ruling relying on *Cavendish* and continues to adhere to the ruling delivered in *Dunlop*. However, a number of High Court judgments have referred to the approach adopted in *Cavendish*.

In *Itronic Holdings Pvt. Ltd v. Tan Swee Leon*,[54] it was laid down by the Singapore High Court that the breach of the primary obligation in a contractual provision leads to the secondary obligation to pay monetary compensation for the loss sustained by the innocent party. This distinction assumes significance as the penalty rule does not apply to a primary obligation to pay an agreed sum. Wei J noted that this distinction was considered in the context of the application of the penalty rule in *Cavendish*. Likewise, in *Seraya Energy Pvt Ltd v. Denka Advantech Pvt Ltd*,[55] the Singapore High Court considered the approach adopted by the Court in *Cavendish*. The issue before the Court in this case was the enforceability of liquidated damages in the context of energy projects. However, it concluded that it was bound by the principles developed by the UK Supreme Court in *Dunlop*, and not *Cavendish*. This informs us that a slow but growing acceptance of the *Cavendish* analysis may be observed in Singapore, pending approval by the Singapore Court of Appeal.

Thus, any liquidated damages provision that is not a genuine pre-estimate of damages, not formulated as a primary obligation, and/or not justified by any legitimate interest, will likely be viewed by the Courts in Singapore as a penalty and therefore will not be enforced.

4.4.3 Civil Law Countries:

Penalty clauses, on the other hand, are enforceable in civil law systems, but have historically been deemed invalid under the common law.[56] The two differ on the basis that while liquidated damages clauses are used to estimate damages in case of breach, provided that

[52] Cavendish Square Holding BV v. Makdessi and Parking Eye v Beavis, [2015] UKSC 67 (U.K.).
[53] *Id.*
[54] Itronic Holdings Pvt Ltd v. Tan Swee Leon, [2016] 3 SLR 663 (Sing.).
[55] Seraya Energy Pvt Ltd v. Denka Advantech Pvt Ltd, [2019] SGHC 2 (Sing.).
[56] Jack Graves, *Penalty Clauses as Remedies: Exploring Comparative Approaches to Enforceability*, 29 TOURO L. REV. 681 (2013).

there has been an actual harm to the plaintiff, penalty clauses, on the other hand, are used to establish a penalty to be paid in case of breach with the intent to encourage due performance. Enforcement of a penalty clause does not depend on proof of any real damage.[57] Civil law countries generally do not distinguish between liquidated damages and penalty clauses and use both these terms interchangeably. The civil law legal system allows penalties to cover a large area of problems that lie beyond the scope of liquidated damages.[58]

Enforceability of liquidated damages and penalty clauses largely depend upon the domestic laws of different countries as a consistent law governing the same is lacking. In Europe, penalty clauses have been enforceable since Roman times, as under the Classical Roman Law, there existed a rule for the literal enforcement of penalty clauses. This was to encourage performance of contractual obligations. The literal enforcement of penalties entitled the aggrieved party to recover the agreed sum without any restriction. However, the liberal Roman principle of literal enforcement of penalties was progressively abandoned.[59] The Council of Europe issued a "Resolution on Penalty Clauses" in 1971, with the aim of recommending a uniform application of penalty clauses for the member states to use. [60] A penal clause has been defined as "any clause in a contract which provides that if the promisor fails to perform the principal obligation, he shall be bound to pay a sum of money by way of penalty or compensation."[61] The resolution thus allows penalty clauses but provides that the amount may be reduced by the courts if they are "manifestly excessive",[62] or "when the principal obligation has been performed in part."[63]

As discussed above, the exact extent of penalty clause enforcement varies across civil law counties 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.[64] 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.[65] 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.[66] A Resolution[67] 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

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[57] Simas Vitkus, *Penalty Clauses Within Different Legal Systems*, 1 SOCIAL TRANSFORMATIONS IN CONTEMPORARY SOCIETY 157, 153-162 (2013).
[58] Ugo Mattei, *The Comparative Law and Economics of Penalty Clauses in Contracts*, 43 AM. J. COMP. L. 427 (1995).
[59] Vitkus, *supra* note 57.
[60] J. Frank McKenna, *Liquidated Damages and Penalty Clauses: A Civil Law versus Common Law Comparison*, THE CRITICAL PATH, Spring 2008.
[61] Art. 1, *Resolution (78) 3 of the Committee of Ministers of the Council of Europe Relating to Penal Clauses In Civil Law*,6 UNIF L. REV. 2, 223-229 (1978).
[62] *Id.*, art. 7.
[63] *Id.*
[64] *See* G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT (Oxford University Press, 1988) (for a comparative treatment).
[65] *See* McKenna, *supra* note 60.
[66] *Id.*
[67] Resolution 78(3) of the Committee of Ministers of the Council of Europe, Relating to Penal Clauses in Civil Law.

resolution allows the enforcement of penalty clauses though with some caveats viz. no enforcement of principal obligation has been performed,[68] no concurrent remedies of specific performance and penalty clause enforcement (only one of them),[69] the amount stipulated sets the upper limit for damages,[70] 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.[71] Most Civil law Countries have implemented the regulation.[72]

France

The French Civil Code, or the Napoleonic Code lays down the provisions for liquidated damages and penalty clauses in France. The Code, as enacted in 1804, established the literal enforcement of conventional penalties in Article 1152. It was the model for the neighbouring nations (Belgium, Italy, Portugal, and Spain) and their laws copied this regulation.[73] Section IV titled "Of Damages Resulting from the Non-Performance of an Obligation", constituent of Articles 1146 to 1155, deals with liquidated damages. Article 1152 was amended in 1985, whereby it was laid down that a judge may, "of his own motion",[74] "moderate or increase the agreed penalty, where it is obviously excessive or ridiculously low".[75] Likewise, Section VI of the Code titled "Of Obligations with Penalty Clauses", constituent of Articles 1226 to 1233, deals with penalties. Article 1231 provides that "where an undertaking has been performed in part, the agreed penalty may, even of his own motion, be lessened by the judge in proportion to the interest which the part performance has procured for the creditor, without prejudice to the application of Article 1152.[76] The *clause pénale* (penalty clause), as defined under Article 1226 of the Code, allows it both to encourage performance of contractual obligations and to act as a pre-estimate of damages for breach of a contractual obligation. This unitary form means that the penalty clause and the liquidated damages clause are integrated within it as one within the French Civil Code.[77]

Moreover, the French judicial precedent also solidifies this statutory position. The Court of Cassation stated that a clause in a contract providing in advance for payment of a sum of money by the party in breach constitutes a penalty clause, subject to revision under article 1152, 2 Civil Code, if the sum is disproportionately high or disproportionately low.[78] Likewise, the Court, in this regard, has also laid down that where a judge has to decide

[68] Resolution 78(3) of the Committee of Ministers of the Council of Europe, Relating to Penal Clauses in Civil Law, art. 4.
[69] *Id.*, art. 2.
[70] *Id.*, art. 6.
[71] *Id.*, art. 7.
[72] *See* McKenna, *supra* note 60.
[73] Ignacio Marin Garcia, *Enforcement of Penalty Clauses in Civil and Common Law: A Puzzle to Be Solved by the Contracting Parties*, 5 EUR. J. LEGAL STUD. 95 (2012).
[74] CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1152 (Fr.).
[75] *Id.*
[76] CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1231 (Fr.).
[77] Lucinda Miller, *Penalty Clauses in England and France: A Comparative Study,* 53 INT'L COMP. L.Q. 79 (2004).
[78] [Cass.] 1e civ., Nov. 10, 1995, Bull. civ. I, No. 360 (Fr.).

reduction of obligations resulting from a "manifestly excessive" penal clause, they need not give specific reasons for their decision, in a situation where they refuse to modify the amount of penalty fixed therein.[79] Moreover, it was also held by the Court that the Court of Appeals could not order the architect and the contractor to pay damages to the employer in excess of the *clause pénale* without demonstrating the existence of specific damages other than the damages redressed by the amount due under the *clause pénale*.[80]

Germany

The German Civil Code establishes a clear general rule, rendering contractual "penalty clauses" enforceable insofar as they are not "disproportionate."[81] The German Civil Code from Section 339 to Section 345 lays down the law relating to enforceability of contractual penalty.[82] 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.

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 Sections 339 and 342, if someone promises a penalty in the event that he undertakes or omits an action.*"

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[79] [Cass.] com., July. 30, 1980, Bull. civ. IV, No. 85 (Fr.).
[80] [Cass.] 3e civ., Oct. 23, 2012, Bull. civ III, No. 11 (Fr.).
[81] George White, *Lost on Penalties: Reconsidering the Rule Against Contractual Penalty Clauses*, https://www.barcouncil.org.uk/media/313935/_30__george_white.pdf (last visited Apr. 10, 2019).
[82] BGB §339 – 345, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1233 (last visited Apr. 10, 2019).

The existing German Code distinguishes between liquidated damages and penalty clauses in commercial contracts. Section 339 provides for the payment of a penalty by the obligor to the obligee in the event of failure to perform contractual obligations, properly or otherwise.[83] Section 340 lays down the promise of payment of penalty by the obligor in case of non-performance and is the relevant provision for liquidated damages. Section 341, likewise, is the *vertragsstrafe* or the penalty clause. Section 343 provides for the reduction in the amount of penalty payable by the obligor if he applies for the same, through judicial decision. This may be possible in cases where the penalty is "disproportionately high".[84]

Spain

The Spanish Civil Code imposes on the judge the duty to moderate the penalty if, and only if, the undertaking has been partially or irregularly performed.[85] There is no provision regarding mitigation of the penalty because of excessiveness, which makes Spain one of the few countries that has not amended its Civil Code to allow a reduction of a penalty amount.[86] Section 6 titled "On Obligations with a Penalty Clause" includes provisions detailing the presence and enforceability of penalty clauses. Article 1154 provides for the modification of the penalty amount by the judge, in an equitable manner, where part of the main contract obligation has been performed or the obligation has been performed irregularly.[87]

Switzerland

Liquidated damages are not explicitly regulated by Swiss law but are still admissible within the same. Para 1 of Article 163, titled "Amount, Nullity and Reduction of the Penalty", provides for a penalty clause; Article 163, para 3, lays down that "the court may reduce penalties that it considers excessive" at its discretion.[88]

Thus, the judicial review of penalty clauses on the grounds of equity is the solution widely accepted by Continental European laws, since Germanic legal systems do also opt for it (Austria, Germany, and Switzerland). The fact that under certain legal systems greater emphasis is laid upon the aspect of sanction in a penal clause (i.e., in Austrian, German, Swiss and Soviet law), whereas in others it is the aspect of an evaluation of damages that predominates (i.e., in French law as in Belgian and Italian law), should not mislead one into disregarding the fact that both the element of sanction and that of damages are present in these legal systems."[89]

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[83] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 339, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.).
[84] *Id.*, § 343, para. 1, sentence 1.
[85] Ignacio Marin Garcia, *Enforcement of Penalty Clauses in Civil and Common Law: A Puzzle to Be Solved by the Contracting Parties*, 5 EUR. J. LEGAL STUD. 95 (2012).
[86] McKenna, *supra* note 60.
[87] C. C. art. 1154 (L.O. 2013) (Spain).
[88] SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 163 (Switz.).
[89] Peter Benjamin, *Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law*, 9 INT'L COMP. L.Q. 600 (1960).

What can be inferred from this is that the enforcement of liquidated damages and penalty clauses under the civil legal system only concerns itself with the amount of penalty and the determination of its excessiveness.[90] Absolute credibility is given to the will of the parties, even if the agreement has a punitive effect. These countries treat the Court as obligated to enforce contractual obligations. Penalty clauses are viewed as an efficient way to encourage performance, and as leading to greater commercial certainty, while also reducing the cost of litigation. It is not considered to be the judge's role or responsibility to assess the adequacy or fairness of the remedy prescribed by the agreement.[91] Thus, the treatment of penalty clauses and their enforcement in civil law countries significantly differs from that of common law countries.

Numerous mixed and common law jurisdictions have now adopted the civilian tradition of enforcing penalty clauses, subject to reasonableness or proportionality.[92] That approach finds support in various international instruments for the harmonisation of contract law.[93] In short, the time is right to reconsider the law of penalty clauses

4.4.4 International Instruments

Soft law instruments such as the UNIDROIT Principles of International Commercial Contract (UNIDROIT PICC) differ from the common law rules of non-enforcement for penalty clauses and have imbibed the civil law rule of enforcement, subject to reduction by the Court.[94] These Principles have been systematically structured in such a manner as to favour the existence and performance of the contract.

UNIDROIT Principles 2016[95] 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.[96] The illustration attached to it makes it clear that the 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.[97]

The UNIDROIT Principles allow direct intervention on the sole ground of the unfairness of a contractual term. Under Article 7.4.13, contract terms which provide for payment of a specific amount of money for non-performance are generally valid, regardless of whether

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[90] Jack Graves, *Penalty Clauses and the CISG*, 30 J.L. COM. 153 (2012).
[91] Jonathan S. Solorzano, *An Uncertain Penalty: A Look at the International Community's Inability to Harmonize the Law of Liquidated Damages and Penalty Clauses*, 15 L. BUS. REV. AM. 779 (2009).
[92] White, *supra* note 81, at note 6.
[93] *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.).
[94] Simas Vitkus, *Penalty Clauses Within Different Legal Systems*, 1 SOCIAL TRANSFORMATIONS IN CONTEMPORARY SOCIETY 157, 153-162 (2013).
[95] https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf. (last visited on Dec. 12, 2018).
[96] UNIDROIT Principles, 2016, art. 7.4.13 (1).
[97] UNIDROIT Principles, 2016, art. 7.4.13 (1).

the stated amount corresponds to the anticipated or actual harm.[98] The principle which underpins Art.7.4.13 is that the aggrieved party is entitled to recover the specified sum from the non-performing party irrespective of the harm which it has in fact suffered as a result of the non-performance. However, the freedom of the parties to make provision for the payment of damages is not without its limits. In the case where the parties agree on a sum which is "grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances"[99], the court is empowered to reduce the specified sum to a reasonable amount. This power is an exceptional one but is important insofar as it underscores that there exist certain limits to the contracting parties' freedom to design provisions for payment of damages.[100] By reducing an unequitable but agreed upon amount, Article 7.4.13 follows the doctrine of 'unconscionability', insofar as it allows a court to limit the application of a contract term, rather than eliminate the contract term altogether. Consequently, this Article only reduces the agreed amount and does not completely disregard the penalty clause.[101]

This position has been solidified through the landmark judgment delivered by the Supreme Court of Poland. Conflicting decisions by different Chambers of the Supreme Court with respect to the question as to whether, under Polish Law, a contractually stipulated penalty must be paid even where the creditor has suffered no loss, led to the Attorney General requesting the Court to render a conclusive ruling on this issue. The Court, composed of seven Justices, issued the following Resolution: "if the contract provides for payment of a penalty in the case of non-performance or improper performance of an obligation, the debtor is not released from paying it even if can prove that the creditor has not suffered any damage." In its reasons, the Supreme Court mentioned that "the view expressed in this resolution is supported by legal solutions found in regulations of international contract law pertaining to the institution of contractual penalties", and in this context expressly referred to the UNIDROIT Principles. In particular, the Court pointed out that "in Art. 7.4.13 of the UNIDROIT Principles of International Commercial Contracts of May 1994, it has been stated that if a contract provides for the payment of penalty in case of default, then the other party shall have the right to claim the agreed amount, regardless of the scope of the incurred damage.[102] Thus, the UNIDROIT Principles were referred to as one of the international bodies of legal rules supporting a view on a particular legal provision advocated by the Supreme Court. The principles were not used as an applicable law, but as a body of rules on which the Supreme Court drew and which it used to reinforce its reasoning process.[103]

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[98] Michael Joachim Bonell, *Policing the International Commercial Contract Against Unfairness under the UNIDROIT Principles*, 3 TUL. J. INT'L & COMP. L. 73 (1995).
[99] International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (2016), art. 7.4.13.
[100] S. Vogenauer & J. Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP eds, 2015).
[101] Bonell, *supra* note 98.
[102] Supreme Court of Poland - 6.XI.2003 - Number: III Czp 61/03 - Parties: Unknown., 11 UNIF. L. REV 1 (2006), 202-203.
[103] Michael Joachim Bonell, *The UNIDROIT Principles and Transnational Law*, 5 UNIF. L. REV. 199 (2000).

In order for the specified sum to be determined as "grossly excessive", it does not suffice to show that the sum specified is greater than the harm which has resulted from the non-performance. The difference must be sufficiently substantial for it to qualify as "grossly excessive". The standard used here is that of a reasonable person. Regard should in particular be had to the relationship between the sum agreed and the harm actually sustained, in such a determination of the specified amount. In the event that a court finds that the sum is "grossly excessive", it has the discretion to reduce such specified sum, and is not required by law to do so. This is evidenced by use of the term "may", instead of "shall". However, once the court has determined the sum to be "grossly excessive", a reduction in it generally follows. Courts appear to enjoy substantial discretion in fixing the amount that would be considered to be reasonable. It is not possible for the parties to contract in such a manner that excludes the jurisdiction of the court to reduce the specified sum. The use of the words "notwithstanding any agreement to the contrary" indicates that the provision is mandatory and cannot be excluded.[104]

No damages of any kind apply, under these Principles, where the non-performance of the contract is excused through qualifiable impediments, unless the parties have otherwise agreed.[105] The difference between an enforceable liquidated damages clause and an unenforceable penalty clause is not relevant for the purposes of Art.7.4.13, unlike the common law system wherein penalty clauses are generally unenforceable.

4.5 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, Section 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.[106]

The **jurisdiction of the court to award compensation is unqualified** except as to the maximum amount stipulated, but the compensation has to be reasonable.[107] But that does not mean that the discretion is unlimited. There is a 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.[108] 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.[109]

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[104] S. Vogenauer & J. Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP eds, 2015).
[105] Chengwei, L., *Remedies for Non-performance, Perspectives from CISG, UNIDROIT Principles and PECL* (2014).
[106] *See* Fateh Chand v. Balkishan Das, AIR 1963 SC 1405.
[107] *Id.*
[108] Macbrite Engineers v. Tamil Nadu Sugar Corp. Ltd., AIR 2002 Mad 429 (DB).
[109] A.S. Motors Pvt. Ltd. v. Union of India (UOI), MANU/SC/0191/2013.

Also, the higher courts have vast **powers to interpret the law**, subject to the rules of interpretation and precedents. Section 74 is no exception. One of the crucial interpretations with regard to Section 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.[110] The section, thereby, merely dispenses with 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.*,[111] 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[112] it was said: "It is important to note that like Sections. 73 and 75, compensation is payable for breach of contract under Section74 only where damage or loss is caused by such breach". The court in this case as well as ONGC case[113] 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*[114] 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*[115] 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 Section.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 is satisfied that the amount claimed is reasonable.

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.

[110] Maula Bux v. Union of India, AIR 1970 SC 1955.
[111] Praveen Talwar v. Naresh Kumar Talwar, MANU/DE/4393/2018 (Del.).
[112] Kailash Nath Associates v. Delhi Development Authority, 2015 (1) SCALE 230; (2015) 4 SCC 136.
[113] Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629.
[114] B.S.N.L v. Reliance Communication Ltd, (2011) 1 SCC 394,
[115] Parasram Agarwal v. Food Corporation of India, AIR 1994 Ori. 290, 292.

4.6 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.

Section74 does 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 is 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.[116]

Thus, the Government contracts and private contract are governed by the same principles. For e.g. In *Maula Bux v. UoI*[117] 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".[118] But since there was no proof of actual loss or damages the penalty clause was not enforced.

G. Ram v. DDA[119]: 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 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.[120]

In *Hind Construction Contractors v. State of Maharashtra[121]* it was held that where the State Government., 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.[122]

In *Jai Durga Finevest Pvt Ltd. V. state of Haryana[123]* 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.

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[116] The Indian Contract Act, 1872, §74.
[117] Maula Bux v. Union of India, AIR 1970 SC 1955.
[118] *Id.*
[119] G. Ram v. Delhi Development Authority, AIR 2003 Delhi 120, 125.
[120] *Id.*
[121] Hind Construction Contractors v. State of Maharashtra, AIR 1979 SC 720.
[122] *Id.*
[123] Jai Durga Finevest Pvt Ltd. v. State of Haryana, AIR 2004 SC 1484

In *State of Gujarat v. Dahyabhai Zaverbhai,*[124] where a work contract provides a clause entitling the Government 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*,[125] 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.

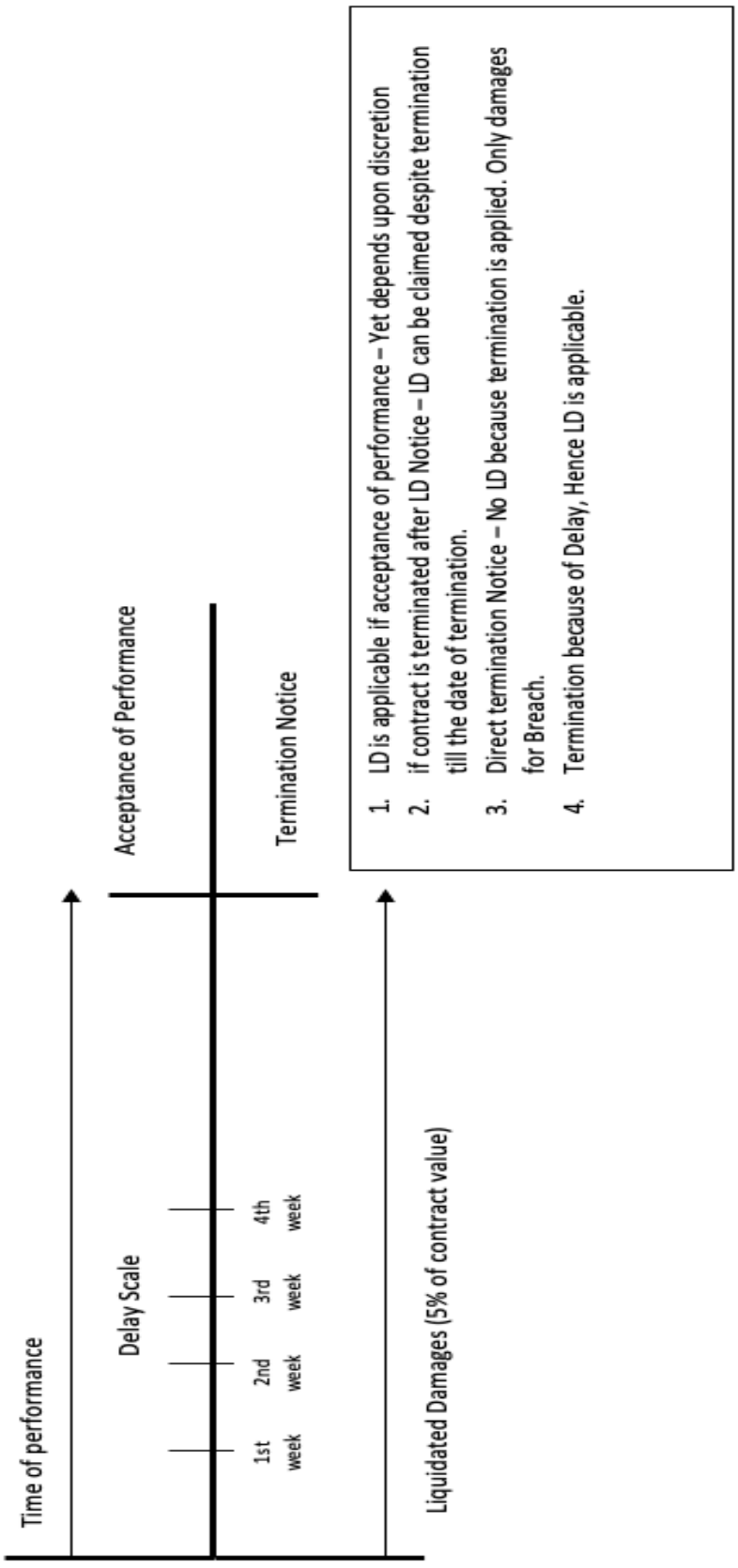
In *Kailash Nath Associates vs. Delhi Development Authority*[126] the court reiterated and clarified the position of law established earlier. It was found that there was no breach of contract. No loss was shown to be incurred by the DDA. Instead they made a huge profit in a subsequent auction. Under such circumstances the forfeiture of earnest money was deemed unreasonable. And thus, it was not allowed.

In *Philips Electronics India Ltd. v. UOI and Ors*[127].: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.*[128] 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*."

[124] State of Gujarat v. Dahyabhai Zaverbhai, AIR 1997 SC 2701.
[125] State of A.P. v. Singnam Setty Yellananda, AIR 2003 AP 182, 187
[126] Kailash Nath Associates v. Delhi Development Authority, 2015 (1) SCALE 230; (2015) 4 SCC 136.
[127] Philips Electronics India Ltd. v. UOI and Ors., MANU/DE/4382/2018.
[128] Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629.



Liquidated Damages and Time of Performance

4.7 LIQUIDATED DAMAGES AND TIME OF PERFORMANCE

Another important manner in which liquidated damages clauses are utilised in commercial contracts is in the form of penalty clauses in non-performance of the contract within the stipulated time i.e. A clause is inserted in the contract which prescribes progressive penalty amounts for delay in the performance of the contract. This is particularly true in government contracts where such clauses are utilised on a regular basis. An important question that arise in this regard is whether additional proof of loss/damage is required to claim the amount stipulated for? Or the mere delay in performance sufficient to claim the stipulated amount without any loss/damage.

Section 55 of the Indian Contract Act, 1872 is relevant in this regard. It states:

> "When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time and fails to do such thing at or before a specified time, and fails to do such thing at or before a specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract.
>
> Effect of such failure when time is not essential: If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.
>
> Effect of acceptance of performance at time other than agreed upon: If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agree, the promisee cannot claim compensation of any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he give notice to the promisor of his intention to do so."

This section of the Contract Act provides for the effect of failure to perform a contract within a fixed time, when time is of essence. As the text of the provision states, when a party to a contract fails to perform a contract within a specified time period, then so much of the contract that has not been performed shall be voidable at the option of the promise if the parties have signified their intention that time is of essence. On the other hand, if they have not signified their intention that time is of essence, then the contract is not voidable by the failure to perform the contract but the promise is entitled to recover compensation from the promisor for any loss occasioned by such failure.

This delay and proof conundrum was discussed narrowly in the case of *GAIL (India) Ltd v. Paramount Ltd.*[129] In this case, the court deliberated upon the question whether in the event a breach of contract arises in context where time is of essence, will additional proof be required to claim damages. The court held that additional proof will be required. It was observed by the court that:

> "In any case, even if it were to be held that delay in completion of the contract was attributable to the contractor, [sic] GAIL was bound to show that some loss or damage had endured by it."

[129] GAIL (India) Ltd. v. Paramount Ltd., MANU/DE/1310/2010.

Another Case on the point is *CCI Ltd v. Alstom Power Boilers Ltd.*[130] In this case the Delhi High Court, while reversing the arbitral award for the refusal to grant the liquidated damages as stipulated under the terms of the contract, held that:

> "The finding that time was set at large and was not of the essence of the contract, does not militate against the right to claim liquidated damages which are contractually provided. As a legal proposition, it cannot be said that liquidated damages would be payable in terms of the contracts, only if time is of essence and not otherwise."

Thus, in this regard still there is no uniformity and certainty of judicial opinion whether delay *ipso facto* will render the payment of liquidated damages as stipulated under the contract to be claimed or should there be additional proof of loss/damage needs to required.

Another important issue that arises with regard to time and liquidated damages is whether a claim for liquidated damages is available in circumstances where a contract has already been terminated. For example suppose a builder A has been contracted by B for construction of a shopping mall. The construction is substantially delayed by A and the contract is terminated by B. The question now is whether B has a valid claim for Liquidated Damages despite the fact that he only terminated the contract. 3 possible answers are available to the following question:

- Liquidated Damages are not available at all
- Liquidated Damages are available for the delay during the period before termination and not for the period after termination.
- Liquidated Damages are available both for the period before and after termination.

KV Krishnaprasad after considering the recent UK judgements of *Triple Point v. PTT Public*[131] and *PBS Energo AS v. Bester Generation UK Ltd*[132] brings out the following three principles –

1. Language of the Liquidated Damages clause is crucial.
2. The key question is whether Liquidated Damages clause requires completion.
3. Liquidated Damages are unlikely to be available for delays after termination unless the contractual language compels that conclusion for the simple reason that employer can unilaterally control the period for which liquidated damages will run after termination.[133]

[130] CCI Ltd. v. Alstom Power Boilers Ltd., MANU/DE/1049/2011.
[131] Triple Point v. PTT Public, [2019] EWCA Civ 230.
[132] PBS Energo AS v. Bester Generation UK Ltd, [2020] EWHC 233 (TCC).
[133] Youtube, *Contractual Termination and Liquidated Damages: Recent Cases by KV Krishnaprasad* (June 1, 2020), https://www.youtube.com/watch?v=rFfrHfw36x4.

4.8 REVIEW OF CASE LAWS ON LIQUIDATED DAMAGES

TABLE 1: Landmark Cases on Liquidated Damages

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 an express forfeiture clause; Additional terms and conditions must have been told in verbatum; the State fetched higher price from the re-auction; no loss/damage
2.	Kailash Nath Associates v. Delhi Developme nt 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 (performan ce 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 is 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 $ 3,04,970.2 0 + Rs. 15,75,559 (deducted from the bills)	US $ 3,04,970.20 + Rs. 15.75,559	0	Parties agreed genuine pre-estimate of damages; difficult to prove the actual loss; Liable to deducted.
7	B.S.N.L. V. Reliance Communica tion 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 profits.	can retain only Rs 1000/- + compensation @ Rs. 140 per mesem +interest @6% p.m.	no loss caused, only entitled to forfeit earnest money and mesne 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; cannot 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 compensation; 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. Shenzen Shandong Nuclear Power Constructio n 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 (orginal 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 manufactured 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 considerati on of Rs. 11,50,000	Suit for Permanent Injunction to not to interfere with the possession	Held Suit is maintainab le	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 considerati on of Rs. 26 Lakhs out of which Rs. 4 Lakhs deposited at Earnest Money	Suit of specific Performance	No specific Performan ce; 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 considerati on 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 by 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 Remarked 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 of 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 were 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 Interest @18%	US $ 20,832.108 at contractual rate plus Interest @7%	Loss of opportunity, Eichleay formula, Claim of MII beyond the term of 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 recission 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 a 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 himself 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.

4.9 CONCLUSION

After thorough perusal of the case laws, theoretical underpinnings, and comparative analysis related to enforcement of penalty clauses it is suggested that the following steps are needed to strengthen the contractual enforcement in India:

1. The legal position on liquidated damages in India should be shifted from the common law approach to Civil Law Approach which can provide strengthened contractual enforcement, save time and cost in contractual enforcement and also provide the required stability and predictability of the legal proceedings.
2. Section 74 of the Indian Contract Act should be amended to make the liquidated damages and penalty clauses enforceable as they are stipulated under the contract to the extent they are not "manifestly unreasonable".
3. The requirement imposed by judicial interpretation of Section 74 that some loss/damage needs to be shown to claim liquidated damages needs to be done away with and the law is to be brought on par with international instruments such as UNIDROIT which do not impose any such requirement and make liquidated damages claimable ipso-facto of the breach without the need to show any loss/damage suffered.
4. In this regard, Section 74 should be amended on the following lines:
    a. The words after the word entitled should be omitted and replaced by "to the agreed upon sum or the penalty stipulated for irrespective of whether actual loss or damage have been caused or not." After this amendment section 74 will read as follows:
    "Compensation for breach of contract where penalty stipulated for: - 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 **to the agreed upon sum or the penalty stipulated for irrespective of whether actual loss or damage have been caused or not by such breach.**"
    b. A proviso to the main provision should be inserted reading as follows: "Provided that this agreed upon sum or the penalty may be reduced to a reasonable amount where it is found manifestly unreasonable"
    c. An illustration shall also be appended to section 74 reading as "A, a former international cricket player form country X was hired by Indian premier League team Y for a contract price of Rupees 5 Crores for a period of 3 years. A contractual provision stipulates that in the event of unjust dismissal by the team the player is entitled to a sum of Rupees 25 Crores. A is dismissed unjustly by team after 6 months. A is entitled to the agreed sum of Rupees 25 Crores, even though A was immediately recruited by another team Z at a salary of Rupees. 10 Crores."

Making the liquidated damages and penalty clauses enforceable in such manner will not only bring the current Indian law close to its ancient philosophical foundations but will also resonate with the objectives and changes brought by the Specific Relief (Amendment) Act,

2018. This will not only strengthen the substantive law of contractual enforcement in India but will also strengthen ease of doing business in India by making the law in this regard generally predictable which will boost investors' confidence in legal outcomes in business transactions.

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CHAPTER 5: FORMULA FOR AWARD OF DAMAGES

5.1 INTRODUCTION

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. In this chapter we explore the possibility and desirability of deriving a general and standard formula for calculation of damages.

Sections 73-75 of the Indian Contracts Act, 1872, under Chapter VI of the Act titled "Of Consequences of Breach of Contract" deal with law of damages; more specifically Sections 73 and 74 deal with unliquidated and liquidated damages respectively. To claim compensation under Section 73 there needs to be a contract, its breach and loss or damage following such breach and the damages are of such nature that it is anticipated by the parties at the end of entering into the contract and that it is also in the normal course of things in case of such a breach and a claim for compensation. To claim compensation under Section 74 their needs to be a contract containing provisions for compensation or penalty in case of its breach by either of the parties to contract, a breach of contract and claim of compensation within the limit set prior in the contract.

Essentials to claim damages are as follows: (i) An established breach of contract; (ii) Proof of damage to claim liquidated damages; (iii) Causation: to establish a connection between the loss or injury suffered by the party or parties to that of the breach of contract; (iv)Remoteness of damages: damages resulting in circumstances which are remote and are excommunicated in the contract in question, the injured party or parties would not be liable to claim compensation;[1] (v) Mitigation: the parties to the contract are duty bound to take reasonable steps so as to mitigate the loss or injury to the other party including taking measures to not aggravate the loss or injury;[2] (vi) Measuring and calculation of damages: ascertaining the quantum of damages to be awarded to the parties of the contract is a penultimate step in a contractual dispute. However, there is difference between awarding quantum of damages and measuring the damages in that the quantum deals with the amount of damages to be awarded while measuring damages would entail considerations of law.[3] (vii) Interest on damages: the courts, under Section 34 of the Civil Procedure Code, 1908, may grant interest on the damages awarded in case of breach of contract. This is done so as to compensate the plaintiff for having been divested of profits from the date of filing of the suit till realization of damages.[4]

Besides this the Interest Act 1978 read with the CPC, confers such power to the Courts to allow to add interests[5] on the award of damages at the rate not exceeding the current rate

[1] Hadley v. Baxendale, (1854) 9 EX 341.
[2] Burn & Co. Ltd v. Thakur Sahib Shree Lakhdirjee, AIR 1924 Cal 427.
[3] 2 POLLOCK & MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACT (Wadhwa ed., 13th ed. 2006).
[4] Krishna Lal Kalra v. NDMC, AIR 2001 Del 402.
[5] The Interest Act, 1978, §3.

of interest for the whole or part of such period provided for in the said provision.[6] Section 73 of the Indian Contracts Act 1872, however, is not said to override the provisions of the Interest Act 1978.[7]

5.2 DEVELOPMENT OF FORMULA FOR AWARD OF DAMAGES

Once it is established as to the kind of damages to be awarded in a particular dispute, one has to begin to evaluate the same in monetary terms. The primary idea behind coming up with a formula to calculate and ascertain damage is to ensure the value expected by the plaintiff from the contract is made good to them.[8] However, the damages awarded must not exceed the loss or injury suffered by them. As Lord Justice Winn states that the general principal of assessment of damages is compensatory i.e. the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed.[9] Therefore, to quantify the unliquidated damages under Section 73 becomes paramount in order to protect either or both the expectation interest and reliance interest stated above. However, Sections 55 and 73 of the Indian Contracts Act, 1872, does not provide for any manner to calculate the damages or compensation following which the Supreme Court of India had held that the damages are to be calculated depending upon the facts and circumstances of each case.[10] However a careful study of Section 73 provides us with a general formula suggested by the legislators and can be stated as follows:

Damages = Total loss – Mitigation of loss – Remote loss

Upon careful perusal of Section 73 one can easily understand the importance of the ascertainment and calculation of 'market price' to calculate the damages in case of breach of contract. Various situations have been considered under the 'illustrations' of the said section such as: loss of value caused by delay in transit to be part of damages;[11] when a buyer breaches the contract, then the amount of damages to be calculated would be the difference between the market price and the contract price.[12] The majority of illustrations take into consideration the 'market price' as the base for calculating the amount of damages to be awarded in case of breach of contract. Applying this to a parallel study of the *Hadley v. Baxendale* case one can conclude that the Section 73 provides to recover damages:

- Arising in the usual course of business resulting from the breach.
- Parties anticipated, would be caused in the event of breach, at time of entering into contract itself.

There have been several instances where while calculating the quantum of damages considerations have been made in terms of the inconvenience caused by a breach of

[6] Cotton Corp. of India Ltd v. Alagappa Cotton Mills, AIR 2001 Bom 429.
[7] Union of India v. Steel Stock Holders Syndicate, AIR 1976 SC 879.
[8] Muralidhar Chiranjilal v. Harishchandra Dwarkadas, AIR 1962 SC 366.
[9] Johnson v. Agnew, 1980 AC 367.
[10] M.N. Gangapp v. Atmakur Nagabhushanam Setty & Co., AIR 1972 SC 696.
[11] The Indian Contract Act, 1872, §73 illustration (e).
[12] *Id.*, §73 illustration (b); *See also* Bhajee Ismail & Sons v. Williams & Co., ILR (1918) 41 Mad 709; Mackay v. Kameshwar Singh, AIR 1932 PC 196; Vishwanath v. Amarlal, AIR 1957 MB 190.

contract,[13] loss caused by misrepresentation,[14] nominal damages in case of no loss[15] and award of damages for mental pain and suffering and punitive damages i.e. for non-pecuniary loss[16] etc.

Where damage means unliquidated damages, which is nothing but the net loss suffered; total loss is inclusive of expression or reliance interest. Moving further, in several disputes pertaining to infrastructural projects, the Supreme Court of India has suggested the use of Hudson Formula to determine the damages.[17] In this section, we chart down the existing formulas for calculation of damages in commercial contract disputes.

5.3 THE LEX MERCATORIA (OLD AND NEW) AND THE TRANSLEX-PRINCIPLES[18]

The first feature in legal environment regarding the formula to calculate damages can be found in the laws of Merchant or Lex Mercatoria, the rules and principles laid down by merchants to regulate their dealings in 1303. Principle No. 7.3.2 of the said Lex Mercatoria is on calculation of damages and states as follows:

> (a) Damages to which the party who suffers a loss from the failure of the other party to deliver is entitled are typically measured by the market value of the benefit of which the aggrieved party has been deprived through the breach, or the costs of reasonable measures to bring about the situation that would have existed had the contract been properly performed.
> (b) The aggrieved party may calculate his loss
> i) based on the difference between the contract price and the price of a replacement transaction (e.g. substitute sale or substitute purchase) concluded within a reasonable time and in a reasonable manner or,
> ii) based on the difference between the price in the unexecuted contract and the market price current at the date of default and at the place where the contract should have been performed, or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.

The principle is primarily built on the preposition to fully compensate the losses sustained by the aggrieved party by specifying 2 formulas:

1. Damages = (amount to have been received in case of performance of contract – amount actually received from the party breaching the contract) + cost of measures undertaken to keep the aggrieved party in the position it'd be if contract had been properly performed.[19]
2. Alternative to Sub-section (a) and based on Article 75 & 76 of United Nations Convention on Contracts for the International Sale of Goods (CISG), Sub-section

[13] Hobbs v. London & South-Western Rly Co, (1875) LR 10 QB 111.
[14] Naighton v. O'Callaghan, (1990) 3 ALL ER 191.
[15] T. A. Choudhary v. State of A.P., (2004) 3 ALD 357 (DB).
[16] Bangalore Development Authority v. Syndicate Bank, (2007) 6 SCC 711 (compensation for mental agony and suffering, such a compensation cannot be awarded under the general law of contract, it can be awarded by applying the principle of administrative law, where the seller being a statutory authority acts negligently, arbitrarily or capriciously).
[17] McDermott International Inc. v. Burn Standard Co. Ltd. & Other, AIR (2006) 11 SCC 181.
[18] Trans-Lex - Law Research, https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8 (last visited Mar. 23, 2020).
[19] Chaplin v. Hicks, (1911) 2 KB 786.

(2) suggests that: damages = replacement transaction concluded by aggrieved party within reasonable time and manner.

These Principles were restated in:

- Principles of European Contract Law under Section 5 - Article 9:502: General Measure of Damages; Article 9:506: Substitute Transaction and Article 9:507: Current Price;
- UNIDROT Principles of International Commercial Contracts 2016 under Article 7.4.2: Full compensation; Article 7.4.5: Proof of harm in case of replacement transaction and Article 7.4.6: Proof of harm by current price;
- UK Sale of Goods Act under Part VI – Section 50: Seller's remedies on damages for non-acceptance and Section 51: Buyer's remedies on Damages for non-delivery.

However, due to the development of national commercial law codes the Principles under Lex Maercatoria or the merchant law had declined to have an independent existence. But its principles were the basis of several national codes and still find its relevance to date.

5.4 INFRASTRUCTURE PROJECTS CONTRACTS AND BUILDING CONTRACTS

Given the enormity and dynamic nature of the infrastructural industry and the quantum of stake involved in them, the rights and obligations of all the stakeholders involved needs to be precisely laid out in order the promptly estimate and calculate the value of the projects. This is to facilitate the disputing parties to ascertain mathematically relevant amount in damages duly supported by documents and relevant evidence. In an infrastructural project, contractual disputes the claims for compensation apart from the valuation of variations based on rates and prices in the bill or schedules rates in the contract can be termed as Head office overheads.[20] The Head office overheads can be further divided into 'dedicated overheads', which is specific to an employer delay and 'unabsorbed overheads', which is usual contractor expenses like rent salaries etc. however unless the contract specifies it irrecoverable the party has to prove that the unabsorbed overheads was because of the delay caused by the other party.[21]

Building contracts on the other hand are undertaken with the sole purpose of earning profits and denying the consideration of the same would not result in equitable consideration of things. A breach of a building contract must make the breaching party liable to the extent of contractor's loss in terms of expected profits.[22] The Supreme Court of India has noted the observations made in the Hudson's Building and Engineering Contracts that in contracts pertaining to competitive tendering at the national level and considering the evidence given

[20] These can also be incidental costs of running the Contractors business and includes indirect costs not directly allocated to production like the costs of production. They may include rent, rates, directors' salaries, pension fund contribution and auditors' fees etc. In other words, HOO may be termed as administrative expenses and direct expenses refers to the costs of sales etc.

[21] The Society of Construction Law: Delay and Disruption Protocol, October 2004 reprint.

[22] A.T. Brij Paul Singh v. State of Gujrat, (1984) 4 SCC 59.

in many such occasions suggests that the head office overheads and profit would come up to 3-7% of the total price of cost that is added to the tender. Therefore, the court had on many occasions allowed for compensations under the head of "loss of profits" in addition to and over and above the actual claims.[23]

5.5 ESTABLISHED FORMULAS FOR CALCULATION OF DAMAGES

There are established formulas to quantify this unabsorbed overhead and the burden of proof of the same is on the contractor. These requirements will lead us to explore the following three formulas to calculate damages:

5.5.1 Hudson Formula

This formula was given by the Hudson Building and Engineering Contracts in the United Kingdom and is acclaimed to assess the 'delay damages' in an infrastructural project. The formula is as follows:

(O&P/100) * (Contract Sum/Contract Period) * Period of delay

Where O&P refers to head office overheads and profit percentage in tender or the contract.

While applying this formula the head office overheads, or the O&P, are considered as per the contractual agreement. Although this formula has been used in several judgments,[24] it has been over looked because of the fact that it depends on the tender in dispute and also due to the fact that the calculation is dependent on the number which itself would contain an element of head office overheads and profits which would lead to double counting.[25] This formula however, is still used by several lawyers in various arbitration proceedings related to contractual disputes of infrastructural projects. This would lead us to the other two formulas.

5.5.2 Emden Formula

This formula finds its origin in the United Kingdom and calculates the average Head Office Overheads and Profits that could have been achieved on a different job elsewhere and applies it to the whole reimbursable period of delay. The formula is as follows:

(O&P/100) * (Contract Sum/Contract Period) * Period of delay

Where O&P refers to actual head office overheads and profit percentage.[26]

Although the Hudson and Emden formula both resemble each other, the major difference is that in Hudson formula the head office overheads and profit percentage are calculated based on the numbers in the tender whereas in Emden formula the same is calculated based

[23] State of Kerala v. K. Bhaskaran, AIR 1985 Ker 49.
[24] Ellis-Don Ltd v. The Parking Authority of Toronto, (1978) 28 B.L.R. 98
[25] M/S National Highways Authority of India v. M/S. Oriental Pathways (Nagpur) Pvt. Ltd, FAO (OS) 464/2015 and CM No. 15464/2015, decided on 24th May, 2016.
[26] Total overhead cost/total amount of turnover in the audited accounts.

on actual numbers which makes this formula a widely used and has an applied judicial support both in India[27] and abroad.[28]

5.5.3 Eichleay's Formula

This formula originates in the United States of America and in its calculation of damages this formula does not include the loss of opportunity. The formula is as follows:

- Head office overheads allocated to the contract (A) = (Value or work billed during contract period / Total value of work billed for the company as a whole during the contract period) * Total Head office overheads during the contract period.
- Daily Head office over heads assessed = A/ Contract period
- Amount of unabsorbed overhead = Daily Head office overheads assessed * No of days of delay

The complex calculation under this formula considers that a significant proportion of final contract valuation is made up of the value of variations, i.e. more than 10%, then an adjustment needs to be made to the formula to consider the fact that variations themselves would be contributing to the head office overheads and profits.

This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overhead during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed. This formula is said to reasonably assess the correct Head office overheads because it compares value of works done in the contract for the project for which contractor claims prolongation cost to that of the total value of all the works done by contractor during the contract period. The Eichleay Formula is regarded by the Federal Circuit Courts of America as the exclusive means for compensating a contractor for overhead expenses.

5.6 INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS

The International Federation of Consulting Engineers was founded in 1913 by three European countries, Belgium, France and Switzerland and known by the acronym FIDIC following its French name Federation Internationale des Ingenleurs Consells.[29] The establishment of FIDIC was an effort towards creating uniform patterns of documentation

[27] *See* State of Kerala v. K. Bhaskaran, AIR 1985 Ker 49; M/S National Highways Authority of India v. M/S. Oriental Pathways (Nagpur) Pvt. Ltd, FAO (OS) 464/2015 and CM No. 15464/2015, decided on 24th May, 2016.

[28] Norwest Holst Construction Ltd. v. Cooperative Wholesale Society Ltd., (1997) EWHC Technology 356; Charles G. William Construction Inc. v. White, 271 F.3d 1055.

[29] About us, International Federation of Consulting Engineers, https://fidic.org/about-us (last visited May 4, 2020).

for contractual agreements applicable to various construction projects to make them more user friendly. The federation is known for its publications that serve as guides and templates for international contracts and businesses, most of them focusing towards agreements between employer and contractor. It is most sought-after publication has been its Edition on Construction Contracts used by Multilateral Development Banks including the World Bank for its projects.[30] These publications provide a reference to form two or more contracts for a single project i.e. between employer-contractor and/or contractor-subcontractor. The International Federation of Asian and Western Pacific Contractors Association, Associated General Contractors of America and the Inter-American Federation of Construction Industry, Multilateral Development Banks etc. have ratified these contracts making them as a broadly accepted form of contracts. An analysis of these contractual formats would put things into perspective with respect to drafting of contracts, providing for the event of breach and damages.

FIDIC's first publication was called "The Form of Contract for Works of Civil Engineering Construction" and it came out on 1957 focusing on Civil Engineering sector. These publications have been constantly evolving and many of the publications have been replaced and updated accordingly. The publications are popularly divided on the basis of color of their cover page and out of the many books we shall look into three books relevant for our study:

- Red book – construction contracts with conditions of subcontract:
- Yellow book – plant and design-build contracts
- Silver book – EPC[31] turn-key project[32] contracts

5.6.1 Red book

The Red book was first published in 1957 and contained contracts relating to the civil engineering sector as compared to mechanical or electrical engineering sector. Subsequently, the Red book was amended and released in 1999 containing contracts with specification that majority of designs are to rest with the employer; Red book eventually ended with a 2011 edition.

Model Clauses relating to 'Delay damages' and whose liability they are to be in civil engineering contracts are provided for in this book. The definition clause defines 'delay damages'[33] to mean damages for which the contractor is to be made liable for failure to comply with the time for completion of a project.[34] Clause 8.8 further specifies how delay damages are calculated. It states that on contractor's failure to comply with the time of

[30] FIDIC MDB Harmonized Construction Contracts, International Federation of Consulting Engineers, https://fidic.org/node/321 (last visited May 4, 2020).
[31] Engineering, Procurement and Construction.
[32] Turnkey Projects are where one party agrees to designing, constructing and equipping a manufacturing or business or service unit or facility, fully ready for occupying and operation, followed by turning the project over or selling to the purchaser.
[33] FIDIC CONDITIONS OF CONTRACT FOR CONSTRUCTION FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER, cl. 1.1.28 of General Conditions (2d ed. 2017).
[34] *Id.*, cl. 8.2 – Time for Completion – Commencement, Delays and Suspension.

completion of a project, or such parts thereof, delay damages are to be paid by the contractor and it shall be the amount mentioned in the Contract Data and is to be paid for everyday lapsed between the time of completion mentioned in the contract and the date of completion of work or section of the project.

- Number of days of delay = Time for completion mentioned in the contract – Date of completion of work or section of project.
- Delay damages = Amount in Contract Data X Number of days of delay
- Where the Delay Damages payable for each day of delay is specified in the Contract Data.

The clause further states that payment of delay damages would not relieve the contractor from their obligation to complete the work or their duties and obligations under the contract. Further it states that the contract must mention a maximum amount of delay damages in the contract data and that the total amount of delay damages must not exceed the said maximum limit. It is also provided that in case a part of the works is taken over by the employer, then the delay damages are to be reduced to that extent.[35]

- Reduction = Value of the part of the works in comparison to total value of works

It is provided that this reduction will only affect the daily rate of delay damage and not he maximum amount of the said damages.

5.6.2 Yellow book

The Yellow book was first published in 1967 and contained contracts relating to the mechanical and electrical engineering sector. An amended version of the Yellow book was released in 1999 with additions that the contractor has major responsibility with it comes to designs; subsequently the latest edition of Yellow book had been released in 2019.

The clauses in the FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, designed by the Contractor provides for similar recovery of damages as provided for in the Red book above with respect to Delay Damages. However, in addition to Delay Damages, the Yellow book provides for Performance Damages. Under its definition clause, it defines 'Performance Damages'[36] as the amount of damages the contractors are to pay the employer in case of failure to achieve guaranteed performance of the plant or works or any part thereof, and as stated in the Schedule of Performance Guarantees. Where the Schedule of Performance Guarantees are to contain the minimum acceptable performance criteria.[37]

[35] *Id.*, cl. 10.2 – Taking Over Parts – Employer's Taking Over.
[36] FIDIC CONDITIONS OF CONTRACT FOR PLANT AND DESIGN-BUILD FOR ELECTRICAL AND MECHANICAL PLANT, AND FOR BUILDING AND ENGINEERING WORKS, DESIGNED BY THE CONTRACTOR, cl. 1.1.63 – General Provisions – General Conditions (2d ed. 2017).
[37] *Id.*, cl. 12.4 – Failure to Pass Tests after Completion.

5.6.3 Silver book

The Silver book was first released in 1999 containing contracts related to turnkey projects. Since the contractor themselves would be responsible for the majority of the designs these contracts place them at a higher risk. The Silver book has been subsequently re-published in 2017.

The amount of and calculations of damages to be paid in case of EPC/Turnkey Projects are similar to the ones specified in the Yellow book in terms of delay and performance damages. However, the Guidance Notes for Preparation of Particular and Special Conditions of the Silver book suggests certain parameters for providing for such damages. It provides that while calculating delay damages ,care should be taken to the extent that the pre-defined damages are reasonable estimates of the anticipated or actual loss to the employer by such delay.[38] This is because if the fixed delay damages are unreasonable, then they may be unenforceable in common law jurisdictions and would be subject to downward adjustment in civil law jurisdictions.[39]

5.7 AWARD OF DAMAGES OR COMPENSATION UNDER OTHER LAWS

One of the determinants of guilt in any civil litigation is the proof of a wrongful conduct of a defendant affecting the plaintiff and causing the alleged damage. The award of damage usually depends on the fact of how and whether the plaintiff proves this line of causation. The standard to establish this depends on the nature of such claim and the relevant law applicable in a jurisdiction or to the alleged act itself. Accordingly, in this section of the chapter we shall explore the different remedies available under certain select civil laws.

5.7.1 Intellectual property Rights Laws

Intellectual Property Rights are considered as personal moveable property and are usually described as having an incorporeal existence due to their intangible nature.[40] Some of the major IPR related laws in India are as follows:

- Patents Act, 1970
- Trademarks Act, 1999
- Copyright Act, 1957
- Designs Act, 2001
- Geographical Indications of Goods (Registration and Protection) Act, 1999

Infringement of IPR happens when a work protected under IP laws is used, duplicated, or exploited in the absence of permission/authorization from the owner of such rights. In other words, infringement is a tortious invasion of property. Infringement can be patent

[38] FIDIC CONDITIONS OF CONTRACT FOR EPC/TURNKEY PROJECTS, cl. 8.8 – Delay Damages – Commencement, Delays and Suspension – Notes on the preparation of special provisions – Guidance for the preparation of particular conditions (2d ed. 2017).
[39] *Id.*
[40] WIPO, *What is intellectual property?,* https://www.wipo.int/about-ip/en/ (last visited Apr. 23, 2020).

infringement, trademark infringement, copyright infringement etc. and the above-mentioned acts provide for both civil and criminal remedies against infringement that can be availed simultaneously. For the purpose of this chapter, we shall consider only the civil remedies against IPR infringement and they are as follows[41]:

- Injunction
- Anton Pillar orders
- Damages or account of profit
- Order for delivery of/destruction of infringing items
- Tracing orders

Focusing more specifically on the 'damages and account of profit' for the sake of our study; the usual course of action is to compensate the plaintiff for the loss caused due to infringement done by the defendant including the profit made by the said defendant in pursuance of infringement to compensate the plaintiff for the wrongful profits gained or made by the infringer; however an owner can only recover either of the two damages but not both.[42] The Indian legislature and judiciary do not have a set formula to calculate damages when in come to infringements, in the sense that the courts have awarded consolidated damages in the case of *Microsoft v. Yogesh Popat.*[43] In the case of *Glenmark Pharmaceuticals Ltd v. Curetech Skincase and Galpha Laboratories Ltd.*[44] the court had ordered exemplary damages, but in the case of *Tata Sons v. Fashion ID*[45] and *Buffalo Network v. Jain*[46] the court had ordered punitive damages; these judgments highlights the fact that India lacks a set principle to calculate damages in IPR infringement litigation.

However, the factors considered while calculating infringement of intellectual property rights may be loss of profit,[47] false advertising,[48] unjust enrichment, royalty, decrease in value, price erosion, as provide under statutory provisions[49] etc. and these factors may be calculated from the date of publication of the patent application[50] in case of patent infringement, so on and so forth. Another thing to be considered while looking at calculation of damages in IP infringement is that the statutes also provide due consideration of the moral rights/paternity rights which make it difficult to set a formula for calculating damages in IP

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[41] *Civil and Criminal remedies for IP Infringement*, Lexis PSL document produced in partnership with Squire Sanders, https://www.squirepattonboggs.com/-/media/files/insights/publications/2013/11/civil-and-criminal-remedies-for-intellectual-pro__/files/civilandcriminalremedies/fileattachment/civilandcriminalremedies.pdf (last visited Apr. 23, 2020).
[42] Ferrero Spa v. M/S Ruchi International (CS(COMM) 76/2018).
[43] Microsoft v. Yogesh Popat, 2005 SCC Online Del 216.
[44] Glenmark Pharmaceuticals Ltd v. Curetech Skincase and Galpha Laboratories Ltd, 2018 SCC Online Bom 11559.
[45] Tata Sons v. Fashion ID, 2005 SCC Online Del 72.
[46] Buffalo Network v. Jain, 2005 SCC Online Del 182.
[47] The Trademarks Act, 1999, §33(c); The Patents Act, 1970, §108,109; The Copyright Act, 1957, §55.
[48] The Trademarks Act, 1999, §72, 69; The Patents Act, 1970, §106; The Copyright Act, 1957, § 60.
[49] The Trademark Act, 1999, §§103-109; The Patents Act, 1970, §§118-124; The Copyright Act, 1957, §§63-70.
[50] The Patents Act, 1970, §11A.

infringement. Therefore, one can conclude that damages are not necessarily calculated based on actual profit or loss experienced or suffered by the plaintiff or the defendant but they may exceed the actual profits gained by the infringing party, contrary to the case of accounts of profits.

Measuring damages under Copyright Act is subjective in nature. It may depend on whether or not a work is published or unpublished, whether or not the infringer proves that they were unaware of the work being copyrighted and had reason to believe it was.[51] The plaintiff while calculating damages, as mentioned above, is only allowed to take into consideration either the loss suffered by him or the profits made by the defendant but not both.[52]

Under Trademarks Act, 1999, however, infringement of trademark or a passing off claim can be made. The calculation of damages can be made thereof granting nominal damages to certification or collective marks as per Section 135 of the Trademarks Act, 1999. Some of the factors considered while calculating damages under infringement of trademark and passing off suit are:

- Loss suffered by the plaintiff due to direct infringement
- Reduction in trade of plaintiff due to infringing actions of the defendant
- Effect of infringing activities on the goodwill and reputation of the plaintiff.

Under Section 111 of the Patents Act, 1970, damages or accounts of profits are granted unless the defendant proves that the existence of patent rights was unknown to them or had reasonable grounds to believe so or such other circumstances specified. In case of infringement, the usual practice to calculate damages has been by multiplying the number of articles the plaintiff could have manufactured and sold plus the profit the plaintiff could have made on each of those articles.[53]

The World Intellectual Property Organization however, identifying the need to quantify damages in case of IP infringement had in 2018 constituted an Advisory Committee on Enforcement to study[54] the same and a concrete outcome is yet to be manifested in this regard.

5.7.2 Motor Vehicles Act, 1988

The Motor Vehicles Act, 1988, along with the Central Motor Vehicles Rules, 1989, is the Indian legislation containing provisions relating to licensing of drivers, registration of vehicles, controlling vehicles through permits, traffic regulation, insurance, liability and offences and penalties etc. and provides for establishing Motor Accidents Claims Tribunal to decide cases relating to compensating road accidents victims.[55] The MV Act has made

[51] The Copyright Act, 1957, §55(1).
[52] Srimangala v. Books (India), AIR 1973 Mad 49; Pillalamari Lakshikantam v. Ramakrishna Pictures, AIR 1981 AP 224.
[53] Meters v. Metropolitan gas Meters (1911) 28 RPC 157, 165 (CA)
[54] *The Quantification of Damages in Cases of IP Infringements*, WIPO Advisory Committee on Enforcement, Thirteenth Session, Geneva, Sept 3-5, 2018, https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_13/wipo_ace_13_9.pdf.
[55] The Motor Vehicles Act, 1988, §165.

compulsory, on part of the owner of motor vehicles, an insurance against third party risk. This means that if a person suffers because of an accident resulting from the use of a motor vehicle, then they may recover compensation from either the owner or the driver of the motor vehicle or from the insurance company or jointly from all of them.[56]

The Act enumerates various 'Offences, Penalties and Procedure' under Chapter 13 Sections 177 to 210. However, under Chapter 10 dealing with 'Liability without fault in certain cases' Section 140 concerns with 'liability to pay compensation in cases on the principle of no fault' where sub-section (2) fixes a set amount of money to be payable as compensation at fifty thousand (50,000) rupees with an upper limit of twenty-five (25,000) thousand rupees; further under Chapter 11 dealing with 'Insurance of Motor Vehicles against Third Party Risks' Section 145 provides for the definition of authorized insurer, insurance policy, authentic certificate of insurance, liability etc. The section provides for insurance cover for not only death or bodily injury but also for the loss of goods or property; these compensation awards are subject to defense of the insurance company provided for under Section 149(2) of the MV Act.

The reason for awarding compensation is not punitive but to make up for the loss sustained by a victim.[57] The Motor Accidents Claims Tribunal makes the award of compensation after taking into consideration certain parameters set thereof in the MV Act and such compensation is to be subjectively just. Section 163A provides for a formula to calculate the amount of compensation to be paid by the owner of the motor vehicle to the legal heirs of deceased person(s) or to those who have suffered permanent disability due to accidents arising out of the said motor vehicle of the owner; the calculation of compensation is case of death is based mainly on the loss of dependency and is dependent on the multiplier method provided for under the Second Schedule of the Motor Vehicles Act 1988.

Section 163A read with Second Schedule of the Motor Vehicles Act, 1988, fixes compensation based on various parameters like:

- Age and income of the victim
- Annual income of the victim (restricted to forty thousand [40,000] rupees)
- Multiplier in the form of a bell curve

While compensating for the death of the victim, the Second Schedule states that the amount calculated as per it would have to be reduced by 1/3rd towards the expenses the deceased would have incurred had they been alive. The schedule also provides for cases of death and in case of injuries and disabilities, a fixed sum of money towards various expenses like funeral expenses, medical expenses, loss of estate; pain and sufferings and medical expenses, for death and injury respectively.

The MV Act, as mentioned above, provides parameters for calculating compensation, their interpretation and basis lies in various judicial decisions. The multiplier table mentioned

[56] The Motor Vehicles Act, 1988, §146.
[57] Bhagwat Prasad Keshri v. Nafe Singh, 1997 (1) TAC 557, 562 (Del).

above was the result of *Sarla Verma v. Delhi Transport Corp*[58] where a two-judge bench took into consideration several older judgments and worked out a table of multiplier to calculate compensation. I the backdrop of the need to have uniformity and consistency in decisions of the Tribunals in determining compensation, the judgment laid out three basic facts that needs to be established by the claimants, such as the age of the decease, their income and the number of dependents they had.[59] The calculation of damages provided for in the judgment is to be done in the following steps:

Step 1
Income – (personal + living expenses) = multiplicand
Step 2
Choosing multiplier considering the age of the deceased and period of their active career from the table provided for in the Second Schedule of MV Act.
Step 3
Multiplicand X Multiplier = loss of dependency to the family
Step 4
Compensation = loss of dependency + loss of estate + loss of consortium (in case of widow) + Cost of transportation of body (if any) + Cost of medical treatment of deceased before death (if any) + funeral expenses

It was stated that this method of having a standardized calculation of compensation would result in uniformity and consistency in the decisions requiring less detailed evidence and not to mention easy and speedy settlement of accident claims for the insurance companies.[60]

Another three-judge bench of the Supreme Court approved the parameters fixing compensation, laid out in Sarla Verma Judgment above, in the case of *Reshma Kumari v. Madan Mohan*;[61] the parameters had certain additions to them through another judgment of the Supreme Court in *National Insurance Company Ltd. v. Pranay Sethi*;[62] in 2019 it was further laid down in the case of *Royal Subdram Alliance Insurance Co. Ltd. v. Mandala Yandagri Goud*[63] that the age of the deceased and not that of the dependent must be considered while applying the multiplier provided for in MV Act.

The 2018 Amendment to the Motor Vehicles Act, 1988 increased the amount of compensation as follows:

- In case of fatal accidents: a fixed amount of rupees five lakhs (5,00,000) regardless of age and income of the victim.

[58] Sarla Verma v. Delhi Transport Corp, (2009) 6 SCC 121.
[59] *Id.*, para 18.
[60] *Id.*
[61] Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65.
[62] National Insurance Company Ltd. v. Pranay Sethi, (2017) 16 SCC 680, para 59.
[63] Royal Subdram Alliance Insurance Co. Ltd. v. Mandala Yandagri Goud, (2019) 5 SCC 554.

- In case of permanent disability:
    - Rupees five lakhs (5,00,000) * percentage (%) of disability as per Schedule I of Employee's Compensation Act, 1923.
    - However minimum liability is set be not less than rupees fifty thousand (50,000)
- In case of minor injury, a fixed compensation of rupees twenty-five thousand (25,000)
- An annual addition of 5% increase of the amount specified above owing to escalating cost of living for future computation is also provided for under the said Act.

Therefore, the formula for calculating damages under the Motor Vehicles Act, 1988 is both statutory, fixed, and done on multiplier basis.

5.7.3 The Employee's Compensation Act, 1923

The Workman's Compensation Act, 1923 was amended in 2010 to be named as the Employee's Compensation Act, 1923. The Act aims to compensate an employee for the injuries they sustain due to an accident at the workplace. The compensation is calculated based on the formula provided for the same and the Act also aims to strike a balance between the interests of the employees and who else? and lays down strict rules to define events affecting liability of the company.[64] The employees under this Act can claim compensation for occupational disease or accidents arising out of the course of employment,[65] they are:

- Death
- Permanent disability – total and partial
- Temporary disability – total and partial
- Occupational disease

The Act also specifies conditions when this Act would not apply and they are injuries sustained due to perils or war; when employees ignored or refused to adhere to safety guidelines as laid out by the company; or when such employee was under the influence of alcohol or drugs; or when disability due to injury lasted not more than 3 days.

That said, the compensation is calculated based on the monthly wages received by the employee, the type of injury, and the relevant factors as defined under Schedule IV of the Employee's Compensation Act 1923. The Schedule takes into consideration the completed years of age as on the last birthday of the employee immediately preceding the date on which the compensation fell due and then provides for a corresponding multiplier. The compensation is calculated as follows:

- In case of death,[66] whichever is higher between an amount of 1,20,000 rupees or 50% of monthly wage X relevant factor.

[64] The Employee's Compensation Act, 1923, §3.
[65] *Id.*, § 3(1).
[66] *Id.*, § 4(1)(a)

- In case of permanent total disability,[67] whichever is higher between an amount of 1,40,000 Rupees or 60% of monthly wages X relevant factor.
- In case of partial disability lasting more than 3 days then 25% of monthly wages.

The calculation also depends on the age of the employee and provides for a higher compensation to younger employees and vice versa. The Act further provides that the State Governments shall formulate such Rules from time to time[68] and to establish a Commission to decide the liability of persons to pay compensation under the Act.[69]

5.7.4 The Sale of Goods Act, 1930

The Sale of Goods Act, 1930 provides for contracts relating to transaction of transfer of title and ownership in the goods from a seller to a buyer for certain consideration. Sections 55 to 61 of the Sale of Goods Act, 1930 deals with the breach of contracts relating to the sale of goods in India. The Sections provides for various scenarios where the parties could sue for claiming damages under the act, they are:

- Neglecting and refusing to pay for the goods;[70]
- Non-acceptance and non-payment for goods;[71]
- Seller defaulting delivery of goods;[72]
- Specific performance;[73]
- Anticipatory breach where one party pulls back from the contract leaving the other party to continue or rescind the contract;[74]
- Recovery of interests or special damages[75] or recover amount paid in case of failure of payment for such consideration.[76]

The claim of damages under the Sale of Goods Act is primarily based on the principal laid down under Section 73 of the Contracts Act, 1872 with an exception to application, under Sale of Goods Act, to only the sale of moveable property. The parties under the Sale of Goods Act are free to have a pre-determined measurement of damages at the time of entering into the contract.[77] In simple terms however, the measure of damages would be the difference between contract price and the resale price.[78]

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[67] The Employee's Compensation Act, 1923, §4(1)(b)
[68] *Id.*, §32.
[69] *Id.*, §19.
[70] The Sale of Goods Act, 1930, §55.
[71] *Id.*, §56.
[72] *Id.*, §57.
[73] *Id.*, §58.
[74] *Id.*, §60.
[75] Following principle provided under §73 of Indian Contract Act, 1872, where parties to the contract while entering the contract were aware that special damages could be claimed which was beyond normal course of events.
[76] The Sale of Goods Act, 1930, §61.
[77] *Id.*, § 62.
[78] Bismi Abdullah & Sons, Merchants and Commission Agents v. Regional Manager, FCI Trivandrum, AIR 1987 Ker 56.

Contract Price – Resale Price

In the absence of provision for resale, the difference between contract price and that of the market price as on the date of breach.[79]

Contract price – Market price as on date of breach

In case of ascertaining the price of the goods nearest market price or the market price at the final destination of the goods are to be taken into consideration;[80] and to calculate the time of delivery of goods the actual date of delivery or the date of acceptance or refusal of goods as the case may be are to be considered.[81]

5.7.5 The Consumer Protection Act, 2019

Consumer Protection 1986, a three-decade-old law has been replaced by the new Consumer Protection Act, 2019, that came into force on 9th August 2019. The new act promises stricter rules to safeguard consumers in this digital era. Apart from introducing a central regulator, called Central Consumer Protection Authority (CCPA)[82] directed towards manufacturers, sellers and service providers, the new Act has introduced product liability,[83] enhanced the pecuniary jurisdiction,[84] directed all rules to be applicable to E-commerce,[85] among other things.

What was earlier under Section 14 is now included under Section 39 and provides that where a District Commission satisfies itself that the defaulting seller of goods and services, including those found guilty of unfair trade practices and claim for product liability is established, then such seller be directed to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to negligence of the opposite party along with punitive damages as they deem fit.[86] Damages under the old Consumer Protection Act were awarded where negligence of a party and subsequent loss or injury to the consumers were proved,[87] nothing much has changes in the present law as well.[88] It was not mandatory to have laid down the exact loss or damage and the consumer disputes redressal mechanism was to take their best judgment to determine the loss and grant compensation thereafter.[89] The workings of the new Act in this regard also has an addition to this that the minimum amount of compensation may be 25% of the value of defective goods or services,[90] in addition to the spectrum of consumer protection in terms of product liability and a provision to refer the disputes to mediation upon admission

[79] *Id.*
[80] Wertheim v. Chicoutini Pulp Co, (1911) AC 301 (PC).
[81] POLLOCK & MULLA, THE SALE OF GOODS ACT 396 (8th ed. 2011).
[82] The Consumer Protection Act, 2019, §10-27.
[83] *Id.*, §§2(34), 82-87.
[84] *Id.*, §34 (Jurisdiction of District Commission); §47 (Jurisdiction of State Commission); §58 (Jurisdiction of National Commission).
[85] *Id.*, §2(7)(ii)(b), §2(16), 2(17), §94.
[86] *Id.*, §39.
[87] Air India v. Suganda Ravi Mashelkar, 1 (1993) CPJ 63 (64)(NC).
[88] The Consumer Protection Act, 2019, §2(11)(i), § 39(1)(d), § 85 (d).
[89] Jaidev Prasad Singh v. Auto Tractor Ltd. 1 (1991) CPJ 34(36)(NC).
[90] Consumer Protection Act, 2019, §39(1)(k).

of a complaint.[91] One can only wait for the new consumer dispute redressal forum to interpret this further. One of the reasons for the absence of a formula to compute damages under Consumer Protection Act is because if exact assessment of damages is provided for under the Act then the applicability of those parameters would not be feasible for deficiency of service claims under the medical profession or an architect.

5.8 JUDICIAL DICTUM ON FORMULA FOR DAMAGE

M.N. Gangappa v. Atmakur Nagabhushanam Setty & Co.[92] Parties had entered into 2 separate contracts on 2 separate days of the same month to supply groundnuts. The damages for breach of both contracts were to be the difference between the contract rate and the market rate. Upon breach of contract, the quantum of damages to be awarded was one of the issues considered for decision-making. As per Section 73 of the Contract Act, 1872, the ascertainment of damages based on the difference between the contract price and the lowest market rate at the time of breach was upheld.[93]

McDermott International INC v. Burn Standard Co. Ltd.[94] Parties had entered into 4 contracts for fabrication, transportation and installation of six platforms and associated pipelines for oil exploration in Bombay High Sea. Arbitration proceedings were initiated upon breach of contract and thereafter award was passed based on Emden Formula, the reliance and application of which was one of the many disputed issues. Since the method of measurement of damages was not specified in the contract, the formula used for computation of damages is subjectively applicable and within the domain of the arbitrator to choose the one relevant to the case before them. Arbitrator applied Emden formula in this case and insisted that proof of sufferance of actual damage is not error warranting court interference.[95] A sum of rupees 10,74,598 was awarded as damages towards 10% profit margin by the arbitrator which seemed reasonable and therefore did not require the Supreme Court to interfere in the same.

Union of India v. West Punjab Factories Ltd.[96] This case was an appeal against the Government of India claiming damages for loss of goods destroyed by fire on railway platform at Morar Road Railway Station. Contract price is no measure of damages to be awarded in the present case. It is the market price at the time of damage occurred needs to be considered.

Ghaziabad Development Authority v. Union of India[97] The principle underlying the assessment of damages in the event of breach of contract is based on the theory of compensatory damages i.e. the party claiming damages are to be put in the same position, albeit in monetary terms,

[91] The Consumer Protection Act, 2019, §37.
[92] M.N. Gangappa v. Atmakur Nagabhushanam Setty & Co, (1973) 3 SCC 406.
[93] Similar to the case of Bungo Steel Furniture (P) Ltd. v. UOI, (1967) 1 SCR 633; P.S. N.S. Ambalavana Chettiar v. Express Newspapers Ltd., (1968) 2 SCR 239.
[94] McDermott International INC v. Burn Standard Co. Ltd, (2006) 11 SCC 181.
[95] *Id.*, paras 109, 110.
[96] Union of India v. West Punjab Factories Ltd, (1966) 1 SCR 580.
[97] Ghaziabad Development Authority v. Union of India, AIR 2000 SC 2003.

in which they would have been as if the contract had been performed. The party is liable to be compensated for the loss directly caused through the breach of contract.

Essar Projects Ltd. v. Edifice Developers & Projects Engineers Ltd.[98] This was a petition under Section 34 of the Arbitration and Conciliation Act, 1996, for setting aside the arbitral award made by a sole arbitrator, applying both the Emden and Hudson formulas, directing the petitioners to pay the respondents a lump sum amount along with interest on aggregate principal sum at the rate 10% per annum. It was held that application of Emden formula warranted no interference whereas the application of Hudson formula and awarding various sums on account of damages is unjustified and the matter was set aside the award to that extent. The arbitral award was for the petitioner to pay the respondent a sum of rupees 1,93,04,481 with aggregate principal sum of rupees 1,84,58,939 at the rate of 10% per annum from date of award till date of realization; the Bombay High Court reduced this amount to rupees 1,43,028 with interest and rupees 94,756 as interest on principal of retention money till date of award is set aside.

Associate Builder v. Delhi Development Authority[99] This case was an appeal to set aside the arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996, from a single judge bench and subsequently from a division bench judgment of the Delhi High Court. Where the single judge of the High Court had dismissed objections against awarding certain claims as to establish expenses by applying Hudson formula and damages for prolongation of contract and the Division Bench had negative award on ground that arbitrator had mechanically applied the said formula and had held that value of work completed and not the contract value needs to be considered to calculate establishment expenses. The Supreme Court here held that applying formulas to a case is at the discretion of the arbitrator and they decide on the same based on the evidence put forth before them, court cannot interfere with the choice of formula made by arbitrator unless such application shocks the conscience of the court. Interference is not available because there is another view is possible and that it is possible when the first view is perverse in nature. The arbitrator had rightly kept independent the escalation clause in contract, providing for increases in prices of material and labour costs, from the claims for damages due to delay. Therefore, the Supreme Court set aside the division bench order and upheld the single judge bench order.

Muralidhar Chiranjilal v. Harishchandra Dwarkadas[100] This case related to measurement of damages in case of breach of contract under the Sale of Goods Act. The parties had the knowledge of a foreseeable consequence that was likely to result in breach of contract. The Supreme Court had held that measure of damages has to be calculated as they would naturally arise in the usual course of things from such breach. It also affirmed the two principles on which damages are calculated; first, the party who has proved a breach of bargain to supply the contracted is to be placed as far as money can do it in a situation as if contract had been performed; second, imposing on plaintiff a duty to take reasonable steps

[98] Essar Projects Ltd. v. Edifice Developers & Projects Engineers Ltd, 2012 BOMCR Supp 11.
[99] Associate Builder v. Delhi Development Authority, (2015) 3 SCC 49.
[100] Muralidhar Chiranjilal v. Harishchandra Dwarkadas, (1962) 1 SCR 653.

to mitigate loss consequent breach and in the event of non-observance of mitigation of damages that party would be debarred from claiming any part of the damage.

Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd[101] The issue in this case was that the High Court had awarded compensation at the rate of Rupees 6000 per month for an unexpired period for which the appellant had contended that as per the agreement, liability for paying damages would amount to large sum than payable under clause 14 of the agreement which had not expressly provided for keeping the right to claim damages alive under general law. Under general law the right to claim damages was excluded by providing compensation in express terms. It was held that the right to claim liquidated damages is enforceable under Section 74 of the Contracts Act and where such a right is found to exist no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they, at the same time intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach.

Union of India v. Raman Iron Foundry[102] The respondents in this case had tendered to supply foam to the petitioners. It was later contended by the respondents that the appellant had committed breach of contract and hence is liable to pay a certain amount as damages to them for what they have suffered. It was held that a claim for damages for breach of contract is not a claim for a sum presently due and is payable and the purchaser is not entitled in exercise of the rights conferred on it under clause 18 of general clauses for construction of contract to recover the money under such claim by appropriating other sums due to the contractor. Therefore, the appellant had no right or authority to appropriate amounts of other pending bills of respondents towards satisfaction of claim for damages against the respondent.

P. Radhakrishna Murthy v. National Buildings Construction Corporation Ltd[103] The appellant in this case claimed loss of profits due to delay in handing over of site causing idling of labour and machinery. The arbitral award was in favour of the claimant and loss of profits at 10% of contract value for delay in addition to allowing claim for damages by respondent for delay in completing work by contractor was made. It was held that mere delay in handling over sites does not entitle contractor to claim damages unless it is established that the same is the consequence of breach committed by the other party. Further arbitrator had not recorded reasons regarding delay in handing over of sites to contractor and whether loss of profits was caused by breached on part of respondent; including the fact that contractor did not claim 10% of loss of profits under specific claims, therefore the Supreme Court held that the High Court was right in holding that award of any sum toward loss of profits could not be made.

[101] Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd, 1962 Supp (3) SCR 549: AIR 1962 SC 1314.
[102] Union of India v. Raman Iron Foundry, (1974) 2 SCC 231.
[103] P. Radhakrishna Murthy v. National Buildings Construction Corporation Ltd, (2013) 3 SCC 747.

Infosys Technologies Ltd. v. Park Infosys & Ors[104] The case of the petitioners was that the defendants with mala fide intention to deceive public and infringe the petitioners' trademark have used the term 'Infosys Technologies'. The Delhi High Court held that there was a clear case of infringement of trademark and went on to formulate parameters for calculating damages in the case. It held that to prove damages in an action for infringement of trademark, the profits made by the defendant cannot always be the true criterion of the damages awardable to the plaintiff as the defendant's gain may not always be proportionate to the plaintiff's loss. However, it is trite law that the plaintiff's loss or the defendant's gain will not be assumed in the absence of proof. The plaintiff is required to prove some damage distinct from the infringement of their trademark by the defendant.

Illinois Tool Works Inc. v. MOC Products Co. Inc.[105] The plaintiff here was the owner of a patented technology to clan automotive intake system and had filed an infringement suit against the defendant who sells products related to automotive maintenance and cleaning. Ahead of starting trial at the federal district court the defendant challenges the plaintiff's experts under Daubert on their report about the lost profits and supplemental report claiming reasonable royalty. It was claimed that the supplementary report had introduced a new theory of calculating damages i.e. reasonable royalty analysis in addition to the main theory of damages i.e. lost profits. The court however permitted the expert to present the alternative theory of damages at trial and admitted the case.

TABLE 1: Judicial Decisions and Formula of Damages

Sl. No.	Case name	Claims	Award	Reasoning
1	**M.N. Gangappa v. Atmakur Nagabhushanam Setty & Co.** (1973) 3 SCC 406	2 Separate contracts entered on 2 separate days Damages payable upon breach = difference between contract rate and market rate	Difference between contract price and Lowest market price	Proper interpretation of Section 73 of Indian Contract Act, 1872 As held in previous judicial decisions
2	**McDermott International INC v. Burn Standard Co. Ltd. and Ors.** (2006) 11 SCC 181	4 contracts were entered into and subsequently breached Arbitrator while delivering arbitral award applied Emden Formula to calculate damages and this was disputed by the appellant	Application of Emden formula was right Arbitrator has rightly applied the formula and provided reasons for doing so No change in arbitral award	Method of measurement of damages not specified in contract Arbitral award to be altered or set aside only when such award upsets the principle belief of the court
3	**Union of India v. West Punjab Factories Ltd.** (1966) 1 SCR 580	Claim against the government of India Goods at the platform of Morar Road Railway Station	Market price of the goods at the time of damage was awarded	Contract price is no measure of damages to be awarded in the present case

[104] Infosys Technologies Ltd. v. Park Infosys & Ors, 2007 SCC Online Del 27.
[105] Illinois Tool Works Inc. v. MOC Products Co. Inc., 2012 U.S. Dist. LEXIS 116471.

		Goods destroyed by fire and damages claimed		
4	**Ghaziabad Development Authority v. Union of India** AIR 2000 SC 2003	Whether compensation can be awarded for mental agony suffered by the claimants? Whether in the absence of any contract or promise held out by the Ghaziabad Development Authority any amount by way of interest can be directed to be paid on the amount found due and payable by the Authority to the claimants? If so, the rate at which the interest can be ordered to be paid?	No award for mental agony Interest at the rate of 12%	The principle underlying the assessment of damages in the event of breach of contract is based on the theory of compensatory damages i.e. the party claiming damages are to be put in the same position, albeit in monetary terms, in which they would have been as if the contract had been performed. The party is liable to be compensated for the loss directly caused through the breach of contract.
5	**Essar Projects Ltd. v. Edifice Developers & Projects Engineers Ltd.** 2012 BOMCR Supp 11	To set aside arbitral award Arbitrator while delivering arbitral award had applied both Emden and Hudson Formulas Directed the petitioners to pay lump sum amount + 10% interest on principal sum	Bombay High Court award to reduce amount payable was partially upheld	Application of Emden formula warranted no interference. Application of Hudson formula and awarding various sums on account of damages is unjustified and set aside the award to that extent.
6	**Associate Builder v. Delhi Development Authority** (2015) 3 SCC 49	Application to set aside arbitral award Single judge upheld arbitral award Division bench negative the award on ground that arbitrator had mechanically applied formulas to calculate damage Division bench held it is wrong to hold value of work completed and not the value of contract to calculate establishment expenses Division bench admitted objection that it was wrong to apply Hudson formula to establish expenses and damages for	Upheld Single Judge bench order Upheld arbitral award	Applying formulas to a case is at the discretion of the arbitrator and they decide on the same based on the evidence put forth before them, court cannot interfere with the choice of formula made by arbitrator unless such application shocks the conscience of the court. Interference is not available because there is another view possible and that it is possible when the first view is perverse in nature. The arbitrator had rightly kept independent the escalation clause in contract, providing for increases in prices of

		prolongation of contract		material and labour costs, from the claims for damages due to delay.
7	**Muralidhar Chiranjilal v. Harishchandra Dwarkadas** (1962) 1 SCR 653	Measurement of damages under breach of contract under Sale of Goods Act Respondent claimed as seller knew goods were to be sent to Calcutta and therefore be presumed to be sold in Calcutta Loss of profit to buyer resulting from difference between rate in Calcutta on date of breach and contract rate must be measure of damages	Measure of damages has to be calculated, as they would naturally arise in the usual course of things from such breach.	Two principles on which damages are calculated: First, the party who has proved a breach of bargain to supply the contracted is to be placed as far as money can do it in a situation as if contract had been performed; Second, imposing on plaintiff a duty to take reasonable steps to mitigate loss consequent breach and in the event of non-observance of mitigation of damages that party would be debarred from claiming any part of the damage.
8	**Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd** 1962 Supp (3) SCR 549: AIR 1962 SC 1314	High Court had awarded compensation at the rate of Rupees 6000 per month for an unexpired period The appellant had contended that as per agreement liability for paying damages would amount to large sum than payable under clause 14 of the agreement that had not expressly provided for keeping the right to claim damages alive under general law.	Under general law, the right to claim damages was excluded by providing compensation in express terms. It was held that the right to claim liquidated damages is enforceable under Section 74 of the Contracts Act and where such a right is found to exist no question of ascertaining damages really arises.	Where the parties have deliberately specified the amount of liquidated damages, there can be no presumption that they, at the same time intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach.
9	**Union of India v. Raman Iron Foundry** (1974) 2 SCC 231	The respondent in this case had tendered to supply foam to the petitioners. It was contended by the respondents that the appellant had committed breach of contract and hence are liable to pay certain amount as damages to them for what they have suffered.	It was held that a claim for damages for breach of contract is not a claim for a sum presently due and is payable and the purchaser is not entitled in exercise of the rights conferred on it under clause 18 of general clauses for construction of contract to recover the money under such claim by appropriating	Appellants had no right or authority to appropriate amounts of other pending bills of respondent towards satisfaction of claim for damages against the respondent.

			other sums due to the contractor.	
10	**P. Radhakrishna Murthy v. National Buildings Construction Corporation Ltd** (2013) 3 SCC 747	• The appellant in this case claimed loss of profits due to delay in handing over of site causing idling of labour and machinery. • The arbitral award was in favour of the claimant and loss of profits at 10% of contract value for delay in addition to allowing claim for damages by respondent for delay in completing work by contractor was made.	Upheld High Court order holding award of any sum toward loss of profits could not be made	Mere delay in handling over sites does not entitle contractor to claim damages unless it is established that the same is the consequence of breach committed by the other party. Further arbitrator had not recorded reasons regarding delay in handing over of sites to contractor and whether loss of profits was caused by breached on part of respondent; including the fact that contractor did not claim 10% of loss of profits under specific claims.
11	**Infosys Technologies Ltd. v. Park Infosys & Ors** 2007 SCC Online Del 27	The case of the petitioners' was that the defendants with mala fide intention to deceive public and infringe the petitioners' trademark have used the term 'Infosys Technologies'.	Delhi High Court held that there was a clear case of infringement of trademark and went on to formulate parameters for calculating damages in the case.	To prove damages in an action for infringement of trademark, the profits made by the defendant cannot always be the true criterion of the damages awardable to the plaintiff as the defendant's gain may not always be proportionate to the plaintiff's loss. It is trite that the plaintiff's loss or the defendant's gain will not be assumed in the absence of proof. The plaintiff is required to prove some damage distinct from the infringement of their trademark by the defendant.
12	**Illinois Tool Works Inc. v. MOC Products Co. Inc.** 2012 U.S. Dist. LEXIS 116471	The plaintiff here was the owner of a patented technology to clan automotive intake system and had filed an infringement suit against the defendant who sells products related to automotive maintenance and cleaning.	The court however permitted the expert to present the alternative theory of damages at trial and admitted the case.	Supplementary report had introduced a new theory of calculating damages i.e. reasonable royalty analysis in addition to the main theory of damages i.e. lost profits.

		Plaintiffs experts under Daubert on their report about the lost profits and supplemental report claiming reasonable royalty.		

5.9 CONCLUSION AND SUGGESTIONS

The difficulty in determining a set formula for calculating damages in a contractual dispute seems justified as every transaction, however huge or small, involves interplay between contract law and its respective substantive law. One would think that awarding damages where the contract between the parties itself stipulates the amount or manner of calculating damages would be easy to decide. However, the existence of numerous judicial pronouncements in this regard bears witness to that mirage.[106] Litigations have not been less under Section 73 of the Contracts Act 1872[107] either as there is no base for calculation damages for a breach of contract. Several judgments had held that the basic formula for calculation of damages should be the difference between the contract price and the market price, yet several others have digressed from it or interpreted the basic formula subjectively[108] or modified it further. Several theories of damages have laid out and justified the broad classification of damages into general, nominal, substantial, liquidated and unliquidated, aggravated and exemplary etc. but what holds the ground are the theory of compensatory damages and the theory of restitutionary damages. The theory of compensatory damages states that damages are used to remedy the breach of contract where it seeks to restore the plaintiff, in monetary terms, to a position they would have been in, in case of absence of the said breach; whereas the theory of restitutionary damages states that damages are awarded when the defendants allegedly gains more than what the plaintiff has allegedly lost, i.e. the loss of profits of the plaintiff is taken into consideration in addition to awarding compensatory damages. The theory of punitive damages rarely comes into picture as the courts, so as to discourage wrongful conduct, not just against one party but also against the entire society because according to them the very act is malicious in nature and deserves punishment, apply this theory. The peripheral issue while deciding on awarding damages is the fact that there needs to be accountability in the mitigation of loss and the remoteness of the loss along with the consideration that the damages awarded would be proportional and that it does not unjustly enrich the other party.

The discussion for calculation has been accounted for as early as 1303 under the mercantile law in Europe.[109] As trade expanded and the disputes between merchants expanded with it. there was a need to develop a touchstone to decide on awarding damages in case of

[106] M.N. Gangappa v. Atmakur Nagabhushanam Setty & Co., (1973) 3 SCC 406;
[107] Compensation for loss or damage caused by breach of contract; Compensation for failure to discharge obligation resembling those created by contract
[108] Union of India v. West Punjab Factories Ltd., (1966) 1 SCR 580.
[109] Trans-Lex - Law Research, https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8.

disputes.[110] The formulae worked towards fully compensating the losses sustained by the aggrieved parties. Disputes under the construction and infrastructure project sector cropped up later on but were saved by several formulae like the one given by the Hudson's Building and Engineering Contracts and the ones provided for in several of the publication of the International Federation of Consulting Engineers. The limited application of Hudson formula[111] and the wider application of Emden[112] and the Eichleay formulae have created inconsistencies and confusion in the sector. The consideration of delay damages[113] under the Red and Yellow books of FIDIC, on construction contracts and plant and design build contracts respectively, contains clauses for performance damages we well.[114] The difficulty in determining the application of the above three formulae in judicial environment is that there is no set rule as to the application of one or the two other formulas which would put the parties in a difficult situation because the arbitrator would have the prerogative on its application and final arbitral award cannot be challenged on the basis of this reason.

The availability of award of both civil and criminal remedies under the IPR infringement disputes also does not have set parameter to determine damages. This could be because of the fact that damages under IPR infringement have to be determined subjectively as the rights under each of the component under different IPR protection vary substantially. The elaborate parameters and structures given under the Motor Vehicles Act, 1988, and that of under the Employee Compensation Act, 1923, have come into being after considering various parameters such as the age of the age and income of the persons affected specifying specific multiplier tables under each of the enactments. Although litigations under the Sale of Goods Act, 1930, uses formula to calculated damages that are similar to that of the basic formula under the Contract Act the subjective application and interpretation of the same can be observed through the various judicial dictums. Since the new Consumer Protection Act, 2019, has replaced the old Consumer Protection Act it has been done so without substantial change to the heart of the enactment; however, there is addition of the option to refer the matter into mediation. This step has been set forth to discourage litigation under the act which would render the requirement of a formula null. However, one can only conclude of this after we see the workings of this relatively new enactment.

Therefore, considering the Public-Private-Partnership scenario in India and its advantages and various shortcomings and also considering the fact that various courts and arbitrators in India apply the above discussed formulas subjectively, it can only be suggested that there be a single formula or set of formulas developed nationally. The new formula must take into consideration all the factors such as the contract price, clear definition of what market price to consider, consideration of loss of profits, various overheads, along with multiplier systems if necessary, having due regard to the international conventions and laws on this subject,

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[110] Principle No. 7.3.2, Lex Mercatoria is on calculation of damages.
[111] M/S National Highways Authority of India v. M/S. Oriental Pathways (Nagpur) Pvt. Ltd, FAO (OS) 464/2015 and CM No. 15464/2015, decided on 24th May, 2016.
[112] Norwest Holst Construction Ltd. v. Cooperative Wholesale Society Ltd., (1997) EWHC Technology 356; Charles G. William Construction Inc. v. White, 271 F.3d 1055.
[113] FIDIC, *supra* note 33, cl. 1.1.28 of General Conditions.
[114] FIDIC, *supra* note 36, cl. 1.1.63 – General Provisions – General Conditions.

followed by a compulsory reference to the alternative dispute mechanism to reduce the burden of the courts would increase the efficiency of contract enforcement and in turn the ease of doing business index for the country.

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CHAPTER 6: COMBINED CLAIMS OF RELIANCE LOSS AND EXPECTATION LOSS FOR BREACH OF CONTRACT IN INDIA

6.1 INTRODUCTION

The common law compensatory principle in the award of damages has been one of the main pillars of Indian contract law as well. According to this principle, the function of damages for breach of contract is compensatory, and not punitive.[1] In another words, the function of damages for contractual breach is to put the person whose right has been invaded by the breach in the same position so far as money can do, as if there was no breach.[2] In the words of Lord Mustill "*Ordinarily, there is just one measure of damages in contract, which is the loss truly suffered by the promise*."[3] Thus, the amount of damages cannot exceed the "*loss actually suffered by the claimant of which he is likely to suffer*".[4] This compensatory principle raises the question i.e. "for what is that the victim of a breach of contract is entitled to be compensated?".[5] This question requires scrutiny of the different categories of losses for which damages can be recovered by the victim of a breach of contract.

This compensatory theory of damages has been the subject of exhaustive investigation in the celebrated work of L.L. Fuller and William Perdue[6] wherein they have attempted to examine the law of damages on the touchstone of "interest theory" of rights and liabilities. Based on interest theory, Fuller and Perdue have classified the damages for contractual breach into three categories, namely, (i) Restitution interest (based on the principle unjust enrichment), (ii) Reliance interest, and (iii) Expectation interest and they have argued for a wider recognition of the reliance interest which in many cases encompasses expectation interest.[7] The present chapter is confined to the relationship between expectation loss and reliance loss only. The restitution interest which is based on the principle of unjust enrichment and is concerned with 'the prevention of gain by the defaulting promisor at the expense of the promise',[8] will not be discussed in this chapter.

6.2 RELIANCE LOSS AND EXPECTATION LOSS

Both reliance loss and expectation loss are measures used by courts to calculate the amount of damages. Generally speaking, the damages based on reliance interest are termed as 'reliance loss' and covers the losses which the claimant has suffered due to the expenses

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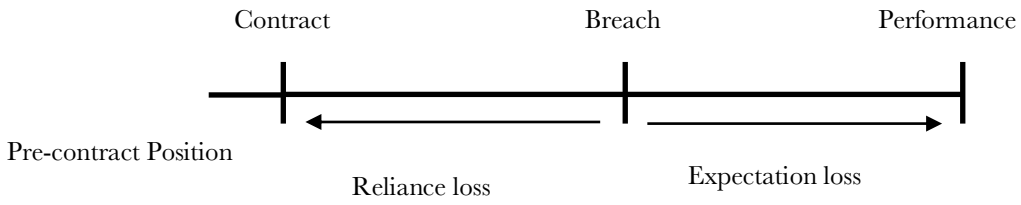
[1] Dhulipudi Namayya v. Union of India, AIR 1958 AP 533.
[2] Trojan & Co. v. Rm N.N. Nagappa Chettiar, AIR 1953 SC 235.
[3] Ruxley Electronics and Constn. Ltd. v. Forsyth, [1995] 3 All ER 268 at 277 (House of Lords United Kingdom).
[4] Ghansiram v. Municipal Board, AIR 1956 Bhop 65.
[5] TRETITEL, THE LAW OF CONTRACT 1120 (Edwin Peel ed., 14th ed., 2015).
[6] See L.L. Fuller & William R Perdue, *The Reliance Interest in Contract Damages: 1&2*, 46 YALE L.J. 52, 373 (1936-37).
[7] *Id.*
[8] 2 POLLOCK & MULLA, THE INDIAN CONTRACT & SPECIFIC RELIEF ACTS 1110 (R Yashod Vardhan et al ed., 15th ed., 2017).

incurred by him in reliance of the contract being performed. It is also known as wasted expenditure. The aim of damages for reliance loss is to put the claimant in the position he would have been in had the contract never been made[9] i.e. to restore the pre-contractual position.[10] In contrast to that damages based on expectation interest are called 'expectation loss' and covers consequential damages which are a type of special damages that can be shown to have occurred as a result of the other party's failure to meet their promised obligation. In other words, expectation loss or consequential damages also mean the loss of the profit which the claimant could have made had the contract been performed i.e. to say to put the claimant in post-performance position.

This can be visualized better with the help of the following diagram:



Thus, allowing recovery for 'gross expectation interest' which includes both the reliance loss as well as loss of profits. In a sense, it can be construed that reliance loss is backward looking while expectation loss is forward looking. They have further stressed that the calculation of damages by the 'value of the promised performance' should be the normal rule of contractual damage recovery.[11]

6.3 PROTECTION OF RELIANCE LOSS

As stated earlier the primary reason for granting reliance loss is the protection of reliance interest to avoid wasting of expenditure under a broken contract.[12] That is to say, while claiming reliance loss the claimant seeks to recover the expenditure which is said to have been wasted as consequence of the defendant's breach.[13]Simply stated, in a claim based on reliance loss the plaintiff is seeking compensation for the extent to which his resources have been depleted in reliance upon the promise of performance.[14] Thus, reliance loss claim gives the plaintiff a starting point to begin the computation and calculation of damages. In this way, the measure of damages based on reliance loss seeks to restore the plaintiff to the position he was in before the contract was entered into i.e. to restore the *status quo ante*.[15] This is also expressed in the maxim *restitutio in integrum* (restoration to the original or pre-contractual position) which lies at the heart of the reliance interest.[16]

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[9] https://uk.practicallaw.thomsonreuters.com/3-1077134?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1. (last visited Jan. 14, 2020).
[10] *See* POLLOCK & MULLA, *supra* note 8.
[11] L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 2,* 46(3) YALE LAW JOURNAL 373, 420 (1937).
[12] *See* POLLOCK & MULLA, *supra* note 8, at 1111.
[13] TREITEL, *supra* note 5, at 1125.
[14] ANDREW GRUBB, THE LAW OF CONTRACT, 1264 (1999).
[15] *Id.*
[16] A. I. Ogus, *Damages for Pre-Contract Expenditure,* 43 (4) MODERN LAW REVIEW 423, 425 (1972).

McRae v. Commonwealth Disposals Commission[17] is an Australian case on this point. In 1947 the defendant, Commonwealth Disposals Commission, had invited tenders for the purchase of an oil tanker lying on Jourmaund Reef. The plaintiff F.E. McRae's tender was accepted and the said tanker was sold to the plaintiff for a price of £285. The plaintiff was unable to locate the Jourmaund Reef and hence, on an inquiry, the defendant provided the plaintiff with the longitude and latitude at which the tanker was said to be located. The plaintiff owned a small steam vessel named *Gippsland* which was engaged in trading at the time the contract was made. The plaintiff after incurring considerable expenses, fitted this vessel for a salvage expedition and headed for the said location. However, on arriving there, the plaintiff found that no tanker ever existed there. The plaintiff sued the defendant for the recovery of the purchase price and the expenditure incurred by him in undertaking the salvage expedition. The plaintiff also claimed the "loss of revenue" which was caused due to directing the vessel *Gippsland* for the salvage expedition. The defendant argued that since there was no tanker, the contract is void and hence the expenditure incurred by the plaintiff is not recoverable and he is only entitled to return of the purchase price. However, the High Court of Australia rejected the defendant's argument that the contract is void on the basis of mistake for the reason that mistake of fact should have been bilateral but here there was a promise on the part of the defendants that the tanker existed as provided by the various communications exchanged between the parties and specific coordinates provided by the defendant. On the question of damages, while allowing the claim of damages for the purchase price as well as expenditure incurred, the Court stated as follows:

> "[T]he practical substance of the case lies in three factors: (1) the Commission promised that there was a tanker at or near to the specified place; (2) In reliance on the promise the plaintiffs expensed considerable sums of money; (3) there was in fact no tanker at or anywhere near to the specified place. In the waste of their considerable expenditure seems to lie the real and understandable grievance and the ultimate question in the case is whether the plaintiffs can recover the amount of this wasted expenditure or any part of it as damages for the breach of contract … [W]hen the contract alleged is a contract that there was a tanker in a particular place, and the breach assigned is that there was no tanker there, and the damages claimed are measured by the expenditure incurred on the faith of the promise that there was a tanker in that place [The plaintiffs] can say: (1) this expense was incurred; (2) it was incurred because you promised us that there was a tanker; (3) that fact that there was no tanker made it certain that this expense would be wasted."

Reliance loss can be classified in two categories based on Pecuniary loss (i) Pre-contractual Reliance loss; and (ii) Post-contractual reliance. In contrast to that, no-pecuniary reliance loss can include Loss of existing reputation or physical inconvenience[18] and consequent mental distress.[19] However, here we have confined our study only to pecuniary losses.

[17] McRae v. Commonwealth Disposal Commission, (1950) 84 C. L. REV. 377 (High Court of Australia).
[18] *See* e.g. Buton v. Pinkerton, (1867) LR 2 Exch 340; Hobbs v. London and South Western Railway Co., (1875) LR 10 QB 111.
[19] *See* Watts v. Morrow, [1991] 1 WLR 1421; Cross v. David Martin and Mortimer, [1989] 1 EGLR 154.

6.4 PRE-CONTRACTUAL RELIANCE

Coming to the first category, pre-contractual expenditure refers to the expenses which are preliminary to the contract. It is uncertain at this point whether there will be a contract or not. Hence, pre-contractual reliance expenditure recovery is very difficult. In the English case of *Hodges v. Earl of Lichfield*[20] Tindal CJ denying the recovery of pre-contractual preliminary expenses stated that "the party enters into them for his own benefit at a time when it is uncertain whether there will be a contract or not". The matter related to purchase of right of free and exclusive fishery of the defendant in the river Trent. The agent of Defendant entered into the agreement with the plaintiff for the sale of the same at a price of £21,500 of which £1,500 was paid and the remaining sum was yet to be paid. The conveyance deal was yet to be finalized and entered into. Despite this, the plaintiff incurred expenses in purchasing sheep, bricks and hurdles etc. Later on, dispute arose between the parties and the Earl of Lichfield refused to enter into the contract. The plaintiff sued for the losses occurred to him in the re-sale of stock of sheep, bricks and hurdles etc. which he purchased relying upon the promise. The court refused to allow the recovery of the said expenses.

However, in a stark contrast to the above case, in *Anglia Television v. Reed,*[21] Lord Denning MR allowed the recovery of pre-contract expenditure. In this case the plaintiffs, Anglia Television Ltd, were inclined to make a film of a play for television which was entitled "The Man in the woods" and completed several preparations in advance such as finding and arranging a location for filming, employing a director, designer and a stage manager etc. and have spent considerable amount of sum on these expenses which amounted to £1822. These expenses were incurred even before they got the leading man. To hold the film together they required a strong actor who has to be on the scene the whole time. On a telephonic conversation on August 30, 1968 they entered into an agreement with Mr. Robert Reed, the defendant, through his agent. However, due to clash of dates with another engagement, he repudiated the contract. The plaintiffs sued the defendant for breach of contract claiming damages amounting to a sum of £2750 (which included £1822 as pre-contract expenditure £854 as post-contract expenditure and £74 as the cost of suit for injunction). The defendants did not dispute their liability but contended the amount of claim of pre-contract expenditure is not recoverable and that the plaintiffs are entitled to only £854 as post-contract expenditure. Lord Denning rejected this defense, allowed the full claim of £250 claim and held that:

> "[I]f the plaintiff claims the wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. He can claim also the expenditure incurred before the contract, provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken."

One of the authorities relied upon (and approved) by Lord Denning to reach this conclusion was *Lloyd v. Stanbury.*[22] In this case the defendant, George Stanbury, contracted to sell to the

[20] Hodges v. Earl Earl of Lichfield, (1835) 1 Bing NC 492.
[21] Anglia Television Ltd v. Reed, [1971] 3 All ER 690 (Court of Appeal of England and Wales).
[22] Lloyd v. Stanbury, [1971] 1 W.L.R. 535.

plaintiff, Thomas Lloyd, a freehold property for £8,500 and also paid a deposit of £850. The plaintiff intended to use the land for the purpose of poultry farming as soon as possible. While, the defendant wanted to construct a bungalow for himself and for that purpose he retained a part of the land. One of the terms of the contract was that the plaintiff should place a caravan on the land which the defendant and his family could occupy until their bungalow is completed. In anticipatory execution of the term, the plaintiff moved a caravan on to the farm at a total cost of £37 and installed a toilet for the use of the family at a further cost of £19. He also incurred expenses in purchase of chicken house and wire netting etc. for £27 and transported his furniture at a cost of £57. However, a dispute arose between the parties and the completion of the conveyance did not take place. Plaintiff sued for damages under various heads which included the aforementioned pre-contractual expenditure. While allowing the claim of pre-contractual expenditure Brightman J held that:

> "[A] disappointing buyer suing for damages because the vendor is not willing to implement the bargain is not limited to compensation for expenditure incurred strictly after the execution of the contract. … the damages which he is entitled to recover include expenditure incurred prior to the contract representing (1) legal costs of approving and executing the contract and (2) the costs of performing and act required to be done by the contract notwithstanding that the act is performed in anticipation of the execution of the contract.
>
> … there is an important limitation to be imposed .... if the buyer is let into the possession prior to the completion and sees fit to improve the property after the date of contract, [those] expenses which he incurs [cannot] in any normal case be recovered [if they were not in the contemplation of the parties]."

However, Andrew Grubb[23] has criticized this recovery of pre-contractual damages in the case of *Anglia Television v. Reed* on the ground that such an award is not only contrary to the general principles but also offends the rules of causation. He argues that the measure of damages based on reliance seeks to restore a party to the position he was in before he entered the contract but the award in *Anglia* had restored the plaintiff to the position he was in 'many months before' he entered into the contract. He states that, referring to such award as reliance damages amounts to the abuse of language and instead, they should be described as expenses incurred in *anticipation* of the contract. Dealing with causation, he has further argued that, the cause of wasted expenditure in this case was not the act of defendant's breach of contract but rather the expenditure was wasted by the plaintiff's own action of incurring considerable expenses even before the contract had been secured. He states that recovery of such losses undermines the role of contract as a "device for allocation of risk". To support his argument, he has relied on cases such as *A-G of Hong Kong v. Humphrey's Estate*[24] and *Regalian Properties v. London Docklands Development Corpn*[25] where the courts have declined to entertain the claim based on an anticipated contract which ultimately failed to materialize citing subversion of contractual allocation of risk if allowed. To this conundrum of pre-contractual reliance damages, a balanced approach is perhaps stated by Professor A. I.

[23] ANDREW GRUBB, *supra* note 14, at 1265.
[24] A-G of Hong Kong v. Humphrey's Estate (Queen's Garden), [1987] AC 114 (Privy Council).
[25] Regalian Properties PLC v. London Docklands Development Corpn, [1995] 1 WLR 212 (United Kingdom).

Ogus[26] who suggest that "the best solution is that there should be a recovery of any expense incurred after 'substantial agreement' had been reached.

6.5 POST CONTRACTUAL RELIANCE

Simply stated, Post-contractual reliance refers to any expenditure incurred by the plaintiff after entering into the contract with the defendant which is wasted as a result of defendant's breach.[27] Under this category various types of expenses have been allowed to be recovered depending upon the nature of the contract. In comparison to pre-contractual reliance loss damages the issues raised under post-contractual reliance loss damages are less contentious.

A distinction has been made by Fuller and Perdue between *essential* and *incidental* reliance.[28] Essential reliance is described as the expenditure which the plaintiff must incur to perform his part of the contract, while incidental reliance are those expenses which is ancillary to, but not essential for, performance.[29] *It has been stated that essential reliance can never be too remote to be recoverable i.e. a defendant must foresee what is essential for the plaintiff to do in order to perform the contract, incidental reliance may be considered too remote to be recoverable.*

In *Hydraulic Engineering Co. v. MaHaffie*[30] the plaintiffs agreed with a third party, Mr. Justice to make a special machine called 'gunpowder pile driver' for him which should be delivered by the end of August. For this purpose, the plaintiffs contracted with the defendants to make a part of the machine called 'gun' which is to be delivered. The defendants were aware that gun was required as part of the machine which has to be delivered by end of August. However, they did not finish the gun until the latter part of the September. The third party, Justice refused to accept the late delivery of the machine from the plaintiffs and as a result the plaintiffs sued the defendants claiming damages, *inter alia*, for the expenditure incurred in making rest of the parts of the machine and the cost of painting it to persevere it. The court of appeal allowed the recovery of this part of the claim by affirming the judgment of the trial court delivered by Field J who held that the "plaintiffs were entitled to recover for the expenditure which they had uselessly incurred".

Further, in a US Case of *Chicago Coliseum Club v. Dempsey*[31] the plaintiff, Chicago Coliseum Club, entered into a contract with boxer William Harrison Dempsey, the defendant, to promote a public boxing exhibition and had engaged the service of another boxer Harry Wills to engage in a boxing match with the defendant. The plaintiffs incurred several expenses after the contract was signed. Later on, the defendant refused to fight and repudiated the contract. The Court of Appeals held that the plaintiffs were entitled to the recovery of expenditure which were incurred between the date of signing of the agreement and such as were a necessary expense in furtherance of the performance.

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[26] *See* A. I. OGUS, LAW OF DAMAGES 350 (1973).
[27] ANDREW GRUBB, *supra* note 14, at 1264.
[28] *See* L.L. Fuller & William R Perdue, *The Reliance Interest in Contract Damages: 1&2*, 46 YALE LAW JOURNAL 52, 373 (1936-37).
[29] ANDREW GRUBB, *supra* note 14, at 1264.
[30] Hydraulic Engineering Co. v. McHaffie (1878) 4 QBD 670 (Court of Appeal UK).
[31] Chicago Coliseum Club v. Dempsey, (1932) 265 Ill App 542 (Appellate Court of Illinois, First District).

6.6 PROTECTION OF RELIANCE LOSS IN INDIA

In *Managing Director of Nagarjuna Co-op. Sugars Ltd. v. TK Mohan Rao,*[32] Nagarjuna Co-operative Sugars Ltd (the employer) contracted with Sri Venkateswara Construction and Agencies, Engineers and Contractors (the contractor) for the construction of certain civil works (pertaining to sugar factory, cane carrier, mill house, boiler house and workshop etc.). The contract was entered into on 25.12.1982 and a deadline of 4 months (with a grace of period of 2 months) was provided. However, the work could not be completed till 15.12.1984. The contractor arguing that this delay was because of the fault of the employer in not giving mark out of the site and not supplying the materials on time. He claimed, *inter alia,* expenses incurred by him for maintenance of the establishment during the period of delay. This claim was allowed by the Arbitrator and later affirmed by the High Court of Andhra Pradesh.

Similarly, in *Food Corporation of India v. Babulal Agrawal*[33] the defendant, Food Corporation of India, had invited tenders for the construction of plinths to be utilized for the storage of food grains. In this regard the tender of the plaintiff was accepted and an agreement was entered into between the parties on 12.2.1986 which, inter alia, provided that the plaintiff could occupy the premises for a period of three years which is extendable for a further period of one year at the option of the defendant. However, the construction of the plaintiff was not completed on time but was ultimately completed on 24.1.1987. No lease deed was executed and registered between the parties after the completion of the work and the defendant served a fifteen-day notice of evacuation on the plaintiff on 26.9.1988. The plaintiff treating it as a breach of contract filed a suit against the defendant for the recovery of Rs. 17,00,000 spent by the plaintiff in the construction of the plinth according to the designs given by the defendant. The trial court allowed the same based on the principle of promissory estoppel which was later confirmed by the Supreme Court of India.

Recently, the question of reliance loss was discussed by the Supreme Court of India in *Kanchan Udyog Ltd v. United Spirits Ltd*[34]. In this case the appellant, Kanchan Udyog, entered into a contract with United Spirits, the respondent, for the construction of non-alcoholic beverages plant and sale under the trademark of the respondent in 1985 for a period of 10 years. For this purpose, the appellant took a loan of Rs. 226 Lakhs and the production commenced in 1987. However, the contract was terminated by the respondent in 1988. The appellant sued the respondent for breach of contract and claimed, *inter alia*, the cost of installation of the plant and other expenditure incurred by it. The appellant contended that the respondent was the domain expert and relying on their assurance the appellant has made a business investment. The bottling plant was specific to their product and is not saleable in open market. The trial court decreed the suit in favor of the appellant awarding, *inter alia,* reliance loss damages of Rs. 160 Lakhs. However, on appeal the High Court reversed the decree and dismissed the suit. The judgement of the High Court was affirmed by the Supreme Court. The Supreme Court agreed with the reasoning of the High Court that the

[32] Managing Director of Nagarjuna Co-op. Sugars Ltd v. TK Mohan Rao, AIR 1995 AP 362 (High court of Andhra Pradesh).
[33] Food Corporation of India v. Babulal Agrawal, AIR 2004 SC 2926.
[34] Kanchan Udyog Ltd v. United Spirits Ltd, 2017 (7) SCALE 69.

loss to the appellant was not caused by the breach of contract by the respondent but was attributable to appellant own actions and failure to mitigate the same.

6.7 PROTECTION OF EXPECTATION LOSS

The main objective of award of damages based on expectation loss is the protection of exceptional interest by putting the innocent party in the position he would have occupied had the contract been performed and the general aim of the law in this regard is the redressal of the innocent party's defeated financial expectation and compensation for the loss of bargain.[35] A contract can give rise to two types of expectations viz. (i) expectation of receiving the promised performance; and (ii) expectation of putting it to a particular use. As stated in Pollock and Mulla, the award of damages based on expectation loss will protect both of these interest subject to the principles of causation and remoteness.

One problem that arises in granting damages based on expectation loss is with regard to the quantification i.e. whether the quantification of plaintiff's lost expectation under the contract should be done with reference to the 'cost of cure' or by reference to 'diminution in value'. The term 'cost of cure' refers to the cost of remedying the breach while the term 'diminution in value' is described as the amount by which something has become less valuable as a result of the breach.[36] Both of these concepts have their set of associated problems with them. In some cases, it is possible, that both cases will produce the same result while in others they may produce very different results.

One of the landmark cases where both of these approaches have produced different results is the case of *Ruxley Electronics and Construction v. Forsyth*[37]. In this case the appellant, Ruxley, agreed to construct a swimming pool for the respondent, Forsyth, which was supposed to have depth of 7 feet 6 inches. The pool was stated to be used for diving purposes. However, the swimming which was finally constructed had a depth of 6 feet only. This depth was still considered safe enough for diving and did not diminish the value of the pool. However, Forsyth considering this as breach of contract brought an action against the appellant and claimed expectation damages on the cost of cure basis for the cost of demolishing and rebuilding the pool amounting to £21,500. The trial court rejected the claim stated that the awarding the cost of cure damages in this case is unreasonable and awarded damages amounting to £2500 on the basis of 'loss of amenity' (a type of diminution in value). However, the Court of Appeals reversed this award of damages and allowed the respondent to recover the full amount based on cost of cure damages. The House of Lords reversing the position of Court of Appeals and restoring the judgement of the trial court stated that:

> "Does Mr. Forsyth's undertaking to spend any damages which he may receive on rebuilding the pool make any difference? Clearly not. He cannot be allowed to create a loss which does not exist in order to punish the defendant for their breach of contract. The basic rule of damages, to which exemplary damages are the only exception, is that they are compensatory not punitive.

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[35] POLLOCK & MULLA, THE INDIAN CONTRACT ACT, Vol. 2 1110-1111 (R Yashod Vardhan et al ed., 15th ed., 2017).
[36] ANDREW GRUBB, THE LAW OF CONTRACT 1249 (1999).
[37] Ruxley Electronics and Construction v. Forsyth, [1995] 3 All ER 268 (House of Lords).

> […] a common feature of small building works performed on residential property is that cost of the work is not fully reflected by an increase in the market value of the house, and that comparatively minor deviations from specifications or sound workmanship may have no direct financial effect at all"

Thus, it is to be noted that in this case the two measures of quantifying expectation loss produced different results. The 'cost of cure' approach computed the damages to be £21,500 while according to the diminution in value there was no damages to be awarded (except for the loss of amenity) as there was no financial depreciation of the property.

6.8 RECOVERY OF EXPECTATION LOSS IN INDIA

In *A.T. Brij Paul Singh v. State of Gujarat,*[38] the erstwhile State of Saurashtra invited tenders for providing cement concrete surface to Rajkot Jamnagar Road and in this connection the tender of the appellant was accepted. One of the conditions of the contract was that the work should be completed within a time limit of 14 months from the date of commencement of the work. However, the work was not completed on time. A dispute arose between the parties and the respondent rescinded the contract on the ground that time was the essence of the contract and the appellant's failure to do so amounted to breach. The appellant filed the suit claiming damages, *inter alia*, for "the loss of expected profits" amounting to Rs. 4.30 Lakhs and the same was dismissed by both the trial court and the High Court. However, while rejecting the claim, the High Court did conclude that the contract was wrongfully rescinded by the respondent. The Supreme Court, accepting this conclusion of the High Court about the wrongful rescission of the contract, reversed the position and awarded the damages for loss of profit amounting to Rs. 2 Lakhs. The Supreme court further held that, for estimating the amount of damages, court should make a broad evaluation instead of going into minute details and expressly stated:

> "[W]here in a works contract, the party entrusting the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What must be the measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under this head is certainly admissible. […] Ordinarily a contractor while submitting his tender in response to an invitation to tender for a works contract reasonably expects to make profits. What should be the measure of profit would depend on the facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party is guilty of breach of contract."

The above reasoning with respect to recovery of loss of profits in a works contract was earlier indicated by Justice V Krishna Iyer in the case of *Mohd. Salamatullah v. Government of Andhra Pradesh*[39]. In this case, the erstwhile Nizam's Hyderabad Government in 1947 entered into a contract with the plaintiffs-appellant for the manufacture and supply of 10,000 'single barrel twelve bore bridge loader' guns which were priced at Rs. 125 per piece for the purpose of civil defence for the State of Hyderabad. Although some of the guns were manufactured, the contract could not be completed owing to a breach on the part of the State. The plaintiff

[38] A.T. Brij Paul Singh v. State of Gujarat, AIR 1984 SC 1703.
[39] Mohd. Salamatullah & Ors v. Government of Andhra Pradesh, AIR 1977 SC 1481.

sued for damages which included, *inter alia*, a claim of loss of profits at the rate of 20% per piece. The trial court found, based on the evidence, that the plaintiffs themselves have estimated profits at the rate of 15% per piece and thus reduced the claim to Rs. 1,87,500. However, on appeal the High Court reduced the profit rate to 10% without giving any reason. The Judgement of Supreme Court authored by Justice Krishna Iyer restored the award of damages given by the trial court with regard to the estimated loss of profits. The stark feature of this case is that the Supreme Court affirmed the quantification of damages for loss of profits which was based on a guesswork by the trial court.

This position of Law for the award of loss of profits was further affirmed by the Supreme Court in *Dwarka Das v. State of Madhya Pradesh.*[40] In this case, the respondent had invited tenders for the construction of a boy's hostel at polytechnic Ujjain. The tender of the appellant was accepted and an agreement was executed between the parties on 26.12.1960 and time line for the completion of the work was set at 29 months with further timelines for different stages of the work which included, inter alia, that ¼ of the work should be completed within 5 months. The work order was issued on the same date and the construction began on 28.12.1960. However due to the obstructions caused by the superintending engineer, the work was not completed on time and the contract was rescinded by the respondent on 19.6.61 stating that even after the expiry of 9 months not even 10% of the work has been completed. The appellant, treating this as a breach of contract, sued for damages claiming Rs. 20,000 for the breach on the ground that if the contractual work had been carried out, he would have earned profit of 10% on the Rs. 2 Lakhs which was the value of the contract. The suit was decreed by the trial court in favor of the appellant but the High Court reversed the position. The Supreme Court by setting aside the judgement of the High Court and following the judgements in the cases of *Mohd. Salamtullah*[41] and *AT Brij Paul Singh*[42] held that:

> "[W]hen the breach of contract is held to have been proved contrary to law and term of the agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate court was not justified in disallowing the claim of the appellant for Rs. 20,000 on account of damages as expected profit out the contract which was found to be illegally rescinded."

This position of Law emerging out of the combined reading of *AT Brij Paul Singh*[43] and *Dwarka Das*[44] cases, regarding the recovery of expected loss of profits has been further affirmed by the Supreme Court of India in *M/s MSK Projects(I) v. State of Rajasthan*[45] where the Supreme Court found the claim unreasonable as the contractor had not completed his side of the bargain with respect to the phase of the work for which he claimed loss of profits.

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[40] Dwarka Das v. State of Madhya Pradesh, AIR 1999 SC 1031.
[41] Mohd. Salamatullah & Ors v. Government of Andhra Pradesh, AIR 1977 SC 1481.
[42] A.T. Brij Paul Singh v. State of Gujarat, AIR 1984 SC 1703.
[43] *Id.*
[44] Dwarka Das v. State of Madhya Pradesh, AIR 1999 SC 1031.
[45] MSK Projects (I) (JV) Ltd. v. State of Rajasthan (2011) 10 SCC 573.

6.9 COMBINED CLAIMS OF RELIANCE AND EXPECTATION LOSS:

It had been laid down by several judgements of Indian as well as foreign courts that both reliance loss and expectation loss are mutually exclusive to prevent double recovery.

Culliance v. British 'Rema' Manufacturing Co Ltd[46] is a case on this point. In this case the plaintiff, Cullinane, had bought a 'clay pulverizing' machine from the defendant British 'Rema' Manufacturing Co. Ltd (BRMCO) with a warranty that the machine processed clay at a rate of six tonnes per hour. But it was later discovered by the plaintiff that the machine can process clay at a rate of merely two tonnes per hour and therefore useless for commercial activity. He therefore sued BRMCO for breach of warranty claiming not only the cost of purchasing the machine along with interest, but also, the loss of profits which he would earned over a period of three years if the machine processed clay at the warranted rate by contending that he is entitled to recover damages to put him in the position which he would have been in if the contract had been fulfilled. For the loss of profits, he argued that the lost profits should be calculated on the average annual earnings as it reflected what he would have earned if the machine was fit for its purpose. BRMCO defended the claim on the basis of the rationale under *Hadley v. Baxendale*[47] and argued that both capital loss for the machine and the profit loss could not be recovered simultaneously. Rejecting the combined claim of both capital and profit loss, the court held that Cullinane could not recover them both as these claims are alternative.

Another case with regard to rejection of simultaneous claim of reliance as well as expectation loss is *C & P Haulage v. Middleton*[48]. In this case Mr. Middleton rented the preemies of C & P Haulage for the purpose of using it as a garage.

Thus, so far, combined claims of both reliance as well as expectation loss is not recoverable to prevent double recovery. However, *Chitty on Contracts* presents a slightly refined version of this position. It states:

> "This position is correct if it is interpreted to mean that the claimant should not recover his gross profits expected under the contract and also the wasted expenditure incurred in reliance of the contract which he intended to meet from the gross profits. A claimant should, in principle, be able to recover for both profit and reliance loss as long as both claims do not overlap."[49]

In *McRae v. Commonwealth Disposals Commission,*[50] as discussed earlier, along with the claim of wasted expenditure, there was also a simultaneous claim of "loss of revenue" which the ship *Gippsland* might have been expected to make (as negotiations were ongoing for the use of the vessel for trade between King Island and Melbourne) if she had not been devoted and rerouted to the futile tanker salvage expedition. This expected profit was estimated at £75 per week which calculated for a 14-week period amounted for £1050. Since there was no concluded contract for this trade, the claim was not accepted in totality. However, the High

[46] Cullinane v. British 'Rema' Manufacturing Co Ltd, [1954] 1 QB 292 (United Kingdom).
[47] Hadley v. Baxendale, [1854] EWHC J70 (United Kingdom).
[48] C & P Haulage v. Middleton, [1983] 3 All ER 94.
[49] CHITTY ON CONTRACTS, Chapter 26, ¶ 26-029 (Sweet & Maxwell, 32nd ed.).
[50] McRae v. Commonwealth Disposal Commission, (1950) 84 CLR 377 (High Court of Australia).

Court of Australia did allow them £500 under this head computed as "daily value" of the vessel at £50 per week for a period of 10 weeks which it could have earned had it not been diverted for the futile salvage expedition.

In *Lloyd v. Stanbury*[51], discussed earlier, in addition to the claim of pre-contractual expenditure (which was allowed by the court) there was also a claim under item 13 for the loss of earnings which was included by way of special damages amounting to a figure of £2,400 but later reduced to £1000. The plaintiffs argued that the defendant knew that the plaintiffs' purpose in buying the land was to re-establish his earning potential and that they must have known that the breach of contract would delay that process. Brightman J, though expressing his surprise over this combined claim, allowed the claim but reduced it to £250 and stated that:

> "I have never known a claim of this sort made in this type of case but that is no reason why, in proper circumstances, it should not be a proper claim … It is correct to say that [the defendant], by breaking his contract, postponed the date when [the plaintiff] would be earning again.
>
> I have felt some considerable doubt about this claim … but … I think it is correct to say that [the defendant] did, by his wrongful act, disrupt for a period of time [plaintiff's] earning potential for which he is entitled to reasonable but not extravagant compensation."

This position also resulted in the increasing theoretical discussion about the true reason for enforcement of promises. One of the main strands of this debate has been that the role of contractual law is functional in nature and it is designed to reflect certain social values, be it the 'economic welfare theory' of Posner[52] or the ideal of dispute-settlement as expressed by Atiyah[53] etc. Another relevant development in this regard has been the development of the theory of reliance interest.[54] These developments challenge the traditional theory, based on the Rule laid down in *Hadley v. Baxendale*[55] that, only bargained for reliance could be relevant and that unbargained for reliance is not a part of contract law. But the courts in England have crafted ways to ensure protection for unbargained reliance by utilizing estoppel-based techniques and doctrines, thus initiating a new debate in the field of contractual law and changing the perceptions about liability.[56] These developments require a flexible approach while awarding damages.

In the case of *Henville v. Walker,*[57] the appellant was considering purchasing land in a residential area for the purpose of development of residential apartments. As a part of the purchasing process, the appellants drafted a feasibility report regarding the expected returns from the project. This report was based on estimates of construction costs, other ancillary

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[51] Lloyd v. Stanbury, [1971] 1 W.L.R. 535 (Chancery Division of High Court of England and Wales).
[52] *See* Posner, Economic Analysis of Law (Little Brown ed., 2d ed., 1977) as cited in Marc Owen, *Some Aspects of the Recovery of Reliance Damages in the Law of Contract*, 4(3) OXFORD JOURNAL OF LEGAL STUDIES 393, 394 (1984).
[53] *See* Atiyah, *Contracts, Promises and the Law of Obligations*, 94 LAW QUARTERLY REVIEW 193 (1978).
[54] *See* Marc Owen, *Some Aspects of the Recovery of Reliance Damages in the Law of Contract,* 4(3) OXFORD JOURNAL OF LEGAL STUDIES 393, 394 (1984).
[55] Hadley v. Baxendale, [1854] EWHC J70 (United Kingdom).
[56] *See* Marc Owen, *Some Aspects of the Recovery of Reliance Damages in the Law of Contract,* 4(3) OXFORD JOURNAL OF LEGAL STUDIES 393, 394 (1984).
[57] Henville v. Walker, [2001] HCA 52.

costs and expected selling prices of these residential units. The appellant was an architect and relied on their own expertise for the estimation of costs. The appellant relied on information provided by the respondent, the seller in this case, for information regarding the selling price and marketability of these residential units. On completion of the project, it was realized that the costs were substantially underestimated while the selling prices were substantially overestimated, thus putting the appellant in an undesirable position. The appellant made claims for the loss he had incurred and for the profit that he had lost due to overestimated selling price provided by the seller.

In this case, Gleeson, C.J. opined that "The appellants undertook a risky business venture, which resulted in a loss. The decision to embark upon the venture was made because of an expectation of a certain level of profit regarded as sufficient to justify taking the risk. That expectation was the consequence of the combined effect of two errors, one made directly by the appellants, and the other made as a result of their reliance upon misrepresentations made by the respondents." While the Court acknowledged that the happenings of the case had led to a loss of profit, they ordered that the appellants only be awarded for the amount lost in terms of incurred expenditure due to this misrepresentation.

Further, in the case of *Hunt v. New Plymouth District Council,*[58] the Council was the successor to a leasehold land consisting of several individual properties. The appellant was one such leaseholder. In 1989, the Council adopted a policy that allowed leaseholders to purchase the free-holding rights to properties. Despite issuing circulars affirming the same, for political reasons, free-holding rights could not be given to the leaseholders. Mr. Hunt, the appellant in this case, had purchased his brother's share of the leasehold while also significantly renovating the property, relying upon the circulars earlier issued by the Council. Mr. Hunt pleaded that he suffered losses based on his reliance of the circulars issued by the Council that led him to reasonably believe that he would be able to attain freehold rights over the property. He further pleaded that these circulars raised expectations about the prospects of being able to freehold these properties. These circulars also caused an increase in price of the properties which would have been beneficial to Mr. Hunt if he was allowed to freehold the property. The Court excepted neither of these claims holding that the Council did not owe Mr. Hunt such a duty of care and that the Council could make changes to their policies as per their will. Additionally, the reliance loss claim was barred by limitation.

Billion Property Developments (Pty) Ltd v. Rhino Log Furniture and Lapas Cc & T/A Log Furniture[59] is a South African case related to combined claims of reliance and expectation loss. In this case, the plaintiff instituted action against the defendant for breach of a lease and claimed for the arrears. The plaintiff also claimed arrears from the second defendant on the ground that he was the principal-debtor and the surety of the first defendant. The defendant's counter claim is that the duly authorised agent of the plaintiff made a number of false yet relevant claims to the defendant which induced them to enter into the lease agreement in the first place. These misrepresentations include information such as the quality of the

[58] Hunt v. Plymouth District Council, [2011] NZCA 406.
[59] Billion Property Developments (Pty) Ltd v. Rhino Log Furniture, (51992/2016) [2019] ZAGPPHC 53 (4 March 2019).

shopping centre in which the premise would be leased and the marketing that the plaintiff would undertake in order to create traction and attract customers. The defendants pleaded with the Court that they be awarded such that the position they would be in on receiving these damages, be the same as what it would be, had the representations made by the plaintiff been true. The plaintiff contended that the defendant cannot claim damages for the costs related to the business while also claiming for the loss of profits. The plaintiff based this argument on basic commercial logic. Costs are incurred to arrive at a profit and if a claim for profit is already being made, costs would have to be incurred for the sake of the profit. By this logic, a claim for costs cannot be made along with a claim for profit. While the Court accepted the rationale provided by the plaintiff, they opined that it was inapplicable to the case at hand. The Court opined that the claim of lost profits was based on the lost opportunity of the defendant to operate their shop somewhere else in this case, and for that reason would not be an impediment to a claim for costs.

Alvin Nicholas Nathan v. Raffles Assets (Singapore) Pvt. Ltd[60] is a Singaporean case on the point of combined claims of reliance and expectation loss. In this case the plaintiff, Alvin Nicholas Nathan was a businessman who had leased a premise from a landlord for a period of two years. As per the lease agreement, on the expiry of two years, Alvin could renew it with an increase in rent that would be capped at 20 percent. During the course of the agreement, the plaintiff learned that the landlord had assigned the lease to the defendant, Raffles Assets. Thereafter, the defendant informed the plaintiff that extensive renovation work needed to take place on the premise and that he could no longer operate his business from there. The defendants offered to waive the remaining rent that the plaintiff had to pay in exchange for his vacating of the premise. The plaintiff did not accept the offers made by the defendant and instead pursued the matter in Court. The plaintiff made a claim for the expenditure that he had incurred on the renovation of the premise, stating that he could have recovered these costs from the profits that would have arisen, had he been able to operate his business from the premise for his entire lease term. Apart from this, he also made claims for the costs of relocation to an interim premise followed by a current premise. The case was first decided by the High Court which accepted the claims of the plaintiff. The Court awarded him damages for the renovation of the premise, thus accepting his claim. However, the Court did not award him damages for the cost of moving from an interim premise to the current one. Aggrieved by this decision, the plaintiff appealed the matter. The Court of Appeal disagreed with the views of the High Court. While they awarded the plaintiff damages for shifting from the interim premise to the current one, the Court did not award the plaintiff damages for the cost of renovating the original premise as did the High Court. However, since the Court realized that this appeal was only making the appellant/plaintiff worse off, the Court dismissed the appeal, thus making the order of the High Court final.

In the case of *J.S. Chaudhary v. the Vice Chairman*,[61] the appellant entered into a contract to construct 448 flats in a particular colony with the respondent, the Delhi Development Authority. The respondent made certain deductions from the amount that was payable to

[60] Alvin Nicholas Nathan v. Raffles Assets (Singapore) Pvt. Ltd, [2016] SGCA 18.
[61] J.S. Chaudhary v. The Vice Chairman, DDA, 183(2011) DLT723

the appellant on the completion of the work. The reason behind doing so, as cited by the respondent, was that the appellant had completed the work envisaged in the contract with delay. The appellant argued before the Court that this delay was due to the actions of the respondent, and that they should not be held accountable for the same. The Court accepted this argument which enabled the appellant to make two claims, the first being the remainder amount that was owed to them for the completion of the contract and the second being the loss of profit from delay in completion of the contract caused by the respondent, that the appellant could have otherwise earned from performing other work. While allowing the second claim, with regard to the amount, the Court referred to the landmark Supreme Court judgement of *T. Brij Paul Singh v. State of Gujarat*[62] in which it was observed:

"What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid."

The Court awarded damages for both the claims of the appellant, thereby accepting the appellants claim for expectation loss.

Further, in *Union of India v. Jain Associates*[63] the Supreme Court of India has expressly stated that s.73 of the Indian Contract Act, 1872 clearly encompasses a claim of damages and loss of profits.

6.10 CONCLUSION

As per Section 73 of the Indian Contracts Act,[64] "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach [….]."

In order for Section 73 of the Act to accommodate for claims of both reliance loss and expectation loss, there are two possible courses of action that can be taken. The first would be an amendment to the Section itself. Such amendment becomes essential in order for the amendment to Section 73 to become functional as it would explain what would constitute claims in the nature of reliance or expectation loss.

Another course of action that may be taken and that requires significantly less procedural compliance is a change in terms of the manner in which Section 73 is interpreted. By deploying a broader interpretation, "compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach" can be interpreted to include both reliance loss and expectation loss. By understanding the losses that naturally arise from breach of contract in a broader sense, loss in terms of expenses incurred relying on the execution of the contract (reliance loss) and profit forgone due to non-execution of the contract (expectation loss), can be construed as losses that naturally

[62] T. Brij Paul Singh v. State of Gujarat, (1984) 4 SCC 59
[63] Union of India v. Jain Associates & Ors, 1994 (2) SCALE 604.
[64] The Indian Contract Act, 1872, § 73.

arise in the usual course of breach. Such broad interpretation helps avoid the tedious procedures and rules that would have to be complied with in case the Section were to be amended.

While broader interpretation seems like a relatively less tedious task as compared to amendment of the Section, it poses the problem of subjectivity that is bound to crawl into any matter decided by judges. Given that the interpretation of Statutes and their subsequent application to cases is a subjective task that varies in nature from judge to judge, a uniform broader sense of interpretation of the Section seems like a difficult task. While it may help avoid certain procedural requirements entailed in amending the Section, a uniform standard of interpretation seems idealistic given the subjectivity of interpretation.

It is important to note the following points in conclusion:

1. It is important to note that reliance loss or expectation loss are not punitive in nature. They are rather the theoretical principles used to measure the damages a party is legally is entitled to.[65] i.e. they are used to measure the amount that will make the party indifferent to the breach.
2. Although reliance damages can be claimed in traditional contractual disputes too, they are generally claimed in cases of promissory estoppel because even if there is no finalized contractual bargain, one party has relied on a promise and thus is damaged to the extent of their reliance.
3. Both reliance loss and expectation loss are subject to the principle of remoteness. Even if it might be thought that a particular item of loss is caused by the breach of contract, there comes a point where the law says some losses are too remote and therefore, cannot be recovered from the breaching party.[66]
4. A combined claim of reliance loss and expectation loss should be made recoverable when both losses do not overlap. And in case of overlap they should be made recoverable barring the double recovery of overlapping.
5. Section 73 of the Indian Contract can be amended in this regard stating that "nothing in this section shall be construed to prevent the recovery of combined claims of expectation loss and reliance loss.

   For the purpose of this section reliance loss means the loss one party has suffered by relying on the promise of the breaching party, and expectation loss means the loss the party has suffered due to non-performance of the promise and it includes opportunity cost, loss of profits, cost of displaced alternatives."

Strengthening Indian Contract Enforcement regime by giving statutory recognition to reliance and expectation loss will provide assurances to the investors as well as contracting parties that they business as well as economic interests are well-protected under the Indian Law and will be enforced swiftly in case of any dispute. This in turn will surely have an impact on improving the ease of doing business in India.

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[65] *See* Clark v. Maccourt, [2013] HCA 56 (High Court of Australia).
[66] Greg Waugh, DAMAGES FOR BREACH OF CONTRACT 6 (2017).

CHAPTER 7: LIMITATION PERIOD UNDER THE ARBITRATION ACT AND SPEEDIER RESOLUTION OF COMMERCIAL DISPUTES

7.1 INTRODUCTION

As part of measures to improve the ease of doing business in India the Government has introduced several reforms. The introduction of the Insolvency and Bankruptcy Code, several amendments to the Arbitration and Conciliation Act of 1996 and the establishment of commercial courts are all intended to improve the speed and efficiency to resolve commercial disputes in India. In this chapter we would explore the efficiency and implications of various reforms and amendments done to the Arbitration and Conciliation Act 1996.

The first law on arbitration in India was the Indian Arbitration Act, 1899 which was limited in its application to presidency towns such as Calcutta, Bombay and Madras;[1] this was followed by the enactment of the Code of Civil Procedure in 1908 whose Second Schedule was dedicated to Arbitration and later in 1940 a first significant legislation exclusively for Arbitration came into being, the Arbitration Act, 1940 which repealed the Second Schedule of the Code of Civil Procedure, 1908 and the earlier Arbitration Act 1899.[2] India was introduced to the legislative system of alternative dispute resolution in the form of Indian Arbitration Act, 1940 during the legacy of the British rule. The 1940 Act however, was heavily criticized by the judiciary as being time consuming, expensive and elaborate, as it provided for the intervention of courts in all stages of arbitration in the sense that it was a court structured and court controlled arbitration that resulted in degenerative legal quagmire impoverishing the parties involved in terms of time and money.[3] In view of globalization and liberalization in 1991 and an increase in global trade, a need to harmonize the concept and system of alternative dispute resolution of various legal systems the Model Law on International Commercial Arbitration and Conciliation Rules was adopted by UNCITRAL[4] and was recommended by the UN General Assembly for adoption by all countries, which led to the enactment of the present Arbitration and Conciliation Act, 1996. The Arbitration and Conciliation Act, 1996, has undergone amendments twice namely Arbitration and Conciliation (Amendment) Act, 2015 and Arbitration and Conciliation (Amendment) Act, 2019, both significantly affecting the proceedings and such other subject matter in the primary Act.

7.2 REPORTS OF COMMISSIONS AND COMMITTEES

The Law Commission being one the important agency of the Government of India has been working towards legal reforms to ensure good governance in India under the Rule of Law

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[1] Bibek Debroy & Suparna Jain, *Stregthening Arbitration and its Enforcement in India – Resolve in India* 6, https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf. (last visited Apr. 20, 2020)
[2] *Id.*, at 7.
[3] Guru Nanak Foundation v. Rattan Singh & sons, AIR 1981 SC 2075.
[4] United Nations Commission on International Trade Law.

since its formation in 1834. They have accordingly worked towards this motto in the field of arbitration and commercial disputes as well. This section of the chapter deals with highlighting some of the reports of different law commissions that has dealt with the topic in discussion.

7.2.1 8th Law Commission Report

The origin of arbitration and commercial disputes are inseparable from one another. Arbitration was recognized by common law in England and was under the control of the King's courts initially. As British overseas trade grew and the Empire expanded disputes between merchants and traders increased and were frequent; this along with other developments led to the passing of Arbitration Act, 1950 in England.[5] In the United States of America, the Chamber of Commerce of the State of New York was the first to privately administer tribunals of businessmen and became first administrator of arbitrations.[6] In the US, the majority of arbitration are 'institutional arbitration' some of it dating as far back as 1761.[7] Recognizing the difficulties and issues created by the time-limits prescribed for arbitral award under the Arbitration Act 1940, the 8th law commission of India under the Chairmanship of Justice H.R. Khanna in its report No. 76th had recommended two alternatives: one, to completely delete the provision relating to time limit, which would avoid questions relating to validity of award made beyond prescribed time-limit, and two, to increase the time-limit taking into consideration the difficulties caused and terming the prescribed time-limit as unrealistic.[8] The report also provided for an extension of time by 12 months to complete an arbitration proceedings under S. 28 of the Arbitration Act 1940, however, it also recommended that having a rigid rule of non-extension of time beyond 12 months would cause undue hardship to certain parties whose cases involve inspection of voluminous evidence.[9]

7.2.2 16th Law Commission

The 16th law commission under the chairmanship of Justice B.P. Jeevan Reddy in it 176th report on Arbitration and Conciliation (Amendment) bill, 2001, was of the view that the provision of fixing of time-limit for arbitration is necessary taking into consideration the long delays and huge expenses involved in arbitration. However, it opined that time-limit can be realistic subject to extension only by the order of court. Report No. 176 of the law commission on Arbitration and Conciliation (Amendment) bill, 2001, notes the need to speed up arbitral proceedings both before the arbitral tribunal and before the Court.[10] The report had suggested amendments to Sec 23 and 24 of the Arbitration and Conciliation Act, 1996, by inserting Sections 24-A and 24-B, to fix time-limits for filing pleadings and

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[5] GILL, LAW OF ARBITRATION (1975) Gill. (as cited in LAW COMM'N OF INDIA, REP. NO. 76, ARBITRATION ACT, 1940 (1978)).
[6] WEHRINGER, ARBITRATION: PRECEPTS AND PRINCIPLES 5 (1969). as cited in LAW COMM'N OF INDIA REP. NO. 76, ARBITRATION ACT, 1940 (1978)).
[7] LAW COMM'N OF INDIA, REP. NO. 76, ARBITRATION ACT, 1940 (1978).
[8] *Id.*, Point 11.11.
[9] *Id.*, Point11.14.
[10] LAW COMM'N OF INDIA, REP. NO. 176, ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2001, point 1.8 (2001).

recording evidence and shifting the power to fix time schedule from the parties to the arbitral tribunal.[11] Further it is to be noted that, it is in this report that the insertion of Section 29-A first finds its existence which prescribes 12 months for arbitrators to complete an arbitral proceedings and a further extension of 12 months upon parties consent. The provision also fixed a time limit of one month for the court to grant extension upon application made before it by the parties. However, the commission was not inclined to suggest a cap on the power of extension as recommended by the earlier report number 76 of the 8th law commission. It notes that beyond the period of 24 months (initial period of 12 months + 12 months post party consented court order) neither the parties nor the arbitrator can extend the time and only a court order would be deemed appropriate in this regard; however, arbitration is said to continue pending disposal of such an application to the Court. It was also suggested that termination of arbitration proceedings owing to extension time-limit would be counterproductive and further suggests that the proceedings are to continue till the award is passed.

The 16th law commission report No. 176 on Arbitration and Conciliation (Amendment) bill, 2001, also suggested the insertion of a new Chapter XI in Part I to the Arbitration and Conciliation Act, 1996, and an addition of Sections 43A to 43D, which provided for the establishment of Fast Track Arbitral Tribunal with such enumerated powers and functions and a time-limit of 6 months to pass the award[12] however without oral hearings, although application for oral hearings may be made to the tribunal. This may potentially prove to be beneficial where claims are small and issue for consideration is relatively straightforward.

Following the above said 16th Law Commission Report the Government of India invited comments from State Governments and commercial organizations in addition to suggestions made at the special seminar organized by Law Ministry and accepted most of the suggestions it received. In 2004, the Government of India constituted a Committee under the Chairmanship of Justice Saraf, also known as Justice Saraf Committee on Arbitration, to study implications of recommendations of the Report No. 176 of the 16th Law Commission and the proposed Arbitration and Conciliation (Amendment) Bill, 2003 and to make suggestions, the committee submitted its Report on 29th January, 2005.

Following this Report the Parliamentary Standing Committee under the Chairmanship of Mr. E.M. Sudarsana Natchiappan of the Committee on Personnel, Public Grievances, Law and Justice, presented its Ninth Report relating to Arbitration and Conciliation (Amendment) Bill, 2003.[13] The said 2003 Amendment Bill had suggested changes to Section 11 of the Principal Act in terms of power of appointment of arbitrators[14] and, among other things, the extension of time period from thirty days to sixty days to do so, but the Parliamentary Standing Committee however, was of the view that thirty days was sufficient

[11] *Id.*
[12] *Id.*, at 2.38.3.
[13] Parliament of India, Rajya Sabha, Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Ninth Report on The Arbitration and Conciliation (Amendment) Bill, 2003, Presented to Rajya Sabha on 4th August, 2005 and Laid on the table of Lok Sabha on 4th August, 2005.
[14] The Arbitration and Conciliation (Amendment) Bill, 2003, cl. 12.

and the extension was unnecessary.[15] On the proposed amendment to insert a new Section 29A(1) to the Principal Act in order to speed up proceedings and to set time limit to make awards, the Parliamentary was of the view that such statutory time limit has seldom worked in India and went on to further opine that such time limits would lead to success only if there were set consequences for non-compliance of such time limit.[16]

Of the many suggestions made by the above said Committee the one relating to avoidance of pendency of cases seems to be of extreme importance to this project. The Committee suggested the insertion of A Schedule which would deal with sole arbitration and would be governed by Part I of the Principal Act; the said Schedule would contain, among other things, a provision narrating consequences for not disposing cases within stipulated time limit as follows:

- To withdraw the fees of the arbitrator or to blacklist them and not to allot further cases to such blacklisted arbitrators.
- To empower the institution to take action against defaulting arbitrators.
- To make provision for the arbitrators to inform the institution if such arbitrator is of the opinion that the delay was caused due to the fault of the parties.

It was eventually viewed that the provisions of the Bill were insufficient and disputable and therefore the said 2003 Bill was withdrawn with reasons that it would be reintroduced after considering recommendations made further.

7.2.3 20th Law Commission on Arbitration and Conciliation Act, 1996

The 20th law Commission under the Chairmanship of Justice A.P. Shah in its report No. 246 on the Arbitration and Conciliation Act, 1996 recommended changes to the effect of reduction of intervention of Courts in arbitration proceedings. The many issues that had surfaced through the judgment of BALCO Case[17] such as remedying the foreign-seated arbitration to apply for interim measures under Section 9 to secure assets or to take evidence provided it is expressly mentioned in the agreement and other issues concerning future signed agreements. It is said that delays are inherent in arbitration proceedings and the costs of arbitration are tremendous. Courts despite playing a pivotal role to give finality to issues arising before, during and after arbitration, pose threats in terms of matters relating to arbitration getting caught up in the huge list of pending cases before the courts. Post an arbitral award, a challenge to it under Section 34 of the Arbitration and Conciliation Act, 1996, the award becomes inexecutable owing to such petitions pending in courts for several years thereby frustrating the objective of quick alternative disputes resolution.[18] To remedy this problem, the commission recommends setting up of separate and dedicated benches at

[15] LAW COMM'N OF INDIA, REP. NO. 176, *supra* note 10, Point No. 3 of the Observations of the Committee on the Arbitration and Conciliation (Amendment) Bill, 2003.
[16] LAW COMM'N OF INDIA, REP. NO. 176, *supra* note 10, Point No. 7 of the Observations of the Committee on the Arbitration and Conciliation (Amendment) Bill, 2003.
[17] Bharat Aluminum Co. v. Kaiser Aluminum Technical Inc., (2012) 9 SCC 552.
[18] LAW COMM'N OF INDIA, REP. NO. 246, AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996. Chapter II para 3 (2014).

the High Court level to deal with arbitration cases as already in practice at the Delhi High Court.[19] The commission here takes note of the fact that initial delay occurs during the appointment of arbitrators by the court, the applications of which are usually observed by the commission to be pending in the court for years. To remedy this issue, the commission suggests that the appointment of arbitrators should not be regarded as a judicial act, i.e. appointment only by High Court and/or Supreme Court, but the courts must have the power to delegate the appointment to specialized, external persons or institutions. Further recommending that where an arbitrator is already appointed by the High Court such orders must become non-appealable and proposed an addition to Section 11(13) of the Arbitration and Conciliation Act, 1996, to dispose of matters within 60 days from service of notice on opposite parties.[20]

The report also suggested remedy to tackle delay in adjudicating a dispute, where multiple arbitrations were initiated under same arbitration agreement, in the form of an explanation to Section 23 of the Arbitration and Conciliation Act, 1996,[21] to make sure counterclaims and set offs to be adjudicated by a tribunal avoiding a separate reference by the respondent unless the issue falls outside the purview of the original arbitration agreement.[22] Followed by a suggestion that prospective arbitrators are to provide mandatory disclosure of their availability to expeditiously adjudicate the proceedings in a time bound manner thereby remedying delay caused in ad-hoc arbitrations.[23] Further suggesting an addition to the preamble of the 1996 Act, the Law Commission condemned the frequent adjournments in arbitration proceedings and recommended use of technology and to ensure uninterrupted sittings of the tribunal.[24]

7.2.4 20th Law Commission on Commercial Court

The 20th law Commission under the Chairmanship of Justice A.P. Shah in its report No. 253 (January 2015) on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015 in its additional provisions makes 3 recommendations based on the 20th Law Commission Report (Report No. 246).[25] They are as follows:

1. Applications arising out of an in international commercial arbitration involving more than one crore and filed in a High Court are to be heard by Commercial Division of High Court and in its absence a regular Bench of the High Court.
2. Applications arising out of domestic arbitration are to be heard by Commercial Division of High Court or a regular High Court bench in its absence or a civil court depending on the pecuniary jurisdiction.

[19] *Id.*, para 23.
[20] *Id.*, para 24.
[21] The Arbitration and Conciliation Act, 1996, §23 (Statement of claim and defense).
[22] LAW COMM'N OF INDIA, REP. NO. 246, *supra* note 18, point 13.
[23] *Id.*, point 7(vi).
[24] *Id.*, Chapter 3, Amendment to preamble.
[25] LAW COMM'N OF INDIA, REPORT NO. 253, COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION OF HIGH COURTS AND COMMERCIAL COURTS BILL, 2015, point 3.24.4-5. (2015).

3. All appeals from arbitration case involving commercial disputes of more than one crore against Commercial Division or commercial court are to be heard by Commercial Appellate Division.

7.2.5 Justice B.N. Srikrishna Committee

Report of the High-level Committee to Review the Institutionalization of Arbitration Mechanism in India in other words Justice B.N. Srikrishna Committee in July 2017,[26] has suggested several amendments to Arbitration and Conciliation Act 1996. The primary recommendation of the commission was to set up an autonomous body called the Arbitration Promotion Council of India to grade arbitral institutions in India. The advantage of institutional arbitration is that they will be empowered to set their own timelines, monitoring speed and efficiency of arbitral proceedings before them. However, for the purpose of this project we are concerned with the following recommendations:

1. Setting up timelines under Section 29A of the Act[27]:
    - Limit its scope to domestic arbitration only.
    - 6 months to submit pleadings
    - Time-limit (12 months) to complete arbitration proceedings begins after the abovementioned 6 months
    - Continue arbitral proceedings during pendency of court proceedings for extension of time
    - An application to be deemed granted if not disposed within time-limit set under Sec 29A
2. Speedy appointment of Arbitrators under Section 11 of the Act[28]: Appointment of arbitrators to be done only by arbitral institutions designated by Supreme Court or High Court without both these Courts having to determine existence of arbitration agreement.

The Report however, is silent as to when such a date to compute the six-month time period for submission of pleadings would commence making it unclear as to whether the first preliminary meeting of the parties with the arbitral tribunal or the commencement of tribunal upon reference would be the start date to calculate. The Report is also silent on whether extension for submission of pleadings, amendment to pleadings, beyond six months would be permitted.

7.3 LIMITATION ACT, 1963

The 2015 amendment, stated above, introduced for the first time a time limit for pronouncing arbitral award in the form of insertion of Section 29A to the Arbitration and

[26] REPORT OF THE HIGH-LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALIZATION OF ARBITRATION MECHANISM IN INDIA, 30 July 2017, http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.
[27] *Id.*, Key recommendations – Point 5, Page 4, 63-65.
[28] *Id.*, at 6, 73-76.

Conciliation Act, 1996; 2015 was also the year the Commercial Court Act came into existence which under Section 10 extends the jurisdiction of Commercial Court in arbitration matters. The 2019 Amendment Act, stated above, however exempted the international arbitration proceedings from Section 29A. Below is an analysis of the provisions of the above-mentioned legislations and also in the light of Limitation Act, 1963.

Limitation Act came into existence to fix or prescribe a period to bar legal action beyond that point. The Limitation Act, 1963, governs Law of Limitation in India. The Halsbury's Laws of England states the objectives of Law of Limitation as follows- The Courts have expressed at least three different reasons supporting the existence of statutes of limitation, they are:

(a) That long dormant claims have more of cruelty than justice in them;
(b) That a defendant might have lost the evidence to dispute the State claim;
(c) That persons with good causes of actions should pursue them with.

The consideration behind the law on limitation is that a right is deemed to be non-existent if it is not exercised for a long time; and also, to eliminate the state of constant doubt, uncertainty and suspense regarding the right in a property or rights in general.

Section 43 of the Arbitration and Conciliation Act, 1996, states that Limitation Act, 1963, would be applicable to arbitration proceedings similar to the way in which it would apply to any court proceedings and that the arbitration proceedings is deemed to have commenced on the date when the respondent receives a request for the dispute to be referred to arbitration.[29] The section also mentions that the Court may extend the time limitation mentioned in an arbitration agreement, provided in its opinion such limitation would cause undue hardship[30] to the parties and to the proceedings.[31] The section also provides that application of Limitation Act, 1963, can be excluded for the period between commencement of arbitration and the date of court[32] order when an arbitral award is ordered to be set aside by such court.[33] It is stated that the purpose of Section 43 of Arbitration and Conciliation Act, 1996, is to make provisions of Limitation Act, 1963, applicable to arbitration.[34]

Moving further, under Limitation Act, 1963, there have been several instances[35] where the courts have applied Section 137 of the Limitation Act, 1963, to arbitration cases. Section 137 states that when, for an application, no limitation period has been provided elsewhere, then such application needs to be filed within three years from the date on which the right to sue has accrued. It is often believed that if a statute is silent and there exists no specific

[29] The Arbitration and Conciliation Act, 1996, §21.
[30] Sterling General Insurance Co. v. Planters Airways, 1 SCC 1975, 603 ("Undue hardship means something not permitted by the conduct of claimant"); Consolidated Investment v. Saponri Shipping, LR 16 (The Virgo Case), 1978, 2. ("undue hardship means undeserved or unmerited").
[31] The Arbitration and Conciliation Act, 1996, §43(3).
[32] Babulal v. Ram Swarup, AIR Raj, 1960, 240 ("Court also includes appellate court").
[33] The Arbitration and Conciliation Act, 1996, §43(4).
[34] Principal Secretary, Irrigation Dept & Ors and Hatti Gold Mines Co. Ltd. v. Vinay Heavy Equipment, AIR 2008 SC 1921.
[35] Dudani Brothers v. State of M.P. 2 Arb. LR 74 MP, 1990; Wazir Chand v. Union of India, AIR 1967 SC 990; Vulcan Insurance v. Maharaj Singh, AIR 1976 SC 287.

prohibition regarding an interpretation then such statute should be interpreted in a manner that would advance the cause of justice. This was reiterated in the case of *State of Goa v. Western Builders*.[36] The case also made some very relevant observation regarding the applicability of provisions of Limitation Act, 1963 to that of matters arising under the provisions of Arbitration and Conciliation Act, 1996, one of which is that the provision of Limitation Act on condonation of delay[37] may be applicable to Arbitration Act 1996 and that it will only be excluded from applicability where different period is prescribed under the Arbitration Act for a given dispute. It has also been held that the arbitrator is bound to apply the provisions of Limitation Act, 1963, to the arbitral proceedings.[38] Although, Limitation Act 1963 is said to apply to limitation in making a claim under arbitration agreements in the same manner as prescribed to contract, i.e. three years, and that any arbitration agreement prescribing shorter period than three years in this regard would be considered void, the Arbitration and Conciliation Act, 1996, is a special law by virtue of which there can be an over-riding limitation period mentioned in it for certain purposes.[39]

The Arbitration and Conciliation Act, 1996, is a special law and Section 29(2) of the Limitation Act 1963, however, mentions that Limitation Act would be applicable to special law only to the extent that it is not expressly excluded from it. Therefore, if an application is said to be made within the prescribed time period under Section 34 of the Arbitration Act 1996 to challenge the arbitral award when it is done so within 30 days from the date of communication of such arbitral award, [40] then the calculation of the time period would commence a day after the receipt of such arbitral award by the parties[41] and such a period does not necessarily expire on the 90th day but would expire at the end of actual 3 calendar months.[42] A proviso to Section 34(3) of the Arbitration Act 1996 provides an additional 30 days to file an application to set aside the arbitral award and it is said that a delay cannot be condoned beyond this limit;[43] however, in exceptional cases, the Supreme Court has permitted the parties to take recourse under Section 14 of the Limitation Act 1963.[44] Therefore, applicability of Limitation Act 1963 to application under Arbitration and Conciliation Act 1996 is restricted to only Section 12[45] and Section 14 of the Limitation Act 1963. This would be in harmony to the objective of Arbitration and Conciliation Act 1996 and makes adhering to the fixed time limits under both Acts as same.

Every appeal filed in India becomes subjected to the Limitation Act 1963. Likewise, Arbitration and Conciliation Act 1996 specifies an appeal mechanism under Section 37 of the same. However, the Section does not prescribe a set time limit to file such appeals. An

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[36] State of Goa v. Western Builders, (2006) 6 SCC 239.
[37] 30 days.
[38] Wazit Chand v. Union of India, AIR 1967 SC 990.
[39] UOI v. Popular Construction Compny, (2001) 8 SCC 470.
[40] Union of India v. Tecco Trichy, (2005) 4 SCC 239.
[41] State of Himachal v. Himachal Techno, (2010) 12 SCC 210.
[42] *Id.*
[43] UOI v. Popular Construction, (2001) 8 SCC 470.
[44] Consolidated Engineers v. Principal Secretary, (2008) 7 SCC 169 (exclusion of time of proceedings bona fide in Court without jurisdiction).
[45] Exclusion of time in legal proceedings.

appeal lies to the Court when the arbitral tribunals' lack of jurisdiction[46] or when parties feel the tribunal is exceeding the scope of its authority[47] or when the tribunal grants or refuses to grant an interim measure.[48] Although the Schedule of Limitation Act 1963 does not specify anything with regard to Arbitration and Conciliation Act, 1996, the savings clause suggests, in case of non-express bar on its application, Sections 4 to 24 of the Limitation Act 1963 shall be applicable.[49] This position was upheld in the case of *Consolidated Engg. Enterprises and Ors. v. Principal Secy, Irrigation Dept. and Ors.*[50] wherein it was held that Limitation Act 1963 is applicable to all court proceedings under the Arbitration and Conciliation Act 1996 so long as it is not expressly excluded[51] by it; and, the calculation of period of limitation for appeals under Section 37 of Arbitration and Conciliation Act 1996, would be governed under Article 116 of the Schedule of the Limitation Act 1963.[52] Therefore it can be concluded that an appeal under Section 37 of the Arbitration and Conciliation Act 1996 has to be filed within a time limit of 90 days as specified under Sections 29(2) of the Limitation Act 1963.

7.4 COMMERCIAL COURTS ACT, 2015 & ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

The Commercial Courts Act, 2015 is said to encompass all the commercial disputes including arbitration and litigation. The Act further specified for the appointment of judges who are experienced in dealing with commercial disputes but fails to specify the criteria to determine such expertise. On careful analysis of the provisions of the Commercial Courts Act, 2015, and the arbitration scenario in the country, one can infer that the reason for inclusion of arbitration disputes under commercial disputes[53] is because of the consequential delay and the clogging up of the judicial system once arbitration disputes enter it at both pre-arbitral stage and at the stage of challenge to the arbitral award. The Commercial Courts Act, 2015, is said to remedy this by speedy disposal of disputes of commercial nature which includes arbitration proceedings as well. The Commercial Courts Act, 2015, further states for the setting up of exclusive Commercial Courts in each State as the court of first instance for commercial disputes[54] and a Commercial Appellate Divisions to be set up in each High Court.[55] However, in the instance of an international commercial arbitration,[56] Section 10(1) of the Commercial Courts Act, 2015, states that Commercial Appellate Division would have jurisdiction to try those matters; this is presumed to have been done to reduce time spent in appellate proceedings, however, this seemed to have created confusion as to which forum would be competent to hear the proceedings related to arbitration.

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[46] The Arbitration and Conciliation Act, 1996, §16(2).
[47] *Id.*, §16(3).
[48] *Id.*, §17.
[49] The Limitation Act, 1963, §29(2).
[50] Consolidated Engg. Enterprises v. Principal Secy, Irrigation Dept., (2008) 7 SCC 169.
[51] *Id.*
[52] North-Eastern Electric Power Corporation Ltd. v. Patel Unity Joint Venture, MC (Arb. A) No. 4 of 2016.
[53] The Commercial Courts Act, 2015, § 2(1)(c).
[54] *Id.*, §3.
[55] *Id.*, §§3A, 4.
[56] The Arbitration and Conciliation Act, 1996, §2(1)(f) (Where one party in the dispute is a foreign company).

There seems to be yet another confusion with the application of Section 10 and Section 15 of the Commercial Courts Act, 2015, in the sense that there is no clarity as to whether a single judge or a division bench in the Commercial Division or the Commercial Appellate Divisions would hear the pending applications and appeals related to arbitration.[57] This was solved by an amendment on 16th December, 2015 where Commercial Appellate Division was substituted by Commercial Division.

Further the apparent inconsistency between the Commercial Courts Act, 2015 and the Arbitration and Commercial Act, 1996 is that even though the amendment to Arbitration Act in 2015 came in existence parallel to the Commercial Court Act, there has not been any amendment to the definition of "Court"[58] in the Arbitration and Conciliation Act, 1996, so as to include the Commercial Division or the Commercial Appellate Division.

Commercial Courts Act, 2015, has provided for Case Management Hearings where the Commercial Division or Commercial Court can prescribe timelines[59] for speedy disposal of suits, but these are not made applicable for Commercial Appellate Division and not directed towards arbitration related matters. However, in the event of application of timelines for disposal of an application, the timeline provided under the Arbitration Act, 1996 would prevail over that of the Commercial Courts Act, 2015, for the simple reason that timeline provided under Arbitration Amendment Act would be statutory and the timeline under Commercial Court Act would have the effect of a delegated legislation. Moving further, Section 14 of the Commercial Courts Act, 2015, provides for disposal of appeals within six months in the Commercial Appellate Division, however, since this Section only applies to appeals, it might not affect the arbitration proceedings before the Commercial Appellate Division where it is filed as a court of first instance. The only way to make both the Acts work in harmony with each other is to address the inconsistencies and contradictions in them which would not lead to prolonged litigation eventually defeating the object of both the Acts.

7.5 ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019

This Amendment Act finds its basis from the above-mentioned Srikrishna Committee Report. The report, as stated earlier in this chapter, had made several recommendations to make India a more pro-arbitration environment. The Committee had made several robust recommendations in this regard such as the establishment of Arbitration Council of India, discussed below; however not all recommendations of the Committee have found their way into the Amendment Act. Provisions relating to a specialist arbitration bar and bench, establishment of permanent standing committee to promote arbitration in India, designated arbitral institutes to appoint arbitrators, emergency arbitrator and emergency award as interim relief etc. which were introduced in line with arbitral institutes in Singapore, Honk Kong, London etc.

[57] Roger Shashoua v. Mukesh Sharma, O.M.P. (Comm) No. 1/2015.
[58] The Arbitration and Conciliation Act, 1996, §2(1)(e).
[59] Commercial Courts Act, 2015, § 15(4).

Some of the major changes this Amendment Act seeks to bring are concentrated on encouraging institutional arbitration[60] with respect to ad-hoc arbitration and to remedy certain practical difficulties[61] which had surfaced post the pervious Amendment Act of 2015. The Amendment of 2019 inserts a new Part 1A to the Act of 1996,[62] this part seeks to establish and incorporate an independent body called as the Arbitration Council of India (ACI) to grade arbitral institutions[63] and accreditation of arbitrators[64] among other things.

One of the provisions of the Amendment Act 2019 is the relaxation of time limit to conclude arbitral proceedings. The 2015 Amendment Act had inserted a new Section 29A into the 1996 Act which set a time limit of 12 months for an arbitral proceeding to arrive at an award. However, the 2019 Amendment has removed such restrictions with respect to international arbitration and retained the same for domestic arbitration. Further, the 2019 Amendment Act also provides for the completion of written submission, both written claims and defence to the claim, within six months of appointment of arbitrators to the arbitral tribunal whereas previously there were no such time limit at all for written submissions.[65]

The primary point of this study was to understand whether this period of 12 month as suggested by the 2015 Amendment Act, which no longer subsists in case of international arbitration, is effective in speedier resolution of commercial disputes. The time limit of 12 months applies to domestic arbitration, with a maximum extension of 6 months subject to the consent of the parties and thereafter of the court in the sense that the award must be pronounced post the date of completion of pleadings and not as previously stated as the date of constitution of arbitral tribunal and to support and restrict the speedy completion of pleadings the time limit of 6 month is prescribed for filing of claims and defense. However, the Amendment Act of 2019 does not mention the consequences of breach of the 6 months' time limit to complete pleadings. The Amendment Act of 2019 also provides for continuation of the arbitrator(s) mandate during the pendency of application by the parties to the courts for extension of time and this mandate to continue till the disposal of the said application. This suggests that the arbitral proceedings would continue during the pendency of the said application in the Court thereby utilizing the time to facilitate speedy disposal of the arbitral proceedings.[66] However, the Amendment Act of 2019 also provides for reduction of the arbitrators fee during the pendency of the said application after giving the said arbitrator(s) and opportunity of being heard in this regard.[67] Conversely, viewing this Amendment, one can say that the time period from beginning till the end of an arbitral proceeding, as stated in the 2019 Amendment, is 18 months because if the pleadings are completed in 6 months then the time limit for making the award begins at the end of 6 months thereby making it 18 months. It can also be noted that the time taken to file rejoinder

[60] The Arbitration and Conciliation (Amendment) Act, 2019, §2, 10.
[61] *Id.*, §6.
[62] *Id.*, §10.
[63] The Arbitration and Conciliation Act, 1996, §43I (India currently has 35 arbitral institutions).
[64] *Id.*, §43J r.w. sched. VIII.
[65] *Id.*, §23(4).
[66] The Arbitration and Conciliation (Amendment) Act, 2019, §6.
[67] *Id.*

in disputes without counter claims or a rejoinder to counter claims in disputes with counter claims shall not be considered as time consumed to complete pleadings.[68]

The Amendment Act provides that the Chairperson of the proposed Arbitration Council of India is to be a judge or a person nominated by the government, this situation is likely to give rise to an issue in disputes where the Indian government is a party in terms of conflict and accusation of bias. The time limit specified is a beneficial step towards speeding up the arbitral procedure, it may however, lead to friction with the rules of an arbitral institution. An arbitral institution usually commands the procedural aspects in an international arbitration and if Section 23(4)[69] is likely to restrict a tribunal from controlling the proceedings, then the impossibility of effectively conducting a multi-party arbitration involving vast number of documents making it difficult to complete the pleadings in 6 months as specified. The Amendment is also not clear as to when the pleadings are said to be complete adding to the confusion. The parties too would be wary about the award in where time requirement is not strictly abided by.

The other difficulty would be that the parties to the arbitral proceedings would be deprived of the option to split the proceedings into two stages where the first one being that of the initial pleadings stage and obtaining of preliminary award and settlement of jurisdictional issues; followed by the second stage, where pleadings are compared and award is pronounced on substantive matters of the dispute. Restricting this would result in stubborn arbitral proceedings where the costs to parties would also escalate. Whatever the critical view only time will tell the effectiveness of the 2019 Amendment Act with regard to speedy disposal of commercial matters, however one can say that it is another step towards the right direction in making India a seat of international arbitration with the establishment of Arbitration Council of India.

7.6 INTERNATIONAL PRACTICE

This section covers various international institutional arbitration rules with respect to time limit and expeditious arbitral proceedings of commercial disputes. These rules however are studied in this chapter as a reference point.

7.6.1 International Chamber of Commerce Arbitration Rules

The International Court of Arbitration is an institute that resolves international commercial arbitration and was established in 1923 under the International Chamber of Commerce. It provides judicial supervision of arbitration proceedings by ensuring application of ICC Rules and assisting parties and arbitrators to overcome procedural hurdles. ICC Arbitration Rules facilitates formal procedure leading to a binding and enforceable decision from a neutral arbitral tribunal honoring domestic arbitration laws and international treaties such as the New York Convention.[70]

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[68] The Arbitration and Conciliation Act, 1996, §23(4).
[69] The Arbitration and Conciliation Act, 1996.
[70] Arbitration Rules in force as from 1 March 2017, International Court of Arbitration, International Chamber of Commerce, published in May 2019.

Article 24(2) of the ICC Arbitration Rules under the 'Case Management Conference and procedural Timetable' provides for setting up of timetable to be followed for conducting the arbitration, where such timetable would be finalized after consulting the parties during the case management conference.[71] This timetable is said to balance the need to complete an arbitral proceeding expeditiously and also provide sufficient time for a party to make their schedule or modify procedural timetables according to their requirements. This would eliminate the tribunal from giving directions impracticable to the set timetable and to the party to unnecessarily delay proceedings counter to the set timetable.

On the other hand, Article 30 of the ICC Arbitration Rules under 'Expedited Procedure' states that the arbitral tribunal is to render the award within six months starting from the date of last signature by the tribunal or the parties and as per the Terms of Reference drawn up as per Article 23 of the said Rules.

Although this seems like a workable formula to set a time limit in resolving commercial dispute through arbitration, to imply the application of this institutional arbitration rule as statutory rule could be made with some modifications.

7.6.2 UNCITRAL Model Law on International Commercial Arbitration and UNCITRAL Arbitration Rules

The United Nations Commission on International Trade Law is one of the core legal bodies of the United Nations system pertaining to international trade law specializing in commercial law reforms worldwide and works towards modernization and harmonization of rules on international business. The Model Law on International Commercial Arbitration was adopted by UNCITRAL in 1985, amended in 2006,[72] and has been the basis for several domestic laws pertaining to arbitration and India is one among those countries to have followed it resulting in the present Arbitration and Conciliation Act, 1996. UNCITRAL has also come up with Arbitration Rules, however, the Rules are different from the model law in the sense that, the Model Law provides countries with a framework to help incorporate the domestic arbitration law whereas, the Arbitration Rules are like any other institutional arbitrational rules by which the parties prefer to abide by in their arbitration agreement.[73] Therefore, apart from prescribing the time limit for filing applications, pleadings etc. the Model law is silent regarding time limit for pronouncing an arbitral award. In this regard, the UNCITRAL Arbitration Rules (as revised in 2010) in its Section III on Arbitral Proceedings under Article 17(2) prescribes the establishment of timetable of the arbitration; under Article 25 the Rules prescribes a period of not more than 45 days for communicating written statements to the arbitral tribunal,[74] under Article 39 prescribes 30 days for filing of

[71] *Id.*
[72] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, UNCITRAL, https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. (last visited Apr. 30, 2020).
[73] UNCITRAL Arbitration Rules, UNCITRAL, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration. (last visited Apr. 20, 2020).
[74] *Id.*, at 17.

additional award and not more than 60 days for pronouncement of such additional award.[75] However, the Rules are silent on the aspects of fixing time limit for the entire arbitration.

7.6.3 Singapore International Arbitration Centre

Established in 1991,[76] the Singapore International Arbitration Centre (SIAC) is an independent, non-profit international arbitration institution. Said to be among the world's top 5 institutions for arbitration,[77] SIAC is known to provide case management services to international businesses, transnational trade and investment but also provides a neutral venue to resolve cross-border disputes. As on 2015, parties from 55 jurisdictions and 6 continents have resolved their disputes at SIAC.[78] One of the benefits of engaging SIAC for arbitration is that the parties are free to choose their procedures of applicable rules to conduct their arbitration. However, SIAC has its own set of Rules that the parties are free to use provided relevant clauses in this regard are mentioned in the arbitration agreement.

The arbitration rules of the Singapore International Arbitration Centre are periodically revised and the 6th edition of primary arbitration rules came into being on 1 August 2016.[79] The Registrar of the court largely manages the arbitration proceedings under SIAC. Rule 32 of the SIAC Rules deals with 'the award' of the arbitral tribunal. Rule 32.3[80] states that the designated tribunal is to submit a draft form of the award to the Registrar within 45 days from the date on which the proceedings of the tribunal are declared closed. Following this, the Registrar is said to make necessary suggestions, if any, in terms of modifications and approve the said award. On receipt of the award, the parties can apply for correction of award, to correct computation, clerical or typographical error, or to interpret the award or to make additional awards. This is provided for under Rule 33 of the SIAC Rules. The rule also states that if the tribunal decides to consider such a request then the additional award must be made within 45 days of admitting the same.[81]

7.6.4 Asia International Arbitration Centre

Previously known as Kuala Lumpur Regional Centre for Arbitration, the AIAC situated in Malaysia, succeeded the KLRC in January 2018 as part of a rebranding for the Centre aiming to strengthen regional footprint and broaden its working horizon.[82] The Centre was

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[75] *Id.*, at 24.
[76] About Us, SIAC, https://siac.org.sg/2014-11-03-13-33-43/about-us. (last visited Apr. 30, 2020).
[77] Frequently Asked Questions, SIAC, https://www.siac.org.sg/faqs/siac-general-faqs#faq01. (last visited Apr. 30, 2020).
[78] *Id.*
[79] Our Rules, SIAC, available at https://www.siac.org.sg/our-rules (last visited Apr. 30, 2020).
[80] Rule 32.3: Before making any Award, the Tribunal shall submit such Award in draft form to the Registrar. Unless the Registrar extends the period of time or unless otherwise agreed by the parties, the Tribunal shall submit the draft Award to the Registrar not later than 45 days from the date on which the Tribunal declares the proceedings closed. The Registrar may, as soon as practicable, suggest modifications as to the form of the Award and, without affecting the Tribunal's liberty to decide the dispute, draw the Tribunal's attention to points of substance. No Award shall be made by the Tribunal until it has been approved by the Registrar as to its form.
[81] Rule 33.4 of SIAC Rules, https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule33. (last visited Apr. 30, 2020).
[82] AIAC, https://www.aiac.world/. (last visited Apr. 30, 2020).

one of the first to adopt the UNCITRAL Rules for Arbitration and has its own procedural rules governing the arbitration proceedings from commencement to its terminations.

The AIAC has retained most of the KLRC Rules with certain modifications. Rule 12(2) of the AIAC[83] provides that within 3 months (90 days) upon completion of the proceedings the arbitral tribunal is to submit a 'draft final award' to the Director of AIAC. It also mentions that the time limit to calculate the 3 months will begin on the day the arbitral tribunal declares its proceedings closed as per Rule 12 (1) of the above Rules.[84] However the Rules further provides that the time limit may be extended subject to the consent of the parties and after consultation with the Director or the Institute;[85] in case of any irregularities found in the award, then the Rule provides that the arbitral tribunal are to resubmit the Draft Final Award to the Director within 10 days of being notified of the same.[86]

7.6.5 International Centre for Dispute Resolution

The ICDR situated in the United States of America is an international branch of the American Arbitration Association dedicated to resolve international commercial disputes via arbitration and mediation. The ICDR relies heavily on the New York Convention on enforcement of arbitral award and works on the area of cross border commercial disputes. Although relatively new in its existence, ICDR has its own international operational structure including rules, panel of arbitrators, mediators and also conducts case management and executive management.[87]

Similar to all institutional arbitration rules, the ICDR Rules establishes time limits to extend award from the date of completion of the arbitral proceedings. ICDR Rules on Arbitration Article 30(1)[88] on 'time, form and effect of award' states that the final award must be made within 60 days from the closing of the hearing. The parties are said to comply with the said award immediately failing which, the Article states that the parties are said to have waived irrevocably their right to appeal, review or recourse to any judicial authority. Akin to the practices of the Singapore International Arbitration Centre, the ICDR also has provisions for corrections and interpretation of the award. Parties are given a 30 day-time limit after the award is pronounced to approach ICDR again for correction, like typographical, computation and clerical errors, and interpretation of the award;[89] the tribunal upon

[83] Arbitration Rules, at 23, AIAC, https://www.aiac.world/wp-content/arbitration/Arbitration-Rules-2018.pdf. (last visited Apr. 30, 2020).
[84] *Id.*
[85] *Id.*, Rule 12(3).
[86] *Id.*, Rule 12(6), at 24.
[87] About ICDR-AAA, International Centre For Dispute Resolution, https://www.icdr.org/index.php/about_icdr. (last visited Apr. 30, 2020).
[88] International Dispute Resolution Procedure, Rules Amended and Effective 1 June 2014, ICDR, at 28, https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf. (last visited Apr. 30, 2020).
[89] International Dispute Resolution Procedure, Rules Amended and Effective 1 June 2014, ICDR, at 30, art. 33(1), https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf. (last visited Apr. 30, 2020).

acceptance has to make such interpretations or corrections or additional awards within 30 days from the date of receipt of such a request.[90]

In addition to regular arbitration proceedings, the Rules provides for 'expedited proceedings'[91] under Article 1(4). Although this can be applied to any arbitral proceedings, the Rule provides certain conditions such as, a claim limit of USD $250,000 excluding interest and cost of arbitration. Another interesting provision that this Rule states is that claims that do not exceed USD $100,000, excluding interest, cost of arbitration and attorney's fee, are to be settled only through written submissions and empowers the arbitration to decide if oral submissions are necessary.[92] Expedited procedure provided for under Article E-1 gives 14 days to the arbitrator, from the date of appointment, to issue a procedural order;[93] and a 60 day-time limit, from the date of the procedural order, to submit written statement and another 60 days to complete oral submissions at the discretion of the arbitrator. Article E-10 provides that the arbitrator has 30 days from the date of closing the hearing or final written submissions, as applicable, to make an award.[94] The rule however, provides for an extension of time at the discretion of the arbitrator alone but does not specify the consequences for non-compliance to the provided time limit.

7.6.6 Dubai International Arbitration Centre

Established under the Dubai Chamber of Commerce and Industry in 1994 the DIAC claims to be the largest arbitration Centre in Middle East catering to commercial arbitration and conciliation. It claims to be a non-profit body that is independent from the Government of Dubai as well as the Dubai Chamber.[95] The Arbitration Rules of DIAC came into being in 2007 after the approval by H.H. The Ruler of Dubai; these Rules are said to have replaced the earlier Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce and Industry No. (2) of 1994.

Article 5.1 provides 30 days for the respondents to file their response and an additional 14 days at the discretion of the Administrator.[96] The Rules provides time limits to appoint arbitrators,[97] to revoke an appointment[98] or to replace arbitrators.[99] Under Article 22, the Tribunal is to hold a preliminary meeting within 30 days of formation to decide on the

[90] *Id.*, art. 33(2).
[91] *Id.*, art. E-1, at 33.
[92] *Id.*, art. 1(4).
[93] *Id.*, art. E-7, at 34.
[94] *Id.*, art. E-10, at 35.
[95] About DIAC, Dubai International Arbitration Centre, http://www.diac.ae/idias/aboutus/. (last visited Apr. 30, 2020).
[96] Article 5.7, Commencing the Arbitration, DIAC, http://www.diac.ae/idias/rules/Arb.Rules%202007/2Commencing%20the%20Arbitration/. (last visited Apr. 30, 2020).
[97] 21 days under Rule 9.7, The Tribunal, DIAC, http://www.diac.ae/idias/rules/Arb.Rules%202007/3THE%20TRIBUNAL/. (last visited Apr. 30, 2020).
[98] *Id.*, Rule 13.4 (Within 15 days of formation of the Tribunal).
[99] *Id.*, Rule 14.2 (Within 21 days of the notification of formation of the Tribunal).

timetable for the entire arbitration[100] and provides 30 days each for the filing of claim[101] and its defence[102] with a further time limit of 45 days to file further written statements.[103] Article 36 of the said rules talks about 'time limit for the award' fixes the time within which the arbitral tribunal is to deliver their award at six months (180 days)[104] from the date on which the arbitrator(s) receives such file with a maximum extendable time limit of 6 more months (180 days). The parties are to approach the Tribunal within 30 days of receipt of the award for corrections, interpretations[105] and the Tribunal is to pass such orders within another 30 days from the date of receipt of such request.[106]

7.6.7 Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

Established in 1917 under the Stockholm Chamber of Commerce the SCC, the Arbitration Institute is an independent institute having gotten recognition in 1970s as the neutral center for resolution of trade disputes.[107] The SCC is headed by a Secretary General and is managed by an SCC Secretariat. The cases are administered by one of three divisions, which is based on languages like English, Swedish or Russian.[108] The SCC Board comprises of chairperson, vice-chairperson and such other members who are experts in international commercial arbitration. The functioning of the Board is to be according the SCC Rules related to deciding prima facie jurisdiction, appointment or challenge of arbitrators, and cost of arbitration.[109]

The SCC Rules, both the Arbitration Rules and Rules relating to Expedited Arbitration, came into force on 1 January 2017. The Rules are said to be in line with the best practices in international arbitration.[110] Under the SCC Rules, the parties are given 10 days to appoint a sole arbitrator failing which, the Board will appoint one themselves.[111] Article 28 of the SCC Rule[112] on arbitration talks about 'case management conference and timetable' and provides under Article 28(4) that the arbitral tribunal after consulting the parties must establish a timetable for conducting arbitration and this timetable is said to include the date for making such award; Under Article 43, the rules provide 'time limit for final award' to be 6 months (180 days) from the date when the case was referred to the said arbitral tribunal

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[100] The proceedings, DIAC, http://www.diac.ae/idias/rules/Arb.Rules%202007/4THE%20PROCEEDINGS/. (last visited Apr. 30, 2020).
[101] *Id.*, art. 23.1.
[102] *Id.*, art. 24.1.
[103] *Id.*, art. 25.3.
[104] The Awards, DIAC, http://www.diac.ae/idias/rules/Arb.Rules%202007/5THE%20AWARDS/. (last visited Apr. 30, 2020).
[105] *Id.*, art. 38.
[106] *Id.*
[107] About the SCC, Arbitration Institute of the Stockholm Chamber of Commerce, https://sccinstitute.com/about-the-scc/. (last visited Apr. 30, 2020).
[108] *Id.*
[109] *Id.*
[110] Rules, Arbitration Institute of the Stockholm Chamber of Commerce, https://sccinstitute.com/our-services/rules/. (last visited Apr. 30, 2020).
[111] Article 17, Arbitration Rules, 2017, https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf. (last visited Apr. 30, 2020).
[112] *Id.*, at 21.

with a provision to extend the said time upon reasoned request from the said tribunal; however, the Rules are silent as the time limit for such extension.[113] The Rules provides for a time limit of 30 days for the parties to approach the tribunal for corrections and interpretations[114] and also for an additional award, in which case a decision needs to be taken within 60 days from such date of consideration; this time limit is subject to extension.[115]

The Rules provides for something called as 'Emergency Arbitrator' to decide on interim measure.[116] Here the appointment of arbitrator is supposed to happen within 24 hours of receipt of application and an emergency interim decision is to be made within 5 days of receiving an application for the same.[117] These emergency awards are binding until a final award is made or if an arbitration proceeding does not commence within 30 days of such an interim emergency award.

The SCC also has Rules for Expedited Arbitrations.[118] Here the parties are to follow the same time limits provided for under regular arbitration, except that the time limit to make an award is 3 months as opposed to 6 months in regular SCC arbitration Rules.[119]

7.6.8 London Court of International Arbitration

Initially established in 1891 and having a long history of evolution and reconstitution, the LCIA came to being in 1981 to resolve international disputes.[120] It has a three-tire operation structure wherein it is a non-for-profit company and it is an arbitration court with its members and representatives, and it has a secretariat in charge of day-to-day administration of disputes.

LICA rules also provide for having a timetable for arbitral proceedings[121] before them. A time limit of 28 days each is given to the claimant and respondent to file their claims,[122] defence[123] and counter claims.[124] However, they do not specify a specific number of days for making the award and mentions under its Article 15.10 that the arbitral tribunal is required to make its final award 'as soon as reasonably possible' following the last submission by the parties and in accordance with the timetable prescribed earlier.[125] Either of the parties have a provision to go before the Tribunal for correction of award or for additional awards,

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[113] *Id.*, at 27.
[114] *Id.*, art. 47, at 28.
[115] *Id.*, art. 48.
[116] *Id.*, app. II – Emergency Arbitrator, at 34.
[117] *Id.*, art. 8, at 36.
[118] Rules for Expedited Arbitration, 2017, https://sccinstitute.com/media/1407445/expeditedarbitrationrules_eng_2020.pdf. (last visited Apr. 30, 2020).
[119] *Id.*, art. 43, at 22.
[120] History, LCIA, https://www.lcia.org/LCIA/history.aspx. (last visited Apr. 30, 2020).
[121]Article 15 – Written Statement, LCIA Arbitration Rules, 2014, LCIA, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx. (last visited Apr. 30, 2020).
[122] *Id.*, art. 15.2.
[123] *Id.*, art. 15.3.
[124] *Id.*, art. 15.4.
[125] *Id.*

in which case they have a time limit of 28 days from the date of final award.[126] In case of additional award, the tribunal is to deliver its decision with 56 days of receipt of such request.[127]

7.6.9 UNCITRAL Working Group II (Dispute Settlement)

The 69th session of the UNCITRAL working group on 'settlement of commercial disputes: issues relating to expedited arbitration' met in New York from 4-8 February 2019.[128] This group is working towards modifying the UNCITRAL Arbitration Rules so as to incorporate them in contracts and arbitration clauses and facilitate expedited arbitration proceedings to strike a balance between speedy resolution of dispute and respect to due process of law. The working group has so far met twice, September 2019 and February 2020.[129] In this regard the UNCITRAL Secretariat with assistance from the International Council for Commercial Arbitration has so far been able to obtain responses from various arbitral institutions around the world in terms of[130]:

- Applicability of rules for expedited arbitration
- Appointment of arbitral tribunal
- Challenge of an arbitrator
- Time limits and deadlines
- Arbitral award

The Secretariat had accordingly received responses and the said responses was presented by the working group at its meeting in February 2020.[131] However, further meetings of the working groups are yet to be conducted.

It is important to note that all the above-mentioned institutional arbitration proceedings do not have a rigid time limit for their proceedings and have provided for extension either by tribunal or agreement of the parties. Therefore, the theory to fix time limit for rendering an award by the arbitral tribunal is not only specific to national arbitration laws but also institutional arbitration as well. However, the presence of saving provision with respect to extension of time limit is significant as they are not uniform and is subject to each case or dispute before the tribunal.

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[126] *Id.*, art. 27.1, 27.2.
[127] *Id.*, art. 27.3.
[128] A/CN.9/WG.II/WP.207, UN General Assembly, https://undocs.org/en/A/CN.9/WG.II/WP.207. (last visited Apr. 30, 2020).
[129] Working Group II: Arbitration and Conciliation/Dispute Settlement, UNCITRAL, https://uncitral.un.org/en/working_groups/2/arbitration. (last visited Apr. 30, 2020).
[130] Memorandum of International Council for Commercial Arbitration, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/overview_of_selected_expedited_arbitration_provisions.pdf. (last visited Apr. 30, 2020).
[131] Responses to UNCITRAL questionnaire on expedited arbitration, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/responses_to_questionnaire_30_january_2020.pdf. (last visited Apr. 30, 2020).

7.7 JUDICIAL DICTUM PERTAINING TO TIME LIMIT IN COMMERCIAL DISPUTE ARBITRATION

It needs to be considered that case laws on enforcement of arbitral award due to expedited arbitral proceedings are scarce. This would indicate that the parties are either content with the proceedings or that they are disinclined to challenge the award rendered by the tribunal via expedited proceedings albeit in considering the amount at stake in the dispute. However, the case laws that are available on this issue show that the courts have tried to balance between power, and discretion of the arbitrators to implement the rules relating to expedited proceedings and consideration of the policy intention behind Arbitration and Conciliation Act, 1996, to have due regard for the time and cost factor along with the need to follow the due process of law.

In the case of *NBCC Ltd v. J.G. Engineering Pvt Ltd,*[132] where in 1993 the parties had entered into an agreement for constructing Bhubaneshwar Airport, however, the said contract was terminated in 1996. In the same year the arbitration clause was invoked and counterclaims were filed in 1997. The rejoinder and objections to counterclaims was filed after a 4-year delay in 2001 by which time several arbitrators were appointed by the appointing authority. In 2004, the respondent sought and succeeded in removal of incumbent arbitrator and a stay on arbitral proceedings was imposed with a direction from the High Court to appoint new arbitrator who was directed to complete arbitration within 6 months but was completed only in 2005 and an extension of time was sought by the parties for passing of the award. On failure of arbitrator to pass an award within the stipulated time, the respondent sought in the High Court to terminate the mandate of the arbitrator and the High Court, in 2006, granting the termination also restrained the arbitrator from making an award and appointed a retired Judge as arbitrator to adjudicate the dispute further. The Supreme Court in this case held that the High Court couldn't exercise its inherent power to extend time fixed by the parties in the arbitration agreement in the absence of consent from either of them. However, it said that the High Court was correct in directing the newly appointed arbitrators, after a delay of 9 years in this case, to conclude the arbitral proceedings within 6 months. The parties were right to have sought termination of arbitrator, under Section 14(1)(a) and automatic termination under Sec 14(1)(b) of Arbitration and Conciliation Act, 1996, as there was no concrete reason for failure of arbitrator to have delayed the pronouncement of the award. Court fixing time limit to conclude arbitral proceedings is highly technical and parties should approach the court for extension of time and party who failed to challenge such order of the High Court is estopped from objecting and challenging such order to terminate the mandate of the arbitrator.

The parties and the arbitrator had failed to approach the court for further extension of time after the expiry of the initial time extended by an earlier order and consent of the parties in 2005.[133] Therefore the High Court had rightly terminated the arbitrators' mandate.[134]

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[132] NBCC Ltd v. J.G. Engineering Pvt Ltd, (2010) 2 SCC 385 : (2001) SCC (Civ) 416.
[133] *Id.*, para 15, 17 and 24.
[134] The Arbitration and Conciliation Act, 1996, §14.

In *Sisma Enterprise Sdn Bhd v. Solstad Offshore Asia Pacific Ltd*,[135] the High Court of Malaya Considered an application to set aside an arbitration conducted under the KLRCA Fast Track Arbitration Rules 2012. The award was issued in favor of the defendant and ordered the plaintiff to make payments. The basis of the setting aside the application was over the factual and interpretive findings made by the arbitrator. No objections were raised in relation to the applicability of the Fast Track Rules. The High Court upheld the award as it found no irregularities in form.

Further, in *Nobel Resources International Pte. Ltd v. Shanghai Good Credit International Trade Co., Ltd*,[136] the Shanghai No. 1 Intermediate People's Court refused recognition and enforcement of an award of the Singapore International Arbitration Centre ("SIAC") under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958[137] on the ground that the constitution of the arbitral tribunal was not in accordance with the agreement of the parties. The dispute concerned a contract for the sale and purchase of iron ore, under which respondent allegedly failed to issue a letter of credit in favor of claimant. Under the contract, disputes between the parties were to be referred to a three-member arbitral tribunal. The claimant commenced a SIAC arbitration against the respondent and applied for the proceedings to be conducted under the expedited procedure of the 2013 Arbitration Rules of the SIAC ("2013 SIAC Rules") before a sole arbitrator. Over the objections of respondent grounded on the arbitration agreement providing for a three-member arbitral tribunal, SIAC granted Claimant's application for expedited procedure and appointed a sole arbitrator. The sole arbitrator eventually issued an award in favor of Claimant.

When the claimant sought to enforce the award in the People's Republic of China, respondent challenged enforcement invoking, inter alia, Article V(1)(d) of the New York Convention. According to respondent, the appointment of a sole arbitrator was contrary to the parties' arbitration agreement. The Shanghai court refused enforcement of the award on the grounds that the arbitral tribunal was constituted contrary to the agreement of the parties. Inter alia, the court held that:

- 2013 SIAC Rules do not preclude alternative constitutions of an arbitral tribunal and do not impose a strict requirement of a sole arbitrator. According to the court, the phrase "unless the President determines otherwise" in Rule 5.2(b) of the 2013 SIAC Rules does not grant SIAC unlimited discretion regarding the formation of an arbitral tribunal.
- The decision-making power of SIAC should be exercised with sufficient consideration to the parties' will as to the constitution of the arbitral tribunal.

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[135] Sisma Enterprise Sdn Bhd v. Solstad Offshore Asia Pacific Ltd, (2013) MLJU 1625.
[136] Nobel Resources International Pte. Ltd v. Shanghai Good Credit International Trade Co., Ltd, (2016) Hu 01 Xie Wai Ren No. 1, https://res.cloudinary.com/lbresearch/image/upload/v1504105750/Noble_Resources_v._Good_Credit_oqc1di.pdf.
[137] Article V(1)(d), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf. (last visited Apr. 30, 2020).

- The use of expedited proceedings should not preclude the parties' right to a three-arbitrator tribunal in accordance with the arbitration agreement.

Similar to the 2013 and 2016 SIAC Rules,[138] the 2017 International Chamber of Commerce Arbitration Rules ("2017 ICC Rules") allows for a sole arbitrator to be appointed in an expedited proceeding notwithstanding that the arbitration agreement provides for three. Article 1 of Schedule VI of the 2017 ICC Rules provides that "The Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator."[139] By contrast, the HKIAC Rules expressly provide that where "the arbitration agreement provides for three arbitrators, HKIAC shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree, the case shall be referred to three arbitrators."[140]

Swiss Supreme Court decision No. 4A_188/2016 is a case which involved a motion to set aside an arbitral award rendered in expedited proceedings. Among the grounds invoked by the appellant was the fact that the award was allegedly rendered one day after the expiry of the six-month time limit (after the powers of the arbitrator had expired). Therefore, the arbitrator allegedly lacked of jurisdiction. The Swiss Supreme Court found that the sole arbitrator rendered its final award within the deadline as, pursuant to Article 2(2) of the Swiss Rules, the six-month deadline starts running on the day following the day when the file is received by the sole arbitrator, which in the case at hand was observed. The motion was denied.

Shapoorji Pallonji and Co. Pvt. Ltd v. Jindal India Thermal Power Ltd[141] is a case which was filed before Delhi High Court regarding the applicability of Section 29A after the Amendment of 2019. In this case the parties were before the arbitral tribunal on 26 May 2018 and as per Section 29 before the Amendment, the arbitration was to be completed on 26 May 2019. But post the Amendment, the court held that the tribunal has to complete the proceedings by 25 November 2019 by taking into consideration the 6 month-time limit to complete the pleadings[142] and 12 months from there to announce the arbitral award.[143] Upon consensus between the parties to further extend the time limit by another 6 months, the new deadline to conclude arbitration would be 23 May 2020. Therefore, the High Court held that amended Sections 23(4) and 29A(1) are procedural law and therefore would be applicable to pending arbitrations as on the date of amendment.

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[138] Rule 5.2(b), 2013 SIAC Rules and Rule 5.2(b) of the 2016 SIAC Rules identically provide: "the case shall be referred to a sole arbitrator, unless the President determines otherwise." The 2013 and 2016 SIAC Rules, available at www.siac.org.sg/our-rules/rules/siac-rules-2013#siac_rule5 and https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule5

[139] 2017 ICC Arbitration Rules, available at https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf

[140] Article 41.2(b), 2013 Rules; Article 42.2(b), of the 2018 Rules.

[141] Shapoorji Pallonji and Co. Pvt. Ltd v. Jindal India Thermal Power Ltd, OMP (Misc.)(Comm.) 512/2019, Judgment Date: 23 January 2020.

[142] The Arbitration and Conciliation Act, 1996, §23(4).

[143] The Arbitration and Conciliation Act, 1996, §29A(1).

In *MBL Infrastructure Ltd. v. Rites Ltd*[144] dealt with a petition before the Delhi High Court seeking extension of time for completion of arbitral proceedings and subsequently passing of the award. In this case, the parties had entered into arbitral agreement on 14 March 2018 and prior to the Amendment, the proceedings were to be completed on 13 March 2019 but since the parties had consented twice for extension of time-limit they had to complete it by 12 March 2020. Post the 2019 Amendment to Arbitration and Conciliation Act, 1996, the Court held that the Amendment must not be applicable retrospectively and therefore wouldn't be applicable in the present case. However, an extension was granted to the parties in this case as the arbitral proceedings were at the stage of evidence.

Further, the case of *M/s Ved Prakash Mithal and sons v. Union of India*[145] dealt with a suit to set aside an arbitral award and as to the commencement of calculating the 3 months to make such an application before the court. The parties had preferred an SLP before the Supreme Court after the Delhi High Court had reversed the District Court judgment that the commencement of 3 months starts from the date of the first award of the arbitrator and not when the arbitrator did dismiss an application for corrections. The Supreme Court upheld the Delhi High Court decision stating that the arbitration award and proceedings therein are considered to be disposed of by the Arbitral Tribunal on the date of allowing or dismissing an application under Section 33 of the Arbitration and Conciliation Act 1996.[146]

Regarding condonation of delay, the Supreme Court in *Union of India v. Varindera Constructions Ltd*[147] while hearing an appeal from a Division Bench judgment from 2013 where the appeal was dismissed on the ground of a 142 days delay in filing and 103 days in refilling the appeal as there was no sufficient cause made out in ground of delay as Section 34 applications are to be filed with a maximum delay of 120 days including 30 days of grace period and therefore an application under Section 37 is also to follow similar timeline, relied on *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri*[148] and held that the delay cannot be condoned as under Section 5 of the Limitation Act, 1963.

Recently on a similar issue in *N.V. International v. State of Assam,*[149] the Supreme Court heard an appeal filed under Section 37 of the Arbitration and Conciliation Act 1996. The facts of the case were that there was a delay of 189 days in filing an appeal to the District Court wherein a challenge to the Arbitral award was made under Section 34 of the Arbitration and Conciliation Act 1996. It was contended that the Section 37 does not exclude the application of Section 5 of Limitation Act therefore a condonation application is to be considered by the court on its own merits notwithstanding the length of delay. The Supreme Court relying on the judgement in *Varindra Construcitons* held that delay over and above 120 days in filing an appeal under Section 37 would not be liable to be condoned as it would defeat the object of speedy resolution of arbitral disputes which is the crux of the Arbitration and Conciliation Act 1996.

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[144] MBL Infrastructure Ltd. v. Rites Ltd, OMP (Misc) (Comm.) 56/2020, decided on Feb. 10, 2020.
[145] M/s Ved Prakash Mithal and sons v. Union of India, 2018 SCC Online SC 3181.
[146] Correction and Interpretation of award; additional award.
[147] Union of India v. Varindera Constructions Ltd, (2020) 2 SCC 111.
[148] Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri, AIR 1941 FC 5.
[149] N.V. International v. State of Assam, (2020) 2 SCC 109: 2019 SCC Online SC 1584.

A series of appeals to challenge an arbitral award passed in April 1999 and initially filed in July 1999 was heard in *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and Ors.*[150] After a series of appeals, it was placed before the Supreme Court in 2008 where it was held that the applicability of Section 14 of the Limitation Act 1963 cannot be excluded in an application to set aside arbitral award under Section 33 and 34(1) of the Arbitration and Conciliation Act 1996. It concluded by saying that Limitation Act, 1963, applies to all proceedings under Arbitration and Conciliation Act 1996 unless it is expressly excluded under it; clarifying that Article 116 of the schedule of Limitation Act 1963, would apply to appeals filed before a court where appeals are governed under Civil Procedure Code 1908, i.e. a period of 90 days from the date of the impugned order.

In *Union of India v. Popular Construction Co,*[151] a case before the Supreme Court wherein the Arbitral Award made in August 1998 was challenged in a series of appeals starting from 1999, under Arbitration Act of 1940 and thereafter under Arbitration and Conciliation Act 1996. The Supreme Court held that Section 5 of Limitation Act 1963, would not be applicable to applications filed under Section 34 to set aside an arbitral award, further expression exclusion of Limitation Act from the ambit of Arbitration Act 1996 can be inferred from the objective of the 1996 Act which states that judicial intervention in arbitral matters must be restricted. The Supreme Court upheld the High Court's order of dismissing the Section 34 application, which was made almost 8 months after it was received from arbitrator.

In *Simplex Infrastructure Ltd. v. Union of India*,[152] an appeal was preferred from the High Court of Calcutta where a delay of 514 days was condoned in an application under Section 34 of the Arbitration and Conciliation Act 1996. The Supreme Court held that extension of condonation of delay beyond a prescribed period was impermissible even when the applicant is the State and such delay is said to have caused due to administrative difficulties. Relying on the Popular Constructions case discussed above, the SC held that Section 5 of Limitation Act 1963 was not applicable to applications under Section 34 of Arbitration Act 1996 and that only a delay of 3 months and 30 days would be permissible.

The Supreme Court in *State of Himachal Pradesh v. Himachal Techno Engineers*[153] decided on the *terminus a quo* of calculating limitation period to file an application under Section 34 of Arbitration Act 1996. It was held that the calculation of 3 months and 30 days limitation period under Section 34(3) of the Arbitration Act 1996, begins on the date of receipt of the arbitral award and in case such award is delivered on a non-working day or a holiday then the arbitral award is said to have been received on the next working day.[154] It was also held that the first day of receipt of the arbitral award will be excluded from computation of limitation[155] and that a "month" does not refer to a period of 30 days but an actual calendar

[150] Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and Ors, (2008) 7 SCC 169.
[151] Union of India v. Popular Construction Co, (2001) 8 SCC 470.
[152] Simplex Infrastructure Ltd. v. Union of India, (2019) 2 SCC 455.
[153] State of Himachal Pradesh v. Himachal Techno Engineers, (2010) 12 SCC 210.
[154] *Id.*, para 10.
[155] *Id.*, para 17 – 19.

month therefore the period of 3 months as stated under Sec 34(3) of the Arbitration Act 1996 is not to be equated to 90 days.[156] Therefore, it was stated that Section 5 of Limitation Act 1963 was not applicable to Section 34 petitions under Arbitration Act 1996 and courts can condone delay up to 30 days on sufficient cause. The High Court order was set aside and delay of 28 days was condoned to be well within the limitations of Section 34 of Arbitration and Conciliation Act 1996.

7.8 RESULTS OF THE EMPIRICAL RESEARCH

An empirical research was conducted to take inputs from the stakeholders on various aspects of time consumption in Arbitration Act. The research was conducted via online survey through google forms. The participants were asked the following questions:

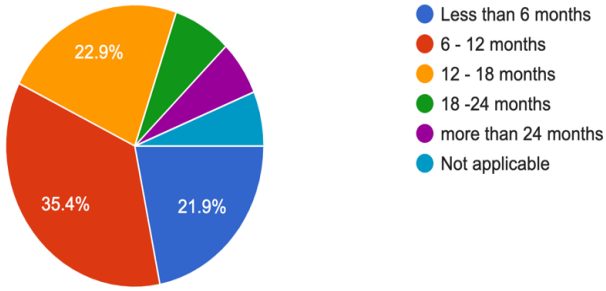
1. On an average, what is the time taken to finish arguments in an arbitration matter?
2. Should there be a fixing of a time table prior to commencement of arbitral proceedings to ensure compliance with the time limit?
3. Which step consumes most amount of time in an arbitral proceeding?
4. What would be the ideal course of action to curb delay?
5. How many adjournments, in your opinion, must be allowed for a party in arbitration?
6. What are your thoughts on institutional arbitration?
7. Does Court interventions in arbitration proceedings have an effect on delaying arbitration?
8. What in your opinion is the appropriate time to conclude an arbitration proceeding?
9. Scope of application of time limit set by the 2019 Amendment to Arbitration & Conciliation Act 1996.
10. Should the arbitrator report on conduct of parties and circumstance that led to delay?
11. Should there be different statutes to govern international and domestic arbitration proceedings in India?
12. Are you aware of Ease of Doing Business Rankings by the World Bank Group?
13. Should Commercial Disputes of all kinds – aside from those dealing with public order, public policy, bankruptcy, consumer right, employment issue or IP – be submitted for arbitration process?

The above questions were raised in a Multiple-Choice and Multiple Selection format. Apart from the above the option was also given to the participant to make and submit any other observation. We circulated the Questionnaire online which was filled by 96 participants. The results of the above questions are as follows:

[156] *Id.*, para 14 & 15.

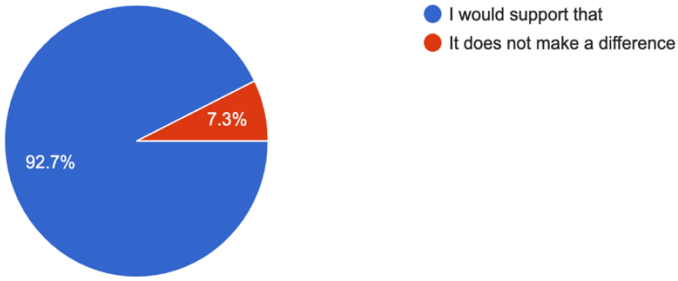
On an average, what is the time taken to finish arguments in an arbitration matter? (select any one)

96 responses



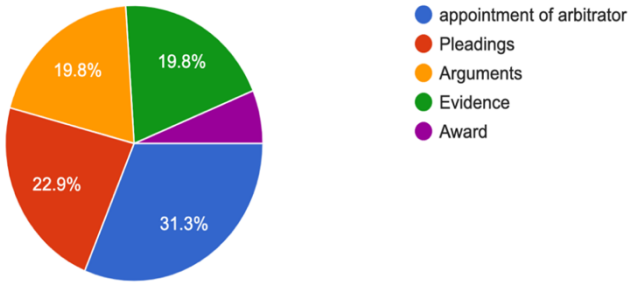
There should be fixing of a timetable prior to commencement of arbitral proceedings to ensure compliance with the time limit

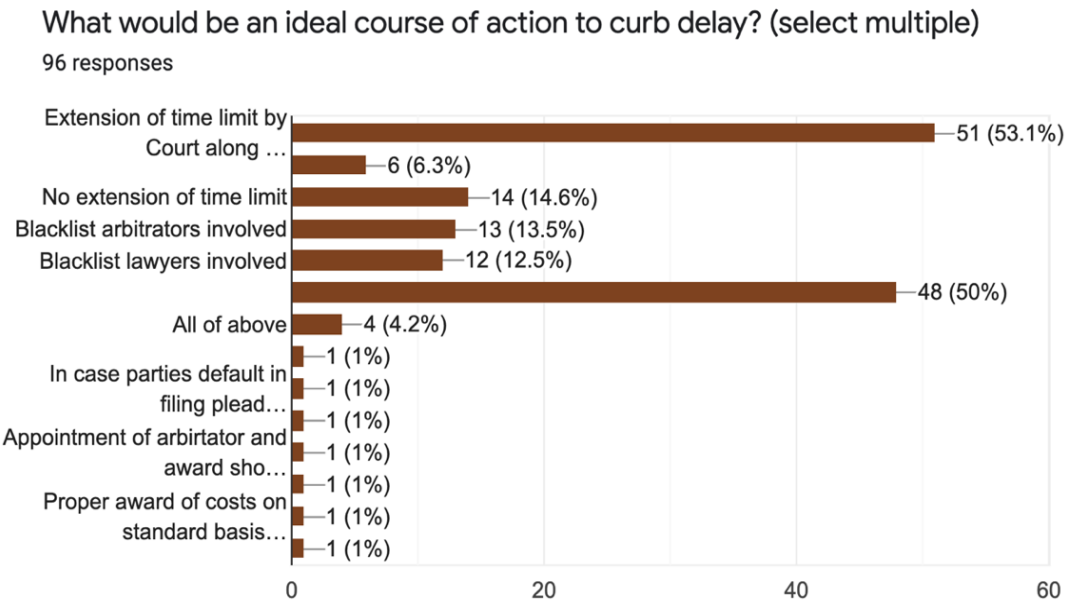
96 responses

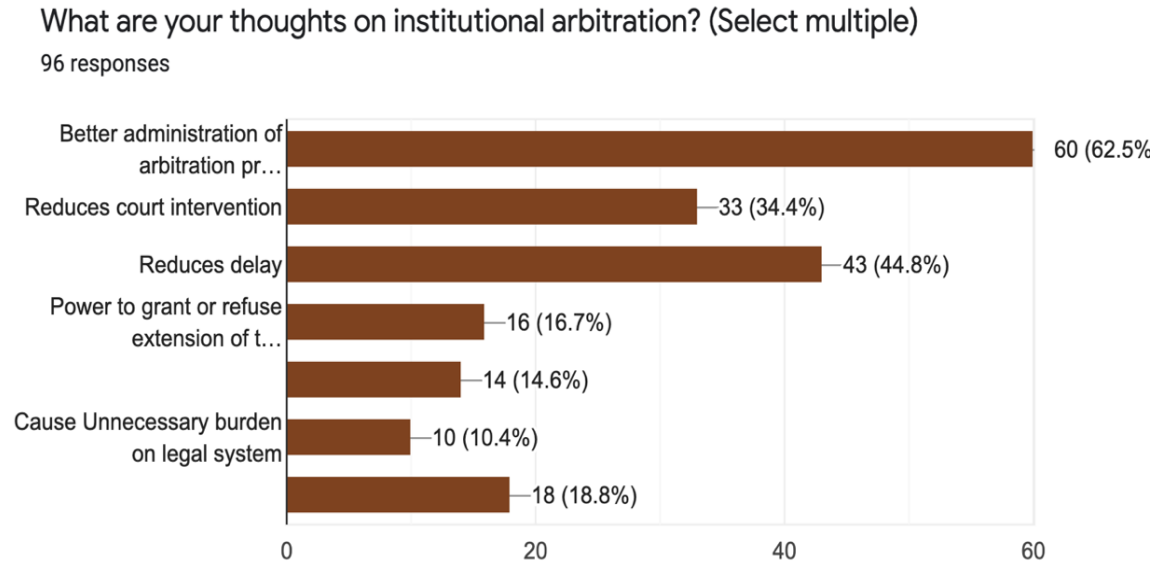


Which of the following step consumes most amount of time in an arbitral proceeding?

96 responses

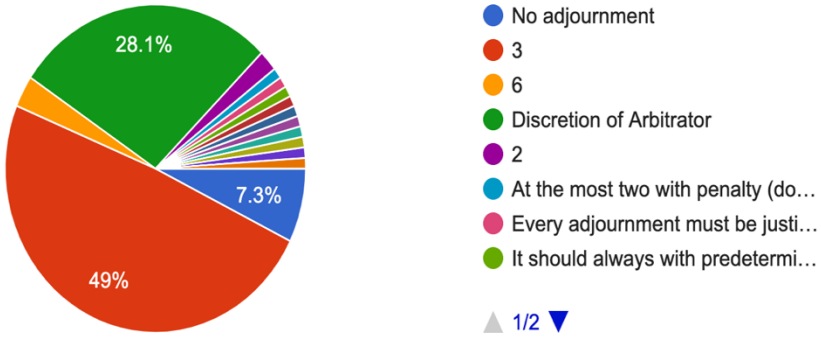



What would be an ideal course of action to curb delay? (select multiple)
96 responses
Extension of time limit by Court along …
51 (53.1%)
6 (6.3%)
No extension of time limit
14 (14.6%)
Blacklist arbitrators involved
13 (13.5%)
Blacklist lawyers involved
12 (12.5%)
48 (50%)
All of above
4 (4.2%)
1 (1%)
In case parties default in filing plead…
1 (1%)
1 (1%)
Appointment of arbirtator and award sho…
1 (1%)
1 (1%)
Proper award of costs on standard basis…
1 (1%)
1 (1%)
0
20
40
60


What are your thoughts on institutional arbitration? (Select multiple)
96 responses
Better administration of arbitration pr…
60 (62.5%
Reduces court intervention
33 (34.4%)
Reduces delay
43 (44.8%)
Power to grant or refuse extension of t…
16 (16.7%)
14 (14.6%)
Cause Unnecessary burden on legal system
10 (10.4%)
18 (18.8%)
0
20
40
60

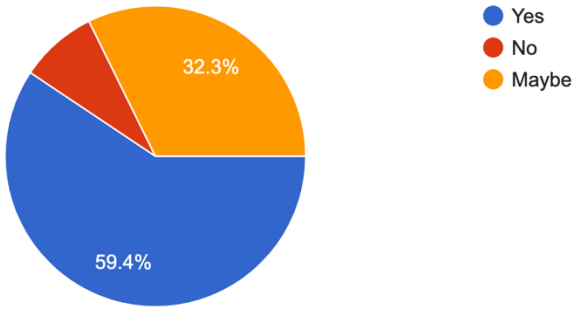
How many adjournments, in your opinion, must be allowed for a party in arbitration? (select any one)

96 responses



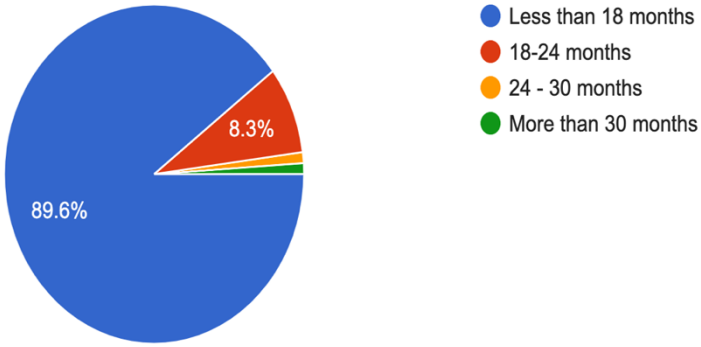
Does Court interventions in arbitration proceedings have an effect on delaying arbitration? (Select any one)

96 responses



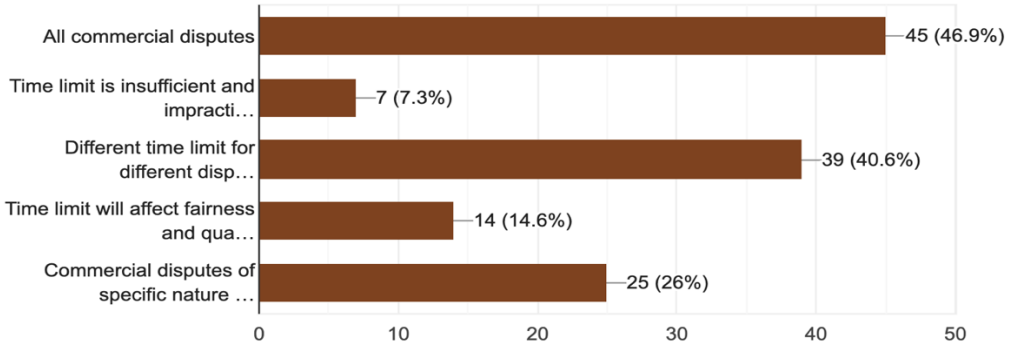
What in your opinion is the appropriate time to conclude an arbitration proceeding? (Select any one)

96 responses



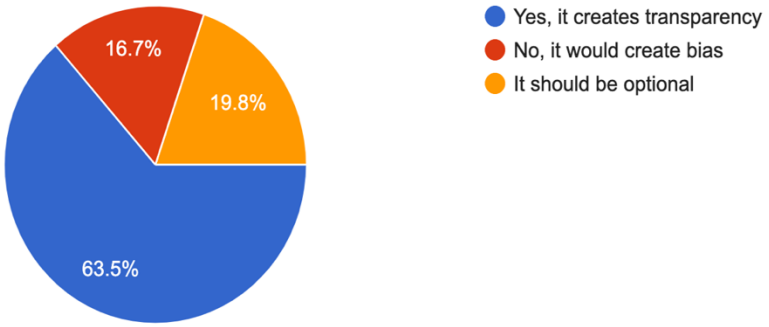
Should the time limit set by the 2019 Amendment to Arbitration & Conciliation Act 1996 be applied to (Select multiple)

96 responses



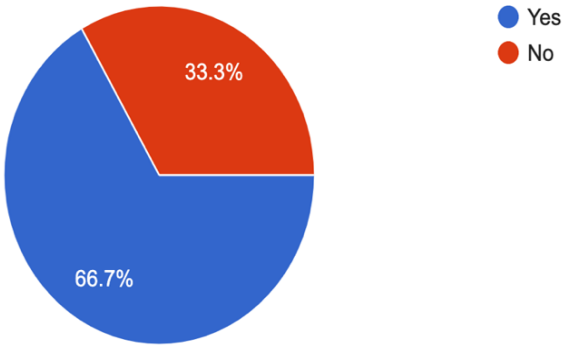
Arbitrators report on conduct of parties and circumstances that led to delay should mandatorily be submitted to Court in the eve...f an extension application (Select any one)

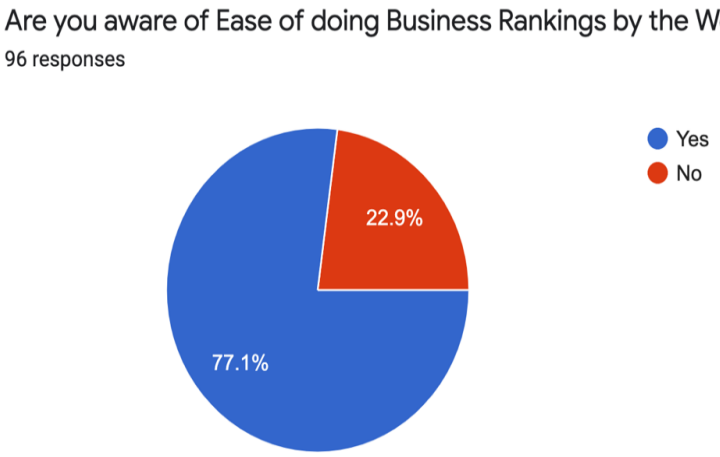
96 responses

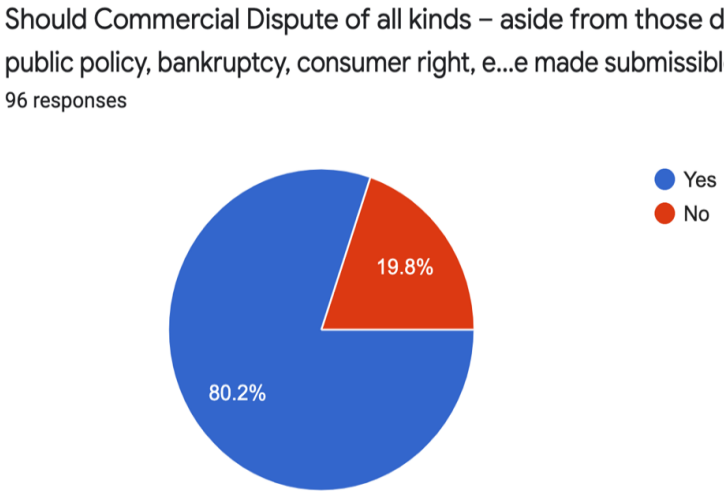


Should there be different statutes to govern International and Domestic Arbitration proceedings in India? (Select any one)

96 responses







Apart from the above, additional suggestions were also made by participants. The most important ones are as follows:

- The pecuniary jurisdiction of commercial courts must be increased to avoid commercial disputes becoming litigations in court.
- There should be a move to mandatory arbitration for family and low intensity consumer disputes.
- Arbitrations often prove to be more expensive than court proceedings, thus steps should be taken to minimize expenditure and a uniformity should be brought about regarding arbitrator's remuneration and the staff appointed for the proceedings. Also, the matters can be categorized and remuneration may be fixed accordingly. There should be a fixed criterion of charging because most of the time the government is the party and has to pay the arbitration fee from public funds.
- Considering the evidence takes a lot of time, we can streamline evidence by reducing all commercial arbitration mandatorily requiring submission of evidence with an affidavit in support thereof. Rebuttal statements should also be made the order of

the day. We should introduce interrogatories in Arbitration and thereby limit the time and scope of cross examination.

- To become an Authorized Arbitrator, there should be an exam conducted for the said purpose and thereafter only the name of the person clearing the exam should be included in the nationwide list of arbitrators.
- Minimum court intervention is most essential to facilitate arbitration proceedings within the time limit.
- Unnecessary delay is made by the parties not attending the proceedings. Also, unprofessional behavior from advocates plagues arbitration in India.
- Too often, arbitration sittings are only held for about an hour or two. There should be extended sittings of 5+ hours at a time so that the bulk of the matter can be dealt with in a sitting.

7.9 ANALYSIS AND FINDINGS OF EMPIRICAL RESEARCH

From the data collected and charts prepared based on the recorded responses it can be stated that:

1. 80.2% of the participants believe that arbitration matters are concluded within 18 months. And only 6.3 % of the matters take longer than 24 months to conclude.
2. 92.7 % of the participants support that that there should be fixing of a timetable prior to commencement of arbitral proceedings to ensure compliance with the time limit. Thus, there is an overwhelming general support for fixing of timelines for arbitration proceedings.
3. There is a split opinion with regard to the most time-consuming step in arbitral proceedings. 31.3% participants are of the opinion that appointment of arbitrator consumes the most of time, while 22.9% believing that pleadings consumes most amount of time. Arguments and pleadings both share an equal 19.8%. No concrete conclusion can be drawn from this apart from that a significant percentage of people believe that appointment of arbitrators consumes the most amount of time.
4. On the issue as to what should be the ideal course of action to curb delay – a majority of the participants is of the opinion that extension of time limited should be allowed by courts with penalty (53.1%), and that changes in the statute should be made to introduce payment of fee for seeking adjournment (50%). Thus, it can be concluded adjournments should be pecuniary discouraged.
5. Almost 49% of the participants are of the opinion that there should a maximum of 3 adjournments should be allowed to a party in arbitration proceedings.
6. 62.5% of the participants were in favor of institutional arbitration as it provides for better administration of arbitration proceedings. 43% participants also believed that institutional arbitration should be encouraged to reduce delay while 33 % favored it because it reduced court intervention. Thus, it can be concluded that because of these three reasons institutional arbitration should be encouraged to tackle delays in arbitration proceedings.

7. 59.4% of the participants responded in the affirmative when asked whether court interventions in arbitration proceedings have an effect on delaying arbitration. Thus, signaling the need to reduce court interventions in arbitration.
8. Almost 90% of the participants agreed that arbitration matters should be concluded within 18 months of time.
9. Almost 47% of the participants opined that the time limits set by the 2019 amendments to Arbitration and Conciliation Act, 1996 should be applied to all commercial disputes while 39% were of the opinion that different time limits should be set for different disputes.
10. 63.5% of the participants agreed that a report of the arbitrator should be submitted to the Court on conduct of the parties and circumstances that led to delay in the event of an extension application. Thus, signaling the need for better transparency in arbitral proceedings.
11. 66.7% of the participants agreed that there should be different statues to govern international and domestic arbitration proceedings in India. Thus, it can be concluded that there is a wide support for having different statues for domestic and international arbitration.
12. 80.2% of the participants agreed that commercial disputes of all kind should be made a subject of arbitration process with the exception of public order and policy, bankruptcy, consumer rights, employment issues and IP. This is very important for improving the Ease of Doing Business ranking in India as it is one of the heads on which the Quality of Judicial Process Index (a part of contract enforcement parameter) is based upon.

7.10 CONCLUSION AND RECOMMENDATIONS

Passage of time exposes gaps in any statutory regime and it is essential to restore and amend a legislation if need be. The arbitration law in India needs to be clarified with a sturdy structural framework to be implemented effectively. Taking note of the various interpretations and plugging such loopholes of the Arbitration and Conciliation Act, 1996 would give rise to an evolved legislation in this regard.

The Parliamentary Standing Committee under the Chairmanship of Mr. E.M. Sudarsana Natchiappan of the Committee on Personnel, Public Grievances, Law and Justice, which presented its Ninth Report relating to Arbitration and Conciliation (Amendment) Bill, 2003 makes the following observations[157]:

> "Ever since the commencement of the 1996 Act, requests have been voiced for its amendment.
> The main problem with this Act is that the UNCITRAL Model which was meant as a Model for international arbitration was adopted also for domestic arbitration between parties in India. In several countries, the laws of arbitration for international and domestic arbitration are governed by different statutes. Also, in many cases we have lost

[157] Parliament of India, Rajya Sabha, Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Ninth Report on The Arbitration and Conciliation (Amendment) Bill, 2003, Presented to Rajya Sabha on 4th August, 2005 and Laid on the table of Lok Sabha on 4th August, 2005.

> the letter and also the spirit, and in some cases, we have kept the letter, but lost the spirit of the UNCITRAL Model Law."

The Committee also noted that taking undue advantage of court procedure so as to gain time and delay arbitration and in turn the implementation of the award was counterproductive and undesirable to the very fact of the existence of arbitration agreement between parties.[158] The Committee further suggests that institutional arbitration to match the international standards.

Part of the bid to improve efficiency and accelerate the process is to keep check on the costs of the arbitral proceedings as well as stay true to the fact that it is in fact an alternative dispute resolution.

Following the Justice Srikrishna Committee recommendations, we would suggest that there be no time limit to submit pleadings and instead a period of 12 months, extendable upon request and consent to 18 months, be fixed to complete arbitral proceedings. However, to eliminate obstacles like extensions for submissions of pleadings and computation of time period, as stated earlier in this chapter, a period of 24 months, instead of the ambitious 12 months, has to be provided to complete the entire proceedings and for granting of award. Alternatively, in case of institutional arbitration, as stated earlier in this chapter, power to permit or refuse and extension of time must be vested with the said institution. This would remedy the delay by reducing the burden and intervention of the Courts in case of international arbitration restricting them to only be concerned with extension applications of ad hoc arbitration proceedings and further promote institutional arbitration in the country.

With regard to the extension application made to the courts under Section 29A of the Arbitration and Conciliation Act 1996, it can be suggested that if the arbitral tribunal apprehends that the proceedings before it would not be completed within 12 or 18 months, provisions need to be made for the said tribunal to inform the parties of the same 30 days before the expiry of the time period. This is likely to facilitate the parties to reconsider whether or not to seek extension from the court. Upon receipt of such application provisions need to be applied to mandate the Commercial Courts to dispose of such application within 60 days. It must also be provided for consultation of the tribunal in an extension application where the arbitrators must record and submit the observations with regard to the conduct of the parties and the circumstances that led to delay in proceedings which would be reviewed by the courts.

Adopting best practices similar to the ones adopted by the Singapore International Commercial Court (SICC) or the Dubai International Financial Centre (DIFC) could attain speedier resolution of commercial disputes and ensuring the ease of doing business in India; in the sense that adoption of the rule to set realistic time tables before the commencement of the arbitral proceedings, the arbitration-litigation model where there is choice of forum, accessibility to the International Bar association Rules of Evidence coupled with the benefits of litigation, like joinder of third party, could help commercial courts dodge the procedural

[158] B.S. PATIL, THE LAW OF ARBITRATION 3 (3d ed. 1996).

delay and cater to the needs of a specialized dispute resolution system. But prior to this there needs to be harmony between the Commercial Courts Act, 2015 and the Arbitration and Conciliation Act, 1996 through a reformation of the Commercial Courts Act and the Arbitration and Conciliation Act which is required to iron out the procedural inconsistencies such as the provision for further right to appeal as provided in the Commercial Courts Act which is absent in the Arbitration Act. Thus, a comprehensive amendment in this regard is the need of the hour to address the inconsistencies and contradictions as mentioned above and thereby fulfill the purpose for which the Acts were enacted.

A 'one size fits all' approach of providing fixed time limits to give arbitral awards would at times seem to pose several practical disadvantages considering the complexity of matters and subjective approach needed to resolve some of those complexity. Resolving complexity in terms of enormous documents and involving multiple parties would become a herculean task to accomplish within the time limit of 12 months to complete the same. Suggesting penalty to arbitrators would result in hurried proceedings and raising concerns about attention to detail and due care to resolving complex issues.

Thus, on the basis of foregoing doctrinal and empirical research we are of the opinion that the time limit set by the Arbitration Act will help in speedier resolution of the disputes provided the following steps be taken:

- With respect to Section 8 of the Arbitration and Conciliation Act, an exception may be carved out whereby a matter before the court can be referred to arbitration by the parties only at the preliminary stage and not at the interim stage.
- Prior to the commencement of arbitral proceedings, a time table should be fixed by parties and arbitrator regarding the procedure and time frame to be adopted to ensure compliance with the time limit.
- Extension of time should be allowed by imposing penalty costs on the party which caused delay.
- Maximum three adjournments should be allowed to a party in arbitration proceedings.
- Institutional Arbitration should be encouraged to provide for better administration of arbitration and to reduce delays.
- Court intervention in the arbitration proceedings should be minimal.
- A Report of the arbitrator should be submitted to the Court on the conduct of the parties during arbitration and the circumstances that led to delay.
- There should be different statutes to govern international and domestic arbitration.

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CHAPTER 8: SUBSTITUTED PERFORMANCE AND CONTRACTUAL ENFORCEMENT

8.1 INTRODUCTION

The Specific Relief (Amendment) Act, 2018[1] has brought radical changes in the arena of contractual enforcement in India. Not only did it make the specific performance of contract a matter of right i.e. a rule rather than exception (by substantially reducing court's discretion in the matter and thus making it an alternative remedy rather than an exceptional remedy),[2] but it also introduced another concept called "substituted performance of contract".[3] The Amendment came into force later in the same year on 1st October 2018.[4] The concept of substituted performance has been incorporated under Section 14(a) and Section 20 of the Specific Relief Act, 1963.[5]

These amendments came on the basis of the recommendations made by an expert committee headed by Sh. Anand Desai.[6] The terms of reference of this committee included, *inter alia*, the following:

> "(a) to review [sic] the Specific Relief Act, 1963 from the point of view of enforceability of contract and other relief provide thereunder, in the context of tremendous developments which have taken place since 1963 and the present changed scenario involving contract-based infrastructure developments, public private partnerships and other public projects involving huge investments;
> ….
> (d) to examine amendments to be made in the Specific Relief Act, 1963 for ensuring ease of doing business in India;"[7]

India's continuing poor performance in the enforcement of contracts parameter of the Ease of Doing Business Ranking is certainly a cause of concern and it is only natural for the Government to take steps towards improving the state of affairs pertaining to contracts' enforcement and providing for faster dispute resolution mechanisms.[8]

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[1] The Specific Relief (Amendment) Act, 2018.
[2] *Id.*, §3 (amending section 10 of the Specific Relief Act, 1963 as "The specific performance of a contract **shall** be enforced by the court subject to the provisions contained in Sub-section (2) of Section 11, Section 14 and section 16").
[3] *Id.*, §10 (substituting older Section 20 of the principal Act); *See also* Specific Relief Act, 1963, No. 47, Acts of Parliament 1963, § 20 (India).
[4] Ministry of Law and Justice, Notification dated Sep. 19, 2018, S.O. 4888(E), Gazette of India, pt. II sec. 3(ii), http://egazette.nic.in/WriteReadData/2018/189830.pdf ("In exercise of the powers conferred by sub-section (2) of Section 1 of the Specific Relief (Amendment Act, 2018 (18 of 2018), the Central Government hereby appoints the 1st day of October, 2018 as the date on which the provisions of the said Act shall come into force.").
[5] The Specific Relief Act, 1963, §§14(a), 20.
[6] Reply of Shri. D. V. Sadananda Gowda, Minister of Law and Justice, Lok Sabha Unstarred Question No. 375 (Feb. 25, 2016), http://164.100.24.220/loksabhaquestions/annex/7/AU375.pdf.
[7] *Id.*
[8] Akshita Alok, *Understanding Substituted Performance under Specific Relief (Amendment) Bill, 2018* (June 5, 2018), https://www.lakshmisri.com/insights/articles/understanding-substituted-performance-under-specific-relief-amendment-bill-2018/#.

In this chapter, we study and analyze the scope and impact of substituted performance in the time period since it has been in force. The chapter firstly discusses the concept of substituted performance. Secondly, we discuss its need and background from the references of objective of the enactment, intention of the legislature and committee reports. We then take a look at the similar provisions of substituted performance in other countries before concluding the chapter.

8.2 SUBSTITUTED PEFROMANCE

The concept of substituted performance is in line with the overall intention of the Amendment Act which seeks to make specific performance a rule, rather than an exception.[9] In the simplest terms, substituted performance means performance of an unperformed or breached contract through a substitute (to the party with whom the original contract was entered into).The concept of substituted performance gives a right to the promisee (aggrieved party) for getting the contract (which has been breached) enforced either through a third party or by his own agency. The promisee is then entitled to recover the expenses and other costs incurred for such 'substituted performance' from the promisor (the defaulter).[10] As stated under Section 20 of the Act itself:

> "[W]here the contract is broken due to non-performance of promise by any party, the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency, and to recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach."[11]

8.2.1 Need and Background

The need for concept of substituted performance comes into picture when we consider other contractual remedies like damages are not helpful in mitigating the losses arising from indirect expenses incurred in getting the desired performance of the contract.[12] Injunctions are also not a viable option when the needs of the party depend on getting the work completed, as injunctions are an instrument for maintaining and protecting the status quo. This is of particular relevance in the arena of government contracts (which will be discussed later in the chapter) where the public is also concerned with the completion of a particular project. Substituted performance helps in modifying the existing contractual relationship between the parties and allows the aggrieved party to reach the position it would have been if the contract had not been breached.[13] In this sense, substituted performance can be considered as a form of specific performance of contract, and is an effective alternative remedy in the event of breach, in comparison to injunctions and compensations.

Further, an estimate of pending cases in India by National Judicial Data Grid as of 2nd April 2018 is 26.5 million. This when viewed along with the average time required to enforce a

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[9] *Id.*
[10] *Id.*
[11] The Specific Relief Act, 1963, §20(1).
[12] Sayak Banerjee, *Substituted Performance: A New Perspective in Specific Relief (Amendment) Act, 2018*, THE CBCL BLOG (Feb. 7, 2019), https://cbcl.nliu.ac.in/contemporary-issues/substituted-performance-a-new-perspective-in-specific-relief-amendment-act-2018/.
[13] *Id.*

contract through court being 1445 days (approximately 4 years as per the Ease of Doing Business Rankings) vs. 164 days in Singapore (which is the best performer in the contract enforcement parameter in the Ease of Doing Business 2018 report) becomes self-explanatory for an investor who is looking for investment in a country and is considering the country risk perception in a situation where a contractual project ends up in a dispute. To change this scenario and reduce element of risk in investor's mind, it is important for a country which is looking to portray itself as an investment destination to bring in radical changes in contract enforcement laws. The concept of substituted performance allows for that.

From an economic point of view, the Economic Survey 2018 states that the count of stayed infrastructure projects belonging to 6 ministries amounts to 52 in number valuing a total of Rs.52,081 Crores.[14] Apart from the general work overload in courts, the Economic Survey also points out that "Recourse to Injunctions and Stays" as one of the main reasons for project delays on account of judicial procedures.[15] For example, in the Delhi High Court, Injunctions in the Intellectual Property Rights (IPR) cases led to about 60% of cases being stayed with average pendency of 4.3 years 7.9 years for final disposal.[16]

8.2.2 Objective of the Enactment

At the time of introduction of the Specific Relief (Amendment) Bill, 2017[17] in the Lok Sabha, the Specific Relief Act, 1963 was a 54-year-old legislation which was originally enacted "to define and amend the law relating to certain kinds of specific relief."[18] It contained provisions relating to, *inter alia*, specific performance of contracts, contracts which cannot specifically enforceable, parties who may obtain and against whom specific performance may be obtained, etc., and did not have any provision allowing a party to claim substituted performance of contracts. The original Act also conferred wide discretionary powers upon the courts to grant the remedy of specific performance and to refuse injunction, etc. It was felt that as a result of these wide discretionary powers, the courts in a vast majority of cases have developed a principle of awarding damages as a general rule and granting specific performance only as an exception.

Also, it was necessary, in the light of tremendous economic development that has taken place since the enactment of the 1963 Act, which have brought in enormous commercial activities in India including foreign direct investments, public private partnerships, public utilities infrastructure developments, etc., and which have prompted extensive reforms in several other related laws for the purpose of facilitating enforcement of contracts and settlement of disputes in speedy manner, to bring the remedies under this Act in tune with the rapid economic growth in the country and the expansion of infrastructure activities that are

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[14] Anjan Chakraborty, *Specific Relief (Amendment) Act, 2018: Its Effect on Contract Enforcement*, http://www.surico.in/admin/Pdf/Special%20Feature-%20Specific%20Relief%20(Amendment)%20Act%202018.pdf (last visited July 11, 2020).

[15] *Id.*

[16] *Id.*

[17] The Specific Relief Amendment Bill, 2017, as Introduced in Lok Sabha (India), http://parliamentlibraryindia.nic.in/writereaddata/Library/Reference%20Notes/SPECIFIC%20RELIEF%20AMENDMENT%20BILL%202017.pdf.

[18] The Specific Relief Act, 1963, pmbl.

needed for the overall development of the country. For this purpose, substituted performance of the contract was envisaged as an alternative remedy to be provided to the aggrieved party. the Statement of the Objects and Reasons of the 2017 Bill stated that:

> "[I]t is proposed to provide for substituted performance of contracts, 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 of contract. This would be an alternative remedy at the option of the party who suffers the broken contract."[19]

8.2.3 Intention of Legislature

Though the amendment was passed by both the houses without much emphasis laid down on its importance and healthy argument (as the Amendment was passed by both houses after a brief discussion, but without debate)[20], it cannot be denied that it is one of the most crucial and revolutionary concepts of recent times introduced to make contractual remedies more meaningful in the contemporary times. The intention of the legislature behind amendment and introducing this concept may be to fulfill the following objectives:

a. Reduce the burden of cases from judiciary.

b. Increasing security for contracting parties.

c. Increase ease of doing business.

d. Save time of parties.

e. Reduce the cost of litigation and additional expenses.

f. The matter remains confidential and restricted among contracted parties.

8.3 ANAND DESAI COMMITTEE REPORT

As stated earlier, an expert committee was formed by the Ministry of Law and Justice which was led by Mr. Anand Desai with the mandate to examine the Specific Relief Act, 1963.[21] The Committee submitted its Report[22] in May, 2016 with certain recommendations, which could be adopted in order to ease the business in India. One of the reforms suggested by the Committee was the introduction of the concept of substituted performance in the Specific Relief Act.[23] The Report stated that:

> "[I]f the promisee can complete performance (substitute performance) through another person (a third party) at the expense of the promisor, it will achieve nearly the same result as actual specific performance. He can either perform it himself, or get it performed through another source. Some systems allow the promisee to perform the promisee himself or through a third party at the expense of the promisor [citation omitted]. Indian law does not give him the right to cover as a substantive right. The

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[19] The Specific Relief Amendment Bill, 2017, Statement of Objects and Reasons.

[20] Saharshrarchi Uma Pandey, *The Specific Relief (Amendment) Act, 2018*, IJLMH (2018), https://www.ijlmh.com/wp-content/uploads/2019/03/The-Specific-Relief-Amendment-Act-2018.pdf.

[21] Reply of Shri. D. V. Sadananda Gowda, Minister of Law and Justice, Lok Sabha Unstarred Question No. 375 (Feb. 25, 2016), http://164.100.24.220/loksabhaquestions/annex/7/AU375.pdf.

[22] LEGISLATIVE DEPARTMENT, MINISTRY OF LAW & JUSTICE, GOVERNMENT OF INDIA, REPORT OF THE EXPERT COMMITTEE ON SPECIFIC RELIEF ACT, 1963 (May 2016).

[23] *Id.*, at 56.

> amendment proposes to give this right and is referred to in the amendment as 'Compensation Pursuant to Substituted performance'. "[24]

The Committee while proposing substituted performance also highlighted the drawbacks of the already existing regime under Section 73 of the Indian Contract Act.[25] The legal regime prior to Amendment allowed the promisee to claim compensation as the difference between the cost of substitute performance and the contract price. He could also have claimed compensation on 'cost to cure' basis.[26] However, the remedy under Section 73 of the Contract Act is subject to the principle of foreseeability (contemplation) and mitigation. Under this regime, the promisee is not certain whether he will get the whole amount he has spent. Another reason mentioned by the Desai Committee is certainty in contractual transactions, which is stated in the following terms:

> "If a promisee has the right to receive the amount he has spent, he will be able to obtain cover and will prefer to do so with confidence. He will seek the amount spent by him for obtaining substituted performance, as an effective alternative to specific performance. He will have the benefit of his contract very close to the time fixed for performance in the contract, rather than having to wait for the decree of specific performance."[27]

The Desai Committee has also looked at substituted performance, from the promisor's perspective and has stated that if the promisor has the knowledge of promisse's right of substituted performance and his liability to pay the costs, then the promisor is likely to perform the contract himself.[28] However, the Committee also warned against the abuse of this right by the promisee which can create a heavy burden on the promisor. For prevention of this abuse, the Committee recommended a "notice mechanism" under which the promisee is required to give a notice to the promisor about the cost of substitute performance that the promisor would have to bear and by also giving an opportunity to the promisor.[29] Thus, by this notice mechanism the interest of the promisor is also protected.

Based on this discussion the Amendment proposed by the Desai Committee has the following important features:

> "(i) A party can perform the contract himself or through another person. He can claim the amount he has actually suffered.
> (ii) He can claim the amount notwithstanding section 73 of the Indian Contract Act. He will have a choice.
> (iii) He can claim the amount only after he has spent or suffered it.
> (iv) The plaintiff will have to:
>
> (a) issue notice to the other party calling upon him to complete performance, and the cost or expenses for getting it done from a third party;
> (b) complete the performance and incur costs and expenses;
> (c) prove breach of contract;
> (d) prove the cost and expenses incurred in the suit; and
> (e) prove the amounts as reasonable.

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[24] *Id.*
[25] The Indian Contract Act, 1872, §73.
[26] The Indian Contract Act, 1872, §73, illustrations (f), (k) and (l).
[27] EXPERT COMMITTEE REPORT, *supra* note 22 at 57.
[28] *Id.*
[29] EXPERT COMMITTEE REPORT, *supra* note 22, at 58

(v) The defendant's interest are protected by giving him an opportunity of performing.
(vi) If the notice is given as above, the amount claimed in the notice shall be deemed to be reasonable, if actually spent or suffered.
(vii) One who seeks compensation pursuant to substituted performance cannot claim specific performance or injunction."[30]

8.4 INDIAN LAW FOR SUBSTITUTED PERFORMANCE

8.4.1 Provisions of the Act dealing with substituted performance

The Government of India amended the 54-year-old Act in the year 2018 in order to improve the position of aggrieved party (which has to fight lengthy court battles to get compensations) and to lay emphasis on honoring of contracts. The basic remedies available to any party in case of breach of contract so far have been damages, injunctions and in exceptional cases specific performance. However, with this Amendment, the government planned to lay emphasis on performance of the contracts rather than fighting for damages in the courts. The Act was given the status of primary resort in cases of breach in order to remove the judicial burden.[31] Following sections were amended in order to incorporate substituted performance under the Specific Relief Act, 1963:

a. Section 14[32] - Section 14(a) states that the specific performance of a contract is not possible in case where the aggrieved party has obtained the substituted performance of a contract under the provisions of Section 20.

b. Section 16[33] - Section 16(a) further reiterates the position already stated under Section 14(a) and states that "Specific performance of a contract cannot be enforced by a person (a) who has obtained substituted performance of contract under section 20".

c. Section 20[34] - Section 20 of the Act as amended by the Specific Relief (Amendment) Act, 2018 is the primary provision which lays down not only the right of substituted performance but also lays down the procedure to be followed when substituted performance is claimed. The right to substituted performance is subject to two main restrictions:

   (i) The right of substituted performance is without prejudice to the generality of the provisions contained in the Indian Contract Act, 1872;[35] and

   (ii) The right of substituted performance can be curtailed by an agreement by the parties.[36]

[30] *Id.*
[31] Fox Mandal, *An Overview of The Specific Relief (Amendment) Act, 2018,* https://www.foxmandal.in/an-overview-of-the-specific-relief-amendment-act-2018/.
[32] The Specific Relief Act, 1963, § 14.
[33] *Id.*, §16.
[34] *Id.*, §20.
[35] *Id.*
[36] *Id.*, §20 (1) ("expect as otherwise agreed upon by the parties.").

8.4.2 Procedure to be followed to exercise substituted performance

Where any party has made default as to performance of the contract, the aggrieved party who suffers the breach has the right to get the contract performed in the procedure mentioned under Section 20 of the Act. As per the procedure, the party can get the contract performed through his own agency or third party in the following manner:

a. A notice has to be served by the aggrieved party to the defaulting party.

b. The notice should be in writing and should not be less than 30 days.

c. The notice should call upon the defaulting party to perform the contract within such time as specified in the notice.

d. After the defaulter refuses or fails to perform the contract, then the aggrieved party can get the contract performed through its own agency or third party.

e. When the contract is performed through substituted performance, only then the aggrieved party can recover the expenses from the defaulting party.

f. Even after the expenses, the aggrieved party has a right to claim compensation from the defaulting party.[37]

Thus, before the remedy of substituted performance is obtained, a 30-day prior notice has to be served on the party committing a breach in order to provide an opportunity to the defaulter and avoid misuse of the provision. After the lapse of the time period or on defaulter's refusal, the aggrieved party can approach the third party for performance of the contract. In the course of enforcement, all the expenses and costs incurred are recoverable from the party committing the default in the first place. However, such expenses are only recoverable when the contract has been performed by the third party or through its own agency.[38]

Further, this does not vitiate other rights of the aggrieved party as they can still exercise their right to claim compensation. Emphasis has been laid to make specific relief as the primary relief rather than remedial or the relief of last resort. This can be significantly drawn from the amendment made to Section 11 of the Act where the words, "may in discretion of the court" are replaced by "shall." Rather than deciding adequate quantum of compensation to be awarded to aggrieved party, the approach shifted to, seeking performance of contract to avoid any bad judgment.[39]

8.5 INTERNATIONAL LAW ON SUBSTITUTED PERFORMANCE

Substituted performance is not a new concept in the global world. It has been recognized by various countries and incorporated in their domestic laws over the period of time. Foreign

[37] *Id.*, §20.

[38] Trilegal, *Amendment to the Specific Relief Act,* August 24, 2018, https://www.trilegal.com/pdf/create.php?publication_id=14&publication_title=amendments-to-the-specific-relief-act-1963.

[39] PSA Legal, *Specific Relief Amendment Act, 2018: A Paradigm Shift?*, http://www.psalegal.com/wp-content/uploads/2017/01/E-Newsline-October-2018.pdf.

laws are much more punctual in the aspect of performing the contract rather than claiming damages. Hence, investors are eager to invest in their states where contract laws are stringent.

Some of the countries which have already incorporated this concept in their laws are as follows:

a. The Principles of European Contract Law also provides for substituted performance if the defaulting party is not willing to perform the contract. Article 9:101 titled "Monetary Obligations" provides that the creditor is entitled to recover money due to them, qualified by certain factors therein. Substituted performance is possible in cases other than where it results in unnecessary significant effort and expense or where it would be unreasonable in the circumstances.[40]
b. Japanese Civil Code: Para 2 of article 414 of the Japanese Civil Code, titled "Enforcement of Performance"[41], empowers the obligee to request the court to enforce specific performance through a third party, where such enforcement through the obligor is not possible. Likewise, Section 213 of the Thai Civil and Commercial Code provides that where specific performance by the debtor is impossible, the creditor may apply to the court to have it done by a third person at the debtor's expense.[42]
c. Under German law, the general remedy for breach of a contract is specific performance. If the contract is to produce a good or provide a service, specific performance is frequently implemented by a covering contract; the way in which specific enforcement tends to be implemented is by the party in breach paying for a covering contract.[43] Section 887 of the German Civil Code, titled "actions that may be taken by others",[44] empowers the creditor with court authorization to have the action required to be taken by a third party at the costs of the debtor.
d. Spain Civil Code 1889, - The Spanish Civil Code has a similar provision which provides that, "should the person obliged to do something fail to do such thing, it should be ordered to be done at the obligor's expense", as per Article 1098 of the Code.[45] It must be noted that prior authorization from the court is required for the same. Article 1098 states, "If the person obliged to do something should fail to do it, it shall be ordered to be done at his expense."[46]
e. Ethiopian Civil Code 1960 - Article 1778, states, "where fungible things are due, the creditor may be authorized by the court to buy at the debtor's expense the things which the debtor assumed to deliver." Further Article 1927, states, "The voluntary acceptance

[40] The Principles of European Contract Law, art. 9:101 (Parts I and II Revised 1998) (EU.).
[41] MINPŌ [MINPŌ] [CIV. C.], art.414, para. 2 (Japan).
[42] The Thailand Civil and Commercial Code, 1925, §213.
[43] Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX. L. REV. 831 (2006).
[44] Zivilprozessordnung [ZPO] [Code of Civil Procedure], §887, para. 1 (Ger.).
[45] C. C. art. 1098 (L.O. 2013) (Spain).
[46] Ministerio D Justicia, Spanish Civil Code, http://derechocivil-ugr.es/attachments/article/45/spanish-civil-code.pdf.

by the creditor of an immovable or of any other asset in satisfaction of the primary debt shall discharge the guarantee even though the creditor may subsequently be evicted."[47]

f. Quebec Civil Code 1991[48] - Article 1602, states, "Where the debtor is in default, the creditor may perform the obligation or cause it to be performed at the expense of the debtor."

g. Uniform Civil Procedure Rules, New South Wales 2005, Rule 40.8., states, "If a judgment required a person to do an act and the person does not do the act, the court-

   a) May direct that the act be done by a person appointed by the court, and

   b) May order the person to pay the costs incurred pursuant to the direction."[49]

h. Uniform Civil Code, State of Delaware - Section 2A-404 states:

> "(1) If without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.
> (2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:
> (a) The lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means or manner of payment that is commercially a substantial equivalent; and
> (b) If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory."[50]

i. Ohio Revised Code, 2006, U.S.A - Section 1302.72 states:

> "(A) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.
>
> (B) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or predatory."51

j. French Civil Code: "French contract law affords freedom of action to the victim of a breach of contract. He is not obliged to take any particular course of action and may choose his preferred remedy without considering how it impacts the party in breach.

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[47] World Intellectual Property Organization, Ethiopian Civil Code, *1960,* https://www.wipo.int/edocs/lexdocs/laws/en/et/et020en.pdf.
[48] LégQuébec, Civil Code of Québec, http://legisquebec.gouv.qc.ca/en/showdoc/cs/ccq-1991.
[49] NSW legislation, Uniform Civil Procedure Rules, 2005, https://www.legislation.nsw.gov.au/#/view/regulation/2005/418.
[50] State of Delaware, Uniform Commercial Code, https://delcode.delaware.gov/title6/c002a/sc04/index.shtml.
[51] Justicia, Ohio Revised Code, https://law.justia.com/codes/ohio/2006/orc/jd_130272-5449.html.

> The innocent party can claim either the specific performance of the contractual obligation of where such performance is possible or the cost of substitute performance by a third party (*faculté de remplacement*). Substitute performance by third party is thus an option under Article 1144 and a claim for specific performance will not be dismissed on the basis that substitute performance is possible."[52] Article 1144, falling under Section III of the French Civil Code titled "Of the Obligation to Do or not to Do", states that a creditor may in the case of non-performance by the debtor "be authorized to have the obligation performed himself, at the debtor's expense."[53] It has to be approved by court order in advance and the lower courts often drew back from using substituted performance at all. Judicial precedent in this regard dictates that the Court of Cassation supported them, declaring that substituted performance was an exceptional mode of enforcement, and its use rested strictly in the lower courts' discretion.[54] The nature of this provision affords significant judicial discretion to the courts. In practice, instead of authorising third party performance, a court may give time to the debtor to perform the required action himself, or simply award the creditor damages. This discretion gives the courts considerable power to control the situations in which the creditor may substitute a third party's performance for the debtor's.[55] Thus, although commercial law recognizes the utility of cover as a prompt, self-help remedy, article 1144 treats cover, in transactions subject to the civil law, as an impermissible form of private justice unless accomplished with court approval or justified by the urgency of the situation.[56]

In the landmark case of *Liberty Merican Ltd. V. Cuddy Civil Engineering Ltd. (TCC),*[57] two parties entered into a contract for building a retail plateau. However, the Liberty commenced proceedings against the contractor, i.e., Cuddy Civil Engineering Ltd. for performance of bonds and warranties with outstanding payments. However, later the Liberty contended to include Cuddy Demolition and Dismantling Limited which was an active trading company having same directors and shareholders. When the Liberty's solicitors were preparing formal documents, they formulated contract in the name of Cuddy Civil Engineering Ltd., instead of Cuddy Demolition and Dismantling Limited that are both part of Cuddy group. The Misnomer Principle states that:

> Usually the parties and terms of the contract are followed for determination of liability and performance of contract. However, under this principle the court decides the legal effect of the contract. As per the principle due to error or mistake, the purpose of the contract shall not be vitiated.

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[52] Solène Le Pautremat, *Mitigation of Damage: A French Perspective,* 55 INT'L & COMP. L. Q. 1, 205-217 (2006).
[53] CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1144 (Fr.).
[54] John P. Dawson, *Specific Performance in France and Germany*, 57 MICHIGAN L. REV. 4 (1959), 495-538.
[55] Simon Whittaker, *Performance of Another's Obligation: French and English Law Contrasted*, OXFORD UNIV. COMPARATIVE L. FORUM 7 (2000).
[56] Edward. A. Tomlinson, *Performance Obligations of the Aggrieved Contractant: The French Experience*, 12 LOY. L. A. INT'L COMP. L.J. 139 (1989).
[57] Liberty Merican Ltd. v. Cuddy Civil Engineering Ltd., [2013] EWHC 4110 (TCC); Lexology, *High Court confirms contractual construction principles apply to misnormer principle,* October 1, 2013, https://www.lexology.com/library/detail.aspx?g=01ad9467-1e2e-419b-b07d-23f5e8d0466b.

In this case, the court recognized the concept of substituted performance. The court ordered that the aggrieved party has a right to receive amount equal to the contract bond, which is to be deposited in to the court by the aggrieved party.[58]

8.6 CONCLUSION

The concept of substituted performance is likely to bring positive impacts under the contract law, thereby improving the situation of India in the ease of doing business. However, in the absence of landmark case laws on the subject and also recent pronouncements of the courts, the true impact of this concept is yet to be seen. The impact will likely be pan-industry, especially industries like construction and infrastructure will benefit the most, where damages often do not adequately compensate breach of contract. New contracts that will be drafted may even incorporate specific clauses identifying the procedure of achieving substituted performance.[59] It is also expected that the introduction of substituted performance will result in reducing litigation as the contracting parties will now have an option of choosing between specific or substituted performance. This will surely encourage continuity of contractual relationships towards achieving the pre-agreed objectives identified by contracting parties.[60] Though, it is premature to judge the effectiveness of substituted performance in India as yet, we should be mindful of the future challenges that might arise in relation to substituted performance and prepare accordingly. Some of the challenges that may arise in the future might be:

1. Risk purchase clauses and Cost purchase clauses vis-à-vis substituted performance – One of the challenges that may arise is the effect of substituted performance on risk and cost purchase clauses which are already incorporated under the contracts.
2. Substituted performance and government contracts – For government contracts, tendering process is a key event. The question that arises will be whether the government organization or department should go for re-tendering for claiming substituted performance and if yes, will the breaching party be barred from participating in the tender process? This will be an important question that needs to clarified and proper rules should be framed in this regard.
3. Existing Interest – Another challenge that substituted performance might have to face will be with respect to, if the breaching party has an interest existing in the contract at the time of breach can the other party still claim substituted performance. For instance, if the contractor has been promised toll collection and at the event of breach will the right of the contractor still subsist? or will it pass on to the new contractor? Who will repay the earlier contractor the loss of profits that he could have earned through toll collection. It will also be challenging to go for substituted performance if rights such as Intellectual Property Rights are involved such as use of

[58] Akshita Alok, *Understanding Substituted Performance under Specific Relief (Amendment) Bill, 2018*, (June, 2018), https://www.lakshmisri.com/insights/articles/understanding-substituted-performance-under-specific-relief-amendment-bill-2018/# .

[59] *Id.*

[60] Suchitya Vyas, *Specific Relief (Amendment) Act, 2018: A Paradigm Shift?*, PSA Legal Consultants, E-Newsline (Oct. 2018), http://www.psalegal.com/wp-content/uploads/2017/01/E-Newsline-October-2018.pdf.

patented technology, copyrighted software etc. cases where specific performance is a better remedy.

4. Section 20 of the Act makes the right of substituted performance subject to "as otherwise agreed between the parties". This will be problematic in standard form contracts as well as where there is inequality in the bargaining power of the parties. The powerful party can easily contract out its liability under substituted performance and deny the other party the remedy.
5. Substituted performance clause should not be a bar to specific performance – Even if there is a clause of substituted performance in a contract, this should not bar a party from availing specific performance from the contracting party. Specific performance should be a remedy over and above the contractual clauses of substituted performance in relevant cases. An explanation in this regard should be incorporated in section 20 itself.

The above-mentioned challenges demonstrate that it is not going to be a smooth sailing for substituted performance. However, giving emphasis on making substituted performance as a general rule rather than exception will have a positive impact, as parties who are unwilling to perform the contract will then have a fear to perform the contract if dispute arises in the court. This will provide certainty in performance of the contracts. This will see an increase in contracts performance and a decrease in litigations. Though the problems for substituted performance where the contracts were supposed to be performed by a specific individual (personal service contracts) still persists as by their very nature there is an obstacle in performance of a contract by a third party. It remains how court will interpret the intention of the legislature and apply the law as per the facts and circumstances of the case. We are still far from the destination, as the general public needs to be aware of their rights and choose the performance of a contract as preference over compensation.[61]

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[61] Khaitan and Co., *Specific Relief (Amendment) Act, 2018* (Aug. 14, 2018), https://www.khaitanco.com/thought-leadership/specific-relief-amendment-act-2018.

CHAPTER 9: STEPS TO BE TAKEN TO OPERATIONALIZE ORDER XLI RULE 11A OF CODE OF CIVIL PROCEDURE, 1908

9.1 INTRODUCTION

Code of Civil Procedure, 1908 (hereafter 'CPC') is an extensive and exhaustive procedural law that provides for comprehensive procedural system for the courts to implement and follow. This Code was a result of several attempts made by the British India regime to consolidate various procedural and substantive aspects of the court system in India. The issue at present is the disposal of the first appeal filed before the lower appellate court and the High Courts, which has the power to adjudicate the first appeals.

The objective of this chapter is to understand various provisions of the Order XLI of CPC and the procedures contained therein. The issue for the present chapter stems from the fact that the Courts, right from the stage of filing of suit till its disposal, are faced with the situation of not being able to dispose a matter in a timely manner. Delivering justice and delivering justice in a timely manner are two different things. Denial of 'timely justice' amounts to denial of 'justice' in itself. The statutory provisions of the Contract Act, 1872; Specific Relief Act, 1963; Sale of Goods Act, 1930 and other substantive legislations provides for the reliefs that a litigant may need. But it is the procedural law that decides when a litigant may actually expect to get justice. However, when it comes to the scenario in India, the litigant may, in some cases, have to wait for his successors to fight and procure justice. Upon analysing and understanding the modern justice delivery mechanism, it may be said unhesitatingly that 'declaring' what is due and 'delivering' what is due have become two distinct processes. Once a litigation commences in India, it is a never-ending fight fought between the parties and their successive generations. The perception that India has developed over a period of time is that it is unfriendly for litigation. This is because litigation may be started by the one actually aggrieved but due to various provisions, procedural and judicial complexity allow the parties to protract the litigation to the extent that it may take decades to decide a matter.

First appeals in India is not just a statutory remedy that has been developed and granted to the litigants, but it is also to ensure that the fallacies of judges do not lead to injustice to the parties. Due to the procedural mandates, the courts sometimes become too technical stressing on procedural compliances rather than focussing on the substantive justice delivery. The procedural norms are created for the parties to maintain uniformity and to make it convenient for the judges to take up any matter for adjudication. The obvious question that arises for consideration is what is the outcome of this effort? Commissions, Committees and Forums have discussed, debated and dissected the issue of delay in the justice delivery system and reforms that are required to improvise it. The Chapter focuses on various recommendations made by different committees and members since 1924 till the recent developments in the year 2014. This covers a period of over 90 years and an attempt has been made to detail the various aspects of first appeals and how it has evolved over a

period of time. In order to discuss more on first appeals, an understanding about the preliminary stages of court system has to be looked into.

9.2 JUDGEMENT AND DECREE UNDER CPC

Parties to the suit i.e., plaintiff/s and defendant/s, contest the suit filed by the plaintiff/s seeking a specific remedy under tort or a statute. The suit has to pass through the trial procedure as enumerated under the provisions of CPC and will reach finality by way of judgment and decree, which may be in favour of the plaintiff/s or defendant/s. The suit culminates by the pronouncement of a judgment under Order XX Rule 1[1] of CPC. Thereafter, by virtue of Rules 6, 6A, 6B and 7 of Order XX[2], the decree is drawn up the courts which shall be in consonance with the judgement delivered by the court. In order to understand what terms 'Judgment' and 'Decree' means, the terms have been defined under CPC as follows –

Section 2(2) - "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

Section 2(9) - "judgment" means the statement given by the Judge of the grounds of a decree or order;

The aggrieved party always has an option to file appeal and the procedure dealing with appeals has been provided under Chapter VII – Appeals from Section 96 to 112. However, for the purposes of this Chapter, we would be focussing only on the first part of the Chapter pertaining to the Appeals from Original Decrees (Sections 96-99A) and General provisions relating to Appeals (Sections 107 and 108). Since the fundamental research of this paper revolves around Section 96, 97 and 107 and 108, along with Order XLI Rule 11A, the provisions read as follows:

> **Section 96. Appeal from original decree**.—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.
> (2) An appeal may lie from an original decree passed ex parte.
> (3) No appeal shall lie from a decree passed by the Court with the consent of parties.

[1] CODE CIV. PROC., Order XX – Judgment and Decree (India).
[2] *Id.*, Order XX Rule 6, 6A, 6B, 7.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees.

Section 107. Powers of Appellate Court. — (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

Section 108. Procedure in appeals from appellate decrees and orders. — The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

9.3 ORDER XLI – APPEALS FROM ORIGINAL DECREES

11A. Time within which hearing under rule 11 should be concluded. — *Every appeal shall be heard under rule 11 as expeditiously as possible and endeavour shall be made to conclude such hearing within sixty days from the date on which the memorandum of appeal is filed.*

While analysing both the provisions i.e., under Section 96 and Order XLI Rule 11A, it has to be read together as they both primarily deal with the appeals from original decrees. Before dealing with aspect of operationalisation of Order XLI Rule 11A of CPC, understanding of few terminologies is essential.

a. **Appeal:** Any person who feels aggrieved by any decree or order passed by the court may prefer an appeal in a superior court if an appeal is provided against that decree or order. Appeal is generally understood as the review of the decision by a higher court of the decision of a lower court. A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority.[3] An appeal may be on a question of fact and/or question of law.

b. **Appeal from an original decree:** From any decree passed by any court exercising original jurisdiction, first appeal lies to the court authorised to hear appeals from the decision of such court unless otherwise has been expressly provided either under the CPC or by any other law for the time being in force.

Sections 96 to 99-A. 107 to 108 and Order XLI of the CPC deals with appeals from original decrees which are known as first appeal. The right to appeal is a substantive right vested in parties from the date suit is instituted. Right to appeal doesn't arise when adverse decision is given, but on the day, suit is instituted i.e. proceedings commenced, right to appeal get conferred.

[3] BLACK'S LAW DICTIONARY (7th Edition).

So, it becomes imperative to understand the aspect of right to appeal in depth and to comprehend whether such a right is conferred by any statute or is inherent by nature of the litigating party among other things.

9.4 RIGHT TO APPEAL

9.4.1 Right to Appeal – A Creature of Statute

Provision of appeal under Section 96 of CPC confers the right to appeal against every decree passed by any court exercising original jurisdiction. The provision also makes it clear that no party to the *lis* shall challenge the order passed by the Court with the consent of the parties. As has been decided and reiterated by the Supreme Court and other Courts from time to time, right to appeal is a statutory right and not an inherent and natural right. In case of *ex-parte* orders, which is not completely based on the merits of the case, the right to file an appeal under Section 96(2) CPC is granted, which is a statutory remedy. The right to appeal is not a mere matter of procedure; but is a substantive right. Right to appeal under Section 96(2) CPC, being a statutory right, the defendant cannot be deprived of the statutory right.[4] Furthermore, appeal is not in itself a new proceeding, rather it is a continuation of the suit wherein the entire proceedings are left open for the appellate Courts. This position of law is well settled and trite in law.

The distinction between the right to file a suit and right to file an appeal is that, right to file a suit is an inherent right. Whereas, right to appeal is a right conferred by a statute. In those statutes which provide for right to appeal, a mechanism has to be constituted for hearing those appeals with powers. There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute. But the position with regard to appeals is quite opposite as right to appeal inheres in no one and therefore, for its maintainability, it must have clear authority of law.[5] Right to appeal carries with it a right to re-hear on law as well as on fact, under the statute conferring a right of appeal limits the re-hearing in some way as has been done in second appeal arising under CPC.[6]

Right to appeal could also be made as a conditional right only by a statute and not by the judgment itself. Right of appeal under Section 96 is not conditional. The conditions including the appeal only on question of law[7] is a condition that is statutorily prescribed. Section 96 of the Code of Civil Procedure gives a right of appeal from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court. An appeal under Section 96 lies only from a decree. The jurisdiction of the court in the first appeal is to the extent conferred by the legislature. No litigant possesses any natural or inherent right to appeal against any order, unless a statute confers it and it is to the extent it is conferred. Therefore, it is necessary to look at the statute as provided under the Code of Civil Procedure in order to understand the scope of appeal and

[4] N.Mohan v. R. Madhu, Civil Appeal No.8898/2019, dated 21.11.2019 (SC).
[5] Smt. Ganga Bai v. Vijai Kumar, AIR 1974 SC 1126.
[6] Hari Shankar v. Rao Girdhari Lal Chowdhury, AIR 1963 SC 698.
[7] CODE CIV. PROC., §100.

the power vested in the Court to hear and decide such appeal.[8] Therefore, right to appeal is a creature of statue and only if it is conferred, such a right can be exercised.

9.4.2 Maintainability of Appeal

Upon reading Section 96, it becomes imperative that the provision provides for the appeals from original decrees. For filing an appeal challenging the original decree, which also means that the challenge against the order given by the court of first instance, will be a challenge against the judgment and decree passed therein.

On a combined reading of Section 96 along with the definitions as afore quoted, not every appeal challenging the order passed by the court of first instance can be considered as regular first appeal (hereafter 'RFA'). A First appeal is maintainable against certain adjudications which are mentioned below –

a. Appeal against a decree;

b. Appeal against preliminary decree;

c. Appeal against final decree;

d. Appeal challenging the rejection of plaint under Order VII Rule 11 of CPC;

e. Appeal for determination of any question within Section 144 of CPC[9].

f. Appeal against *ex-parte* decrees.

Only in the cases as mentioned above, a first appeal may be instituted seeking adjudication of judgments and decrees passed by the Court of first instance. However, there are certain other cases where the first appeal is not maintainable, and they are as follows –

a. Where a suit has been dismissed for default, which means that due to the callousness of the plaintiff, either due to delay or non-prosecution, an appeal does not lie against such dismissal of suit.

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[8] Sri. T.S. Channegowda v. Sri. H. Thopiah, 2015 SCC Online Kar 8184.

[9] CODE CIV. PROC., §144 (Application for Restitution - (1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified; and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order. Explanation. — For the purposes of sub-section (1), the expression "Court which passed the decree or order" shall be deemed to include —
(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;
(b) where the decree or order has been set aside by a separate suit, the court of first instance which passed such decree or order.
(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute, it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.
(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)).

b. Where a decree was passed by the court with the consent of the parties, will be dealt with in the later part.

c. Where a judgment has been passed in any petty suits where the amount or value of the subject matter does not exceed Rs.10,000/- as has been provided under Section 96(4) of CPC. An exception has been carved out to this effect that if any question of law arises, then an appeal is maintainable.

d. Where a question has arisen at the time of execution as provided for under Section 47[10] of CPC, against such orders, First appeal is not maintainable.

The power of the First Appellate Court while adjudicating a first appeal has been vested with the power to judge correctness of findings if facts as well as of law recorded by the court of first instance, as has been provided under Section 107 of CPC.

9.4.3 Appeal of a Consent Decree

The provision also makes it clear that no party to the *lis* shall challenge the order passed by the court with the consent of the parties. Cases wherein the parties have opted for alternate dispute resolution mechanism including Arbitration, Mediation, Lok Adalat[11] shall not challenge such orders. As such a decree is more of a compromise and *per se* not a decision of the court. A consent decree resembles a contract between the parties, but is super added by a seal of the court. In case, the parties claim that the compromise terms were not as per the intentions and raise a contention of fraud, the parties do not have the luxury of appealing the decree, as the bar created under Section 96(3) is on the broad principle of estoppel. On the other hand, the parties also cannot approach the court once again with the fresh suit due to the clear bar mentioned under Rule 3A to Order XXIII.[12] So, in this case the parties have the option to approach the same court which passed a consent decree under Order XXIII Rule 3[13] of CPC. Then the court will have the power to reopen the case and consider the case based on merits.

Section 97 enables the aggrieved party to appeal against the preliminary decree, but he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree if he does not appeal from the preliminary decree.

9.5 ANALYSIS OF ORDER XLI

Order XLI of the CPC (hereafter 'Order XLI') lays down the procedural law relating to first appeals (also known as appeal from original decrees). This means that the order lays down the stipulations that have to be complied with for validly presenting an appeal. That Order XLI sets out meticulously the procedure for considering the appeals filed under Section 96 of CPC. Before the appeal is admitted, a memorandum of appeal accompanied by a copy of the decree against which the appeal is preferred has to be submitted. The appeal should

[10] CODE CIV. PROC., §47.
[11] *Id.*, §89.
[12] R. Rajanna v. S.R. Venkataswamy, Civil Appeal No.10416-17 of 2014, decided on Nov. 20, 2014, (SC).
[13] CODE CIV. PROC., Order XXIII, Rule 3; *See also* Banwari Law v. Chando Devi, (1993) 1 SCC 581.

be in a specified format.[14] This memorandum should contain the grounds on which judicial examination of the decree passed by a lower court is sought. Leave of the court is needed before a ground for objection is not mentioned in the memorandum is urged in court.[15] In the Amending Act of 104 of 1976, along with Rule 11A, Rule 3A was also added. Rule 3A lays down the procedure for applying for condonation for delay. It was enacted for ensuring that the courts do not admit appeals without consideration of the application for the condonation of delay and to provide a procedure to regulate the practice of Courts in this regard. Sub rule 3 of Rule 3A posits that the appellate "court shall not make in order fact the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal". Rules 3A and 11A read together, posit that in the period of 60 days from the date of filing the memorandum of appeal and the date on which the hearing under Rule 11 takes place, a stay of execution of decree cannot be ordered. However, the legislative intent points towards the Appellate Court exercising its power of granting stay during these 60 days but not extending it beyond 60 days without admitting the appeal. Therefore, the right of appeal created by Section 96 should be advanced and not be frustrated.[16]

Thereafter, appeal is barred by a specified limitation period of 60 days for appeal to a high court and 30 days for any other court.[17] An application seeking condonation of delay is required to be filed for any party aggrieved by the order of flower court to prefer an appeal. Such an application should establish sufficient cause for not preferring the appeal within the limitation period. However, this is not a necessary condition. An appeal dismissed due to it being time-barred is an order, not a decree (not conclusive, can be appealed against). Furthermore, an appeal can be admitted wholly or rejected wholly; a partial admission of appeal is not allowed and merits alone to decide whether appeal is admitted.

When there are common questions of law and facts, the appeals may be clubbed and the courts under the provision Rule 4 of Order XLI, may try the matter as common appeals. Rule 3A provides for seeking condonation of delay. Once, the appeal is filed by the aggrieved party either before or after the limitation, it is to be noted that, an appeal is not a stay on proceedings under a decree/order. Which implies that the party who has obtained the decree may prefer Execution of the decree after the period of appeal is over. Therefore, once an appeal is filed, execution can be stayed if court finds sufficient cause i.e., the exercise of the discretionary power vested, in addition to the appellant facing substantial losses, and the appeal having been filed without unreasonable delay and a valid security provided for payment.

Rule 5 of Order XLI provides for the stay of decree or appeal by the Appellate Court as well as by the same Court which passed the Decree. The Rule also provides for staying the judgment and decree passed by the very court which decided the issue. The appeal in itself

[14] CODE CIV. PROC., Order XLI, Rule 1.
[15] *Id.*, Order XLI, Rules 2, 3.
[16] Luis Antonio Romualdo Jesus De Maria Jose De Abreu v. Linda D'Souza E Fernandes and Others, 2018 IndLaw Mum 1970.
[17] The Limitation Act, 1963, §15.

shall not operate as a stay of appeal proceedings under a decree or order nor shall the execution proceedings filed be affected due to the filing of such appeal. Therefore, the court passing the judgment and decree is not hindered from executing its own judgment and decree. However, the Appellate Court has the power to stay the judgment and decree passed by the lower court only upon satisfying itself that not granting such stay order will cause substantial loss and injustice to the party. The court adjudicating the appeal has the power to stay any further proceedings and therefore, admission of appeal is not automatic and grant of order off stay is also not automatic. Moreover, the stay has to be only for a dispute claim and in case of a money decree, the disputed amount will be ordered to be deposited.

Rule 6 of Order XLI also provides for taking restitution of property which is taken while executing the decree appealed from. Rule 7 stands repealed and Rule 8 deals with the powers that are conferred by rules 5 and 6, shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree. Before the commencement of the Rule 9, a special heading titled as "Procedure on admission of appeal" has been provided. The words 'admission of appeal' has not been defined by the Code and High Court of Karnataka by virtue of powers conferred under Article 225 of Constitution of India and Section 54 of States Re-organisation Act, 1956 read with Sections 122 and 129 of CPC, and Section 19 of the Mysore High Court Act, 1884, has issued the High Court of Karnataka Rules, 1959, and accordingly Rule 1 of the said High Court of Karnataka Rules, 1959, defines the following[18] -

> Rule 1 -
> (e) – "**Admission Judge**" or "**Admission Court**" means the Judge for the time being dealing with admission of cases and with interlocutory applications:
> (p) – "**To admit a case**" means to decide to issue notice to respondent or direct issue of notice to respondent after preliminary perusal of papers or preliminary hearing under the provisions of Order 41, Rule 11 of the Code of Civil Procedure or section 421 of the Code of Criminal Procedure or any other like provision of any other law for the time being in force.
> (q) – "**To Admit a Case to Register**" or "**To Register a Case**" means entering the same in the appropriate register and giving it a number in accordance with the practice of the Court after the Registrar is satisfied that the papers of the particular case have been presented to the High Court within the time, if any, limited therefore by any law for the time being in force, that proper court fee, if any, payable in respect of those papers has been paid, that all enclosures required by or under these Rules have been furnished and that the papers in all respects comply with the provisions of law and of these Rules applicable to the same relating to the presentation of such papers.

Order XLI applies equally to the Lower Appellate Court and to the High Court. It is only additional that the High Court has to follow the Rules for Admission of appeal as prescribed under the High Court rules apart from what is already prescribed under the CPC.

Rule 9 prescribes with the Registry of memorandum of appeal and the said provision has been explained by the Supreme Court of India in the case of *Salem Advocate Bar Association v.*

[18] Hari Shankar v. Rao Girdhari Lal Chowdhury, AIR 1963 SC 698.

Union of India[19] as follows, it is observed that the apprehension that this rule requires the appeal to be filed in the Court from whose decree the appeal is to be filed, is unfounded. It was held that the appeal is to be filed under Order XLI Rule 1 in the Court in which it is maintainable. All that Order XLI Rule 9 requires is that a copy of memorandum of appeal which has been filed in the Appellate Court should also be presented before the Court against whose decree the appeal has been filed and endorsement thereof shall be made by the decreeing court in a book called the Register of Appeals. Perhaps the intention of the legislature was that the court against whose decree the appeal has been filed should be made aware of the factum of filing of the appeal. That is all the object of the said amendment.

Rule 10 of Order XLI deals with the power of the court to secure the respondent in an appeal from the risk of having to incur further costs which the respondent may never recover from the appellant. In most of the cases, including in the matters of commercial nature, the court orders the appellant to deposit a security even before the respondent is called upon before the Court. In order to secure the ends of justice the statutory provision has been carved out in the CPC itself. Despite this being a discretionary relief, the Court may make an order upon an application made by the respondent subsequent to appearance. The consequences of non-compliance of order furnish the security shall bind the Court to reject the appeal. Hence, mandatory compliances of conditions placed by the Court are necessary even before the Court takes up a matter for hearing for admission.

The order also provides for the summary dismissal of an appeal under Rule 11. There are various grounds under which this can be done. Rule 11(1) provides for dismissal of appeal after hearing the appellant on the date of hearing without sending notice to the lower court or the respondent. The same was upheld in *M.C. Mohammed v. Gowramma*[20], where even though a prima facie case for admission was posed, the appeal was disposed of, after hearing both the contesting sides at the stage of admission itself. Where there is posed a controversy on facts, its summary disposal without notice to the respondent is a misuse of Rule 11. Resort to a summary dismissal should be restricted to an appeal which is so devoid of substance or merits that the issue of notice to the opposite side would be an unmeaning formality.[21] Dismissal of appeal *in limine* with one word 'dismissed' is not justified when a serious question of law and fact is raised. Where an appeal is preferred against an *ex-parte* order, the appeal cannot be granted without giving notice to opposite party. This poses a material irregularity and hence is not allowed.[22]

On interpretation of Rule 11(2), it provides for dismissal when the appellant does not appear before court when an appearing is called. This is in the same manner as when an original complaint where if a plaintiff does not appear for hearing, the case may be dismissed. This dismissal is in default. However, under this rule and Rule 19, an appeal cannot be dismissed in the absence of appellant on the basis of merits of the case. A separate provision is made

[19] Salem Advocate Bar Association v. Union of India, AIR 2003 SC 189.
[20] M.C. Mohammed v. Gowramma, AIR 2007 Kar 46.
[21] Neelawwa v. Chinnawwa, AIR 1970 Mys 138.
[22] Kiranmal Zumerlal Borana Marwadi v. Dnyanoba Bajirao Khot, (1983) 4 SCC 223.

for Motor Vehicle claims so that the aggrieved party is not held back from obtaining immediate relief. Such appeals can nevertheless be dismissed for non-prosecution. In this case, the decree of the lower court is enforced during execution. Appeals dismissed for non-prosecution can be readmitted under Rule 19 if sufficient cause for not appearing before the court is proved. On the basis of such cause the courts can re-admit the appeal on terms such as costs or otherwise as the court deems fit. Although, in certain cases, establishing sufficient cause is not necessary. The Bombay High Court[23] has held that courts have inherent power to admit an application for readmission that is time-barred under art 168 of the Limitation Act, 1908. Just like the case with the original suit, if the respondent does not appear but the appellant does, the court may proceed *ex-parte*. If the case goes in the favour of the appellant, the respondent may apply for the rehearing of the appeal under Rule 21 of Order XLI. If the respondent is able to satisfy the court that he had sufficient cause for not having appeared for the scheduled hearing, the court may accept the application. However, ordinarily the court should not pass an *ex-parte* decree except on reliable evidence.

Rule 11(4) of Order XLI directs the appellate Court not being the High Court, to give a reasoned judgement. Sub-Rule (4) has been inserted by the amendment of 1976, which makes the appellate Court to deliver a judgment recording in brief the grounds for dismissing the appeal under Sub-Rule (1). The Lower Appellate Court shall deliver the judgment recording in brief, its grounds for doing so and a decree shall be drawn up in accordance with the judgment. The reason for insertion of this rule being that the High Court First or Appellate Court decides and dismisses the First Appeal, the statute does not provide for a Second appeal. All that the party could do is to invoke the power of the Supreme Court under Article 136 of Constitution of India. Additionally, in *Harijan Vanabhai Devbhai and Others v. Khoda Gram Panchayat*,[24] it was held that the appellate court must be chary in exercising the power of dismissing appeals and, if it chooses to do so, it must express its own reason as the appellate forum for summarily rejecting the first appeal. This rule aligns with the elementary canons of justice where justice should not only be done but seem to be done. The judgement should be a re-appreciation and reappraisal of the evidence on record and redetermination of the points in dispute during the original suit. It should deal with/dispose contentions agitated in the plaint or written statement and in the memorandum of appeal.[25] Although prima-facie it excludes high courts from having to give a reasoned judgement, this rule cannot be construed to stop or prevent the High Court from supporting its summary dismissal order in appeals by reasons. Additionally, the appellate court must be cautious in exercising the power of dismissing appeals and, if it chooses to do so, it must express its own reason as the appellate forum for summarily rejecting the first appeal. The High Court of Karnataka[26] has held that an appeal under Section 96 of CPC, High Court is empowered to dismiss the first appeal at the preliminary stage if there is no merit in the appeal. Despite there being a position that the litigant has a right to be heard

[23] Sonu Bai v. Shivajirao, AIR 1921 Bom 20.
[24] Harijan Vanabhai Devbhai and Others v. Khoda Gram Panchayat, AIR 1994 Guj 1.
[25] Dhanroop v. Purushottamdas Purohit, AIR 2000 MP 118.
[26] Smt. Lakshminarasamma v. Sri. Lakshmana, RFA No.502/2017, dated 21.07.2017, (High Court of Karnataka).

on both facts and law in the first appeal and the said matter cannot be disposed of *in limine* at the time of admission of the case.

9.6 OPERATIONALISATION OF RULE 11A OF ORDER XLI

Order XLI Rules 11, 11A and 12 makes it obligatory for the Appellate Court to fix a day for the preliminary hearing of appeal as expeditiously as possible and to endeavour to conclude such hearing within a prescribed period of sixty days from the date of which the memorandum of appeal is filed. Justice Malimath Committee Report[27] recommended that the provisions should be strictly followed and the care should be taken that an appeal which raises triable issue is not dismissed *in limine*. We would also like to emphasize that when an appeal is dismissed *in limine*, a brief order giving reasons for dismissal at the preliminary stage should invariably be recorded. The time limit prescribed under Rule 11A to conclude hearing expeditiously within 60 days from the date on which the memorandum of appeal is filed. The said Rule has been introduced by the parliament with an intention that any appeal filed under Section 96 should either be admitted or dismissed within sixty days from the date of presentation of appeal. The breach of these provisions is evident as has been noted by the High Court of Karnataka[28] that in practice in the lower courts sometimes, if there is no urgency, the appeal papers will not be placed before the Judge even after 60 days. Whereas, in the High Court, the failure of the parties to comply with the office objections even for six months leads to appeal not being placed before the Court. It is also observed that due to the non-application of mind these breaches are committed contrary to the mandate of law.

Rule 11A of Order XLI posits that an "endeavour shall be made to conclude such hearing (hearing under Rule 11) within sixty days from the date on which the memorandum of appeal is filed". In *Bhagwan Godsay v. Kachrulal Samdariya*,[29] the word 'shall' was interpreted. And it was held that the legislative object is merely to provide a regulatory procedure to prevent appeals being admitted without considering the question of condonation of delay and that the use of the word shall is only permissive or directory. If construed as mandatory, the appeal may become infructuous, thereby destroying the regulatory content of Rule 3A of Order XLI.

That apart, the statute also specifically provides for the provision of appeal in order to examine whether there have been any errors that the Judges have committed in deciding the cases. In order to rectify the errors committed by the court of first instance, the statutory right of appeal is provided.

Furthermore, the legislative intent of Rule 11A was relied on, to interpret Rule 22 of Order XLI while determining the limitation period for filing cross-objections for the respondent. Reading the legislative intent into Rule 22, the Supreme Court of India[30] held that the

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[27] Report of the Arrears Committee 1989-1990, Constituted by the Government of India on the Recommendation of the Chief Justices' Conference, http://dakshindia.org/wp-content/uploads/2016/08/Malimath-89-90.pdf.

[28] Hari Shankar v. Rao Girdhari Lal Chowdhury, AIR 1963 SC 698.

[29] Bhagwan Godsay v. Kachrulal Samdariya, 1987(2) Bom CR 153.

[30] Mahadev Govind Gharge v. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, Civil Appeal No.5094 of 2005, decided on May 5, 2011 (SC).

period of limitation would commence from the respondent receiving a notice of the appeal which he was entitled to receive as per the judgement. In case the respondent is present at the hearing as a caveator or otherwise, such order of the next hearing is deemed to be the notice. However, when the courts deem fit on a case-by-case basis, an extension for filing cross objections can be made to further the ends of justice. If the appeal is not dismissed under Rule 11, the appellate court has to fix a day for the 'final' hearing. A notice is also sent to the court whose decree is appealed from.[31] The records of the case are then transferred from the lower court to the appellate court.[32]

It is to be noted that the first appeal is a valuable right of the appellant and that all the questions of law and fact decided by the trial court are open for re-consideration. The Court adjudicating the first appeal has to comply with the requirements as prescribed under Order XLI Rule 31 of CPC and non-observance of this requirement leads to infirmity in the judgment of the first appellate court.[33]

At present, post the enactment of the Commercial Courts Act, the appeal provision under the Commercial Courts Act, 2015, has been revamped and to ensure speedy disposal of the case, the frequent approach to the higher courts seeking their intervention by the aggrieved party has been restricted and any issue that has arisen during the proceedings will be dealt with at the appeal stage. This has been a paradigm shift in the way appeal provisions are drafted. Hence, the operationalisation of the Order XLI Rule 11A has been reiterated by the Higher Courts time and again in several decisions as has been discussed before.

Another issue that plagues the court is that stage in the appeal proceedings, wherein the records from the lower courts are called for. This is the stage, wherein the Appellate Court be it the High Court or any other court exercising the power of first appellate court calls for the records including all the documents pertaining to the case in hand. It is during this stage that maximum amount of time gets consumed and the courts usually wait for months to procure complete records from the other courts for the adjudication of cases. However, due to the technological developments, the courts have to adapt to the changing circumstances and obtain digital copies of the record in order to ensure that the records are not transferred physically not just jeopardising the records of the case, but also leads to delay in adjudication of cases.

9.7 RECOMMENDATIONS BY VARIOUS COMMITTEES

The issue of delay and arrears have been taken up by the Law Commission of India and other committees established time and again. Various committees over a period of time starting from the Rankin Committee[34] dealing with the issues of the operation and effects of the substantive and adjective law, whether enacted or otherwise, followed by the Courts in India in the disposal of civil suits, appeals, applications for revision and other civil litigation.

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[31] CODE CIV. PROC., Order XLI, Rule 12.
[32] *Id.*, Order XLI, Rule 13.
[33] Malluru Mallappa (D) Thr. LRs. v. Kuruvathappa & Ors., Civil Appeal No.1485/2020, decided on Feb. 12, 2020 (SC).
[34] Dealt with the question of delay in the disposal of civil cases both in the High Courts and the Trial Courts in 1924, headed by the Mr. Justice Rankin, Judge High Court of Calcutta.

This exercise was undertaken with a view to ascertain whether any changes, and if so, what changes are necessary for the speedy, economical and satisfactory despatch of business transacted by courts.

Thereafter, in the year 1949, after independence, High Courts arrears committee was set up by the Government of India, under the Chairmanship of Mr. Justice S.R. Das for enquiring and reporting as to the feasibility of curtailing the right of appeal and revision.

In the year 1967, the Government of India took note of the serious issue of increasing number of cases, and decided to increase the strength of number of judges of some High Courts. This decision was taken due to various contributing factors including the delay in filling up vacancies, lack of court accommodation and diversion of serving judges to other duties such as Commission of Inquiry without providing replacement in the High Courts. On the whole, there was some result that was visible, but did not result in any significant change in overall position. Another Committee headed by Justice Shah was appointed seeking suggestions to reduce arrears of cases pending in the High Courts. Apart from these committees, various other committees were also appointed to look at the issue and suggest changes to the legal framework for reducing the time and delay in the High Courts.

The Law Commission of India in the 14th Report[35] discussed about various aspects relating to the reforms that are requisite in the judicial administration, including the question of delay in the disposal of cases at the level of High Courts. Thereafter, in the 27th and 54th Report, the Law Commission of India dealt with changes to be suggested to the Code of Civil Procedure, 1908. Specifically, to deal with the changes in the procedural laws, the 54th Report recommendations fructified and the right to second appeal was restricted. In the 58th Report, the Law Commission had the opportunity to review the structure and jurisdiction of the higher judiciary and dealt with number of questions including the writ petitions, industrial disputes, service matters and power to adjudicate appeals by both High Courts and Supreme Court.

As far back as in the year 1978,[36] the Law Commission of India took note of the problem of delay and arrears in trial courts and the increasing number of pendency. A year later i.e., in 1978, the Law Commission of India came up with its Seventy Ninth Report.[37] It was observed by the Law Commission that various proceedings that are pending in High Courts have, in due course of time, piled up to a disquieting figure and at present, the situation in regard to arrears is so grave that it needs to be tackled without any delay. Speedy Justice is of the essence in an organised society and in order to speed up the decision of cases, the basic norms that are necessary for ensuring justice should not be dispensed with. The need for striking a balance between speed and demands of justice have to be maintained. Delay in disposal of cases has not just led to causing of hardship but also has embroiled the

[35] Fourteenth Report on "Reforms of the judicial administration" Law Commission of India, 26th November, 1958, in two volumes. http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf.
[36] Seventy Seventh Report "Delay and Arrears in Trial Courts", Law Commission of India, November, 1978 http://lawcommissionofindia.nic.in/51-100/Report77.pdf.
[37] Seventy Ninth Report "Delay and Arrears in High Court and Other Appellate Courts" Law Commission of India, 10th May, 1979, http://lawcommissionofindia.nic.in/51-100/Report79.pdf.

succeeding generations to continue with the litigation started by their ancestors. Supreme Court in the year 1976 made an observation to this effect and stated as follows[38] -

> "Apart from that we find that the suit out of which the present appeal has arisen was filed as long ago as January, 1950. From the title of the appeal we must find that many of the original plaintiffs and defendants have during this period of more than a quarter of century departed and are no more in the land of the living, having bowed as it were to the inexorable law of nature. They are now represented by their legal representative. To remand the suit to the trial court would necessarily have the effect of keeping alive the strife between the parties and prolonging this long-drawn litigation by another round of legal battle in trial court and thereafter in appeal. It is time, in our opinion, that we draw the final curtain and put an end to this long meandering course of litigation between the parties. If the passage of time and the laws of nature bring to an end the lives of men and women, it would perhaps be the demand of reason "and dictate of prudence not to keep alive after so many years the strife and conflict started by the dead. To do so would be in effect be defying the laws of nature and offering a futile resistance to the ravage of time. If human life has a short span, it would be irrational to entertain a taller claim for disputes and conflicts which are a manifestation of human frailty. The Courts should be loath to entertain a plea in case like the present which would have the effect of condemning succeeding generation of families to spend major part of their lives in protracted litigation."

It was also recommended by the Commission that the appellate jurisdiction of the district judges, which was recommended to be raised, was felt to be not desirable, as the pecuniary limit cannot be fixed for the whole country and this should be left to the concerned state and concerned authorities.

Thereafter, in the year 1986, Committee headed by Justice Satish Chandra[39] recommended abolition of the power to decide first appeals by the High Courts which was prevailing in the State of Haryana. In the alternative it was proposed that the pecuniary appellate limit of the district judges be fixed at Rupees Five lakhs, as was the case in State of Punjab.

Subsequent to the recommendations by Justice Satish Chandra Committee, the Law Commission of India made another attempt to look at the issues of arrears yet again in the year 1988.[40] In the Report, it was suggested that the mandatory annexation of the copy of decree in the appeal memorandum, as the copy of the decree has to be procured which causes considerable delay which gets multiplied twice, thrice or in rare cases even ten times. Experience shows that the copy of the decree is hardly necessary for the purpose of admitting the appeal under Order XLI Rule 11. This Commission Report also suggested the implementation of the computer technology in the Courts to modernise the processes and to move from the earlier mechanical process or printing and photocopying.

In its Report on the Conflicting Judicial decisions pertaining to the Code of Civil Procedure, 1908,[41] the Law Commission of India examined the issue of whether an order refusing to

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[38] Bechan Pandey v. Dulhin Janki, (1976) 2 SCC 286, 290, 291.
[39] Justice Satish Chandra Committee, 1986.
[40] One Hundred Twenty-Fourth Report on "The High Court Arrears – A Fresh Look", 1988, Law Commission of India, http://lawcommissionofindia.nic.in/101-169/Report124.pdf.
[41] One Hundred Forty Fourth Report on "Conflicting Judicial decision pertaining to the Code of Civil Procedure, 1908, Law Commission of India. http://lawcommissionofindia.nic.in/101-169/Report144.pdf.

record compromise is appealable or not? As there were conflicting views given by various High Courts of Andhra Pradesh[42] and Madhya Pradesh[43] in two conflicting judgments. This was specific to the question raised under Section 96(3) which bars an appeal against the decree passed with the consent of the parties. This recommended the Government to introduce an amendment to this effect, with a proviso that the right to appeal of the parties should not be affected to contest that the compromise should or should not have been recorded. Another recommendation to the effect that power of the appellate court under Section 107 should be amended to include the rejection of plaint[44] under the appeals and to make requisite changes to Order XLI Rule 3(1) of CPC.

In the year 1998, the Law Commission of India[45] proposed certain changes to the Order XX which added the Rules 6A, 6B etc., to the order XX, pertaining to judgments and decrees and also to the appellate procedure under Order XLI, Rule 1, 9, etc. There were also recommendations about the memorandum of appeal being filed in the same court which delivered the judgment, which was a different scheme from the existing procedure. Thereafter, suggested amendments to rules 11, 12, 13 etc.

The Report emphasized the aspect of case specific time tables to be followed, as the case specific time tables are used as timeliness standards, delay reduction methods, and yardsticks for measuring delays in the system in jurisdictions around the world including the United States of America, United Kingdom and Canada. It was in the case of *Salem Bar Association*[46] the Supreme Court sought for setting up a committee to prepare a case management formula. Therefore, the Law Commission of India came up with the Consultation paper on Case Management.[47] The Paper has made several references to various other countries including Australia,[48] United Kingdom[49] and some states in the United States of America[50]. Almost two decades back the case management has been adopted by these aforementioned jurisdictions and have started yielding good results. The Consultation Paper has also dealt with the aspect of case management in the First appeals, which is as follows –

a) Service of Notice of Appeal;

b) Documents to be filed with the memorandum of appeal;

c) Fixation of time limits and completion of pleadings;

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[42] G. Peddi Reddy v. G. Tirupatty Reddy, AIR 1981 AP 362.
[43] Thakur Prasad v. Bhagawandas, AIR 1985 MP 171.
[44] CODE CIV. PROC., Order VII, Rule 11.
[45] One Hundred Sixty Third Report on "The Code of Civil Procedure (Amendment) Bill, 1997", November, 1998, Law Commission of India, http://lawcommissionofindia.nic.in/101-169/Report163.pdf.
[46] AIR 2003 SC 189.
[47] *See* Law Commission of India, Consultation Paper on Case Management, http://lawcommissionofindia.nic.in/casemgmt.pdf (Last accessed on 24th April 2020).
[48] *See* Judicial and Case Management, Australian Law Reform Commission, 1999. It defined the Judicial Management as a term used to describe all aspects of judicial involvements in the administrative and management of courts and the cases before them.
[49] Lord Woolf's Reports on Case Management, 1997, United Kingdom. The reforms recommended by Lord Woolf pointed out to three main issues including costs, delays and complexity.
[50] Court of Common Pleas, Delaware County published Rules regarding the Case flow management on 01.01.1999.

d) Procedure on grant of interim-orders;

e) Printing or typing of Paper-books;

f) Filing of Written submissions;

g) Cost.

Apart from these points that were identified by the Consultation, there were other points on the case management of the trial case and also at the level of High Courts.

Dr. Justice A.R. Lakshmanan, erstwhile Chairman of the Law Commission of India, submitted another report suggesting "Reforms in the Judiciary – Some Suggestions",[51] wherein some general recommendations were made with regard to the punctuality of the judges and lawyers, unnecessary requests for adjournments, delivery of judgments within reasonable time, staggering arrears and reduction in vacation among other things.

It was recently that the Law Commission of India[52] took note of the fact that the previous Law Commission Reports have recognised the time lags between institution and disposal necessary to complete the various stages of a court-based dispute resolution process and that "the time so taken will depend on several factors, such as, the nature of the suit, the number of parties and witnesses, the competence of the pressing officers and so forth. We must not forget that however similar the facts of two cases may be, every case is entitled to individual attention for its satisfactory disposal and any "mass production methods" or "assembly line techniques" in the disposal of cases would be utterly incompatible with a sound administration of justice". However, the Commission also recognized that even with these caveats it would still be possible to determine "limits of time within which judicial proceedings of various classes should be normally brought to a conclusion in the Courts in which they are instituted". Based on this reasoning, the Commission provided a listing of time frames for different types of cases. The Report has relied on the case decided by the Supreme Court of India in *Rameshwari Devi and Others v. Nirmala Devi & Others*[53], the two-Judge bench headed by Justice Dalveer Bhandari and Deepak Verma iterated on the Case Management aspect and observed as follows -

> "at the time of filing the plaint, the trial court should prepare complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the Courts should strictly adhere to the said dates and the said time table as far as possible. If any interlocutory application is filed then the same can be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed."

Several recommendations to this effect have already been made and submitted to the Government in the past five decades. Considering the various recommendations submitted by eminent jurists from across the country, some changes have been implemented. But the changes in the statute should be complemented with the changes in system. Plethora of

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[51] Two-Hundred Thirtieth Report, Law Commission of India, 5th August, 2009. http://lawcommissionofindia.nic.in/reports/report230.pdf.

[52] Two hundred Forty Fifth Report on "Arrears and Backlog: Creating Additional Judicial (Wo)manpower", July, 2014, Law Commission of India, http://lawcommissionofindia.nic.in/reports/Report245.pdf.

[53] Rameshwari Devi and Others v. Nirmala Devi & Others, (2011) 8 SCC 249.

reports, committees and studies have been undertaken wherein innumerable suggestions and recommendations have been made which are now archived without any action being taken on them.

9.8 NATIONAL JUDICIAL DATA GRID

The Government of India established the National Judicial Data Grid (NJDG), as a part of the on-going e-Courts Integrated Mission Mode Project. NJDG works as a monitoring tool to identify, manage and to reduce the pendency of cases. The NJDG was initially implemented on the pilot basis in the Financial year 2013-14.[54] NJDG along with the E-courts set up has been set up to digitise the court proceeding records and also some of the orders passed by the courts at the lowest level in the country. This data provides the public with the much-required tool of information without having to seek from the courts details about the pendency and other details. Statistics as updated on NJDG clearly suggests that the number of cases are increasing and pendency is rising rapidly. The statistics are as follows:

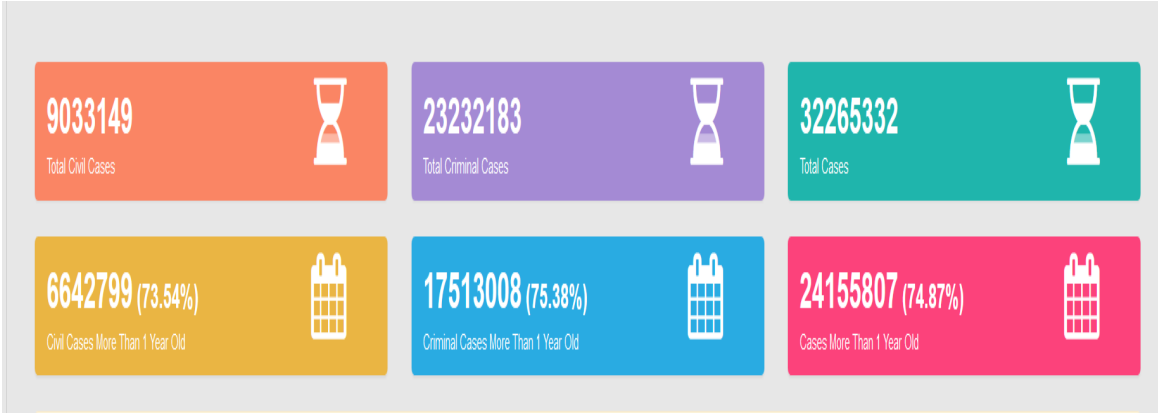

Figure 1 - Suggesting the number of pending cases throughout the country under various heads.

The pictures below represents the different categories in which cases are pending.[55]

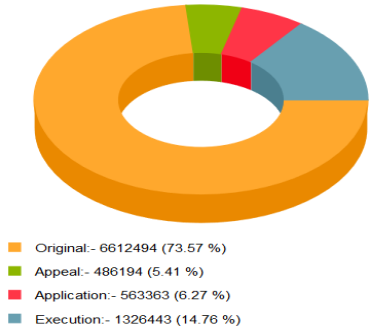

Figure 2- Pie Chart depicting number of cases based on the type of case filed.

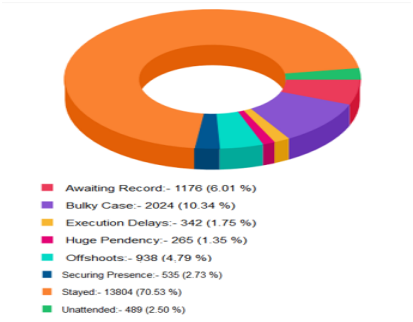

Figure 3 - Depicts the reason for delay, as majority of the cases are stayed.

[54] National Judicial Data Grid, Ministry of Law & Justice, Government of India, 23rd April, 2013, https://pib.gov.in/newsite/PrintRelease.aspx?relid=94951.
[55] Cases pending as on 25th April, 2020 at about 01.00 AM IST.

There are also statistics which are in the form of a pie chart, wherein the reasons for delay under various heads has been calculated. It is clear that most of the cases i.e., around 70% of the cases have been stayed by the courts and the process of stay is possible only at the appellate level wherein the cases under execution, appeals or parties seeking any other form of stay has been granted by the courts. The Figure -2 clearly depicts the reason for delay or pendency. Cases which are in the state of awaiting of records come up to 6%, whereas the cases which classified as Bulky case stands at 10.34%. However, a separate classification for appeals has been made as depicted in Figure -3. But the classification as to the first or the second appeals has not been made. It is clear from the picture that the number of original suits under the head civil suits constitute up to 74%, whereas, appeals only form a part of the pie constituting to around 5.4%. It is however, interesting to note that the number of application and Execution petitions constitute around 6.3% and 15%. Based on the figures that have been provided by the Ministry of Law and Justice, the numbers are staggering considering the fact that despite there being development in infrastructure, increase in number of judges and digitisation of the court functioning, the pendency is on the rise. Figure-4 depicting the period of the cases pending from 0-1 year to 30 years and above clearly reflect the lacunae in the justice delivery mechanism. Approximately 94% of the cases in the category of civil appeals are pending for over 10 years, which is clearly an indication of the non-compliance of the statutory prescriptions.

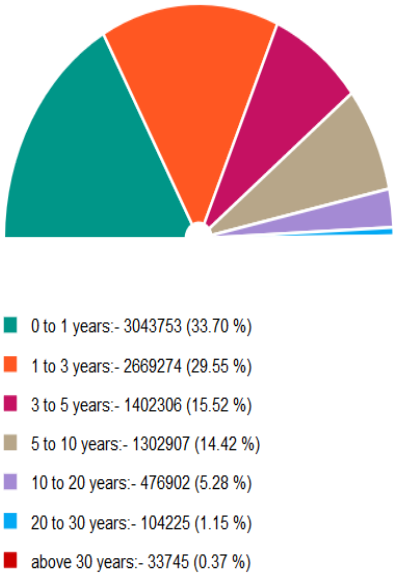

Figure 4 - Chart depicting the number of civil appeals pending as per the age of the case.

9.9 RECOMMENDATIONS

Based on the analysis of the existing provisions and after considering the various reports submitted by various Committees, Law Commission of India and other independent organisations, operationalising the Order XLI of the Code of Civil Procedure, 1908, the following recommendations are appropriate for the purpose of ensuring timely disposal of the First appeals -

a. **Ensuring strict enforcement of prescription of 60 days from the date of filing** - Several rules pertaining to technical compliances should be relooked and procedural niceties, which are not relevant and cause difficulty in compliance shall be removed. Power to dispense the procedural requirements are vested with the High Courts but not for the lower courts having appellate jurisdiction.

b. **Supervision by the Higher Courts** – It is a well-known fact that the Higher Courts, themselves are burdened with pendency and arrears, but the having the power to supervise and administer the functioning lower courts, the Higher

Courts shall monitor the number of appeals and direct the lower Courts to dispose with the matters expeditiously.

c. **Enforcement of Case Management** – As there are many matters pending before the court to dispose and decide, a systematic way of deciding the cases has to be introduced. As has been discussed earlier, implementation of case management for all of types of matters much less the first appeals is the need of the hour. Thereby, over a period of time, the judicial system will evolve and will be imbibed in the judges to expeditiously decide matters.

d. **Provision for settlement** – Settlement of matters shall not only be encouraged at the trial courts, but also in the Higher Courts and appeal cases. This means that the judges despite admitting the matter may encourage the parties to go for settlement, if the court feels that continuation of appeal may be a futile exercise.

9.10 CONCLUSION

Framers of the statute in order to bring in uniformity and to ensure speedy justice to the litigants, have placed certain timelines, as have been prescribed under the various provisions of CPC. Despite a robust and comprehensive framework having developed, the litigation ends up suffering delays and frequent adjournments. Prescription of a time limit to conclude a hearing within 60 days from the date of institution of appeal, in most cases is not followed and there is blatant disregard to the statutory prescriptions. The stakeholders are responsible for such delays including the court officials who are keen on compliance of the technicalities which may be one of the reasons for the matters to not be put up before the courts for adjudication. Order XLI provides for an elaborate procedure for the appellate court to go about with the adjudication of case. The scheme of appeal is provided under Order XLI and Section 96, the provision which prescribes the right to appeal also prescribes the procedure for the court to hear the said appeals. The Courts have to be mindful of these provisions and cannot refuse to follow the procedures prescribed under the law. Therefore, the complete Order XLI itself can be made operational with strict adherence to the timelines prescribed. Implementation of the Case Management Hearing even at the stage of appeals may bring about a change in the system ridden with delays and adjournments. It is to be appreciated that there have been significant strides made in the past few decades and several changes have been brought about to existing framework and there are many more aspects pending in this regard to be implemented. Global best practices are the first hand examples of how decisions may be made. A holistic approach has to be considered by the authorities to implement the changes that are necessary for the system to rid the lethargy and delays, impacting the business and economy positively in the country.

Lastly, after the enactment of the Commercial Courts Act, every appeal from decrees of the commercial court or commercial division of High Court will be heard by commercial appellate court or commercial appellate division of the High Court respectively as per Section 13 of the Commercial Courts Act. The Act also amends certain provisions of the CPC but only till order XX which means that provisions of the CPC with respect to appeals are unaffected and thus the provisions of order XLI are applicable to commercial appellate

courts. This would mean the operationalizing the order XLI will also have impact on the functioning of the Commercial Courts Act. Thus, operationalizing this order will provide a faster and efficacious appeal system for the commercial courts. Thus, by ensuring that appeals under the Act are also disposed of effectively, operationalizing the order will ensure improvement in the ease of doing business in India, the purpose for which commercial courts were created. Though it might not have an impact on the Ease of Doing Business ranking directly, but the concept of ease of doing business is much broader and will surely benefit from expeditious appeal disposal system.

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CHAPTER 10: DIFFERENT AVENUES FOR COMMERCIAL DISPUTE RESOLUTION IN INDIA

10.1 INTRODUCTION

The Indian judicial and commercial landscape over the past decade has witnessed major revamps owing to the aim of the central government to improve its "ease of doing business" rank. It was realized that the inordinate delays in the disposal of the cases were preventing domestic and foreign investors from investing in India. The Law Commission of India submitted its 188th report after deliberating upon international practices to deal with high value commercial cases and to develop a fast track procedure for disposal of the same in the country thereby improving the standing in ease of business index.

The Indian legal system is based on the inquisitorial system where the judge conducts civil and criminal proceedings and delivers judgment after considering arguments, appreciating the evidence and applying the relevant law to the facts of the case. The civil suits in the country are governed by Code of Civil Procedure, 1908. The code provides for elaborate procedures for filing a civil suit before the court. The remedies available to the parties under the law include asking for damages, specific performance, injunctions and even punitive damages. The time limit for bringing in a suit has also been prescribed under the Limitation Act, 1963. Moreover, special statutes have been enacted prescribing the period within which a party must approach the appellate authority. Ordinarily, these statutes provide for "condonation clause" condoning delay in filing appeal if sufficient cause is shown.

The Law Commission of India in its 188th report highlighted the fact that foreign courts have assumed extraordinary jurisdiction, particularly in commercial litigation cases by observing that Indian judiciary is not acquainted to provide effective relief to the parties. In the case of *Shin-ETSU Chemical Co. Ltd. v. ICICI Bank,*[1] the Court while discussing judgments noted that- *"India is not an adequate forum because of the delays in its court system"* and *"a delay of 15-20 years rendered India an inadequate alternate forum."* And because of the continuous criticism from the foreign courts, the Law Commission noted that: *"on account of the additional reasons referred to above, namely, the generalizations by US and UK courts about long delays in India, the constitution of a separate division called the 'Commercial Division' of the High Court for the disposal of high-value commercial cases on fast track with high-tech facilities is necessary. Once that is done, there will no longer be any scope for foreign courts to generalisations or assumptions about delays in Indian courts."*

The Government, realizing the delay in adjudicating civil and commercial suit is the reason behind the poor performance of the country in Ease of Doing business rankings,[2] thereafter consulting with the Law Commission of India,[3] decided to establish specialized courts as

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[1] Shin-ETSU Chemical Co. Ltd v. ICICI Bank, 777 N.Y.S. 2d 69, 75.

[2]MINISTRY OF LAW & JUSTICE, WORLD BANK REPORT ON DOING BUSINESS 2018 (2018), hLttps://doj.gov.in/sites/default/files/Brief%20Note%20on%20Doing%20Business%20Report-2018_2.pdf.

[3]Law Commission of India, 253rd Report, https://www.prsindia.org/uploads/media/Commercial%20courts/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf.

similar system was present in other countries. Thus, the commercial courts were established to reign in economic reforms and improve the ease of doing business rankings, the government had also made significant amendments to the Arbitration and Conciliation Act, 1996 in the year 2015[4] with the major amendments include mandating time bound arbitrations (to be completed within 12 months). Amendments were also made in the year 2019[5] to make the arbitration process in the country cost effective, friendly and ensuring timely disposal of the cases. The 2019 amendments sought to establish an independent body namely Arbitration Council of India primarily responsible for framing policies for arbitral institutions in India. A time limit of six months was also imposed for filing of pleadings from the date of appointment of an arbitrator to address frivolous litigation wasting the time of the court.

Thus, the objective of improving the standing in the ranks has been sought to be achieved primarily through following two enactments: first, Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and the Arbitration and Conciliation (Amendment) Act, 2015. The government has been criticized for making a foreign index as a fulcrum for the entire country which will address difficulties only in the short run while leaving out addressing more real and systematic concerns. Furthermore, the legislation puts the onus on courts to maintain a case management system and publish monthly judicial statistics on the commercial cases; the implementation of the same has remained elusive.[6] Additionally, the designation of commercial courts where there is no to very little commercial litigation might result in wastage of precious judicial time and resources.

10.2 COMMERCIAL DISPUTES IN INDIA

The word "commercial' has a very wide import, the Supreme Court of India while interpreting the meaning of "commercial" in the context of the erstwhile Arbitration Act, gave the term a liberal interpretation after placing reliance on the Black's Law Dictionary and analysed the term to mean:-

> "*20. In ordinary parlance "commercial" means:*
> *1. of, engaged in, or concerned with, commerce.,*
> *2. Having profit as a primary aim rather than artistic etc. value;*
> *21. In Black's Law Dictionary, "commercial" is defined as anything which: Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce.*
> *22. The word "trade" is also defined in the Black's Law Dictionary. It is the act or the business or buying and selling for money; traffic; barter.*
> *Purchase and sale of goods and services between businesses, states or nations. Trade is not a technical word and is ordinarily used in three senses: (1) in that of exchanging goods or commodities by barter or by buying and selling for money; (2) in that of a business occupation generally; (3) in that of a mechanical employment, in contradistinction to the learned professions, agriculture, on the liberal Articles.*"[7]

[4] *See* the Arbitration and Conciliation (Amendment) Act, 2015.
[5] See, the Arbitration and Conciliation (Amendment) Act, 2019.
[6] VIDHI, COMMERCIAL COURTS ACT: AN EMPIRICAL IMPACT EVALUATION (2019), https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf.
[7] Harendra H. Mehta and Ors. v. Mukesh H. Mehta and Ors., 1999 5 SCC 108.

This wide definition effectively makes any dispute arising out of such commercial activities a commercial dispute. The Commercial Courts Act, 2015 has given a similarly wide definition to the term "commercial dispute" under Section 2(c).[8] The definition brings within its ambit ordinary transactions of merchants, bankers, financiers and traders, export or import of merchandise or services, issues relating to admiralty and maritime law, transactions related to aircraft, aircraft engines, aircraft equipment and helicopters, carriage of goods, construction and infrastructure of contracts, tenders, immovable property agreements (trade & commerce), franchising agreements, distributing and licensing agreements, joint venture agreements, shareholders agreements, services industry (subscription and investment agreements), mercantile agency & usage, partnership agreements, technology development agreements, intellectual property rights, sale of goods or provision of services agreements, oil, gas reserves and other natural resources exploitation; insurance and re-insurance; agency contracts and other commercial disputes.

The courts have refrained from expanding the scope of the definition of commercial disputes, as can be seen with the meaning given to clause vii of Section 2(c) of the Act, which includes disputes arising out of "*agreements relating to immovable property used exclusively in trade or commerce"* within the ambit of "commercial disputes". While the courts have given a liberal interpretation to agreements relating to immovable property, they have refrained from expanding the meaning of the property being used exclusively for trade and commerce.

The Delhi High Court, in *Jagmohan Behl v. State Bank of Indore*, held that the words "relating to immovable property" should not be given a narrow and restricted meaning and the expression would include all matters relating to agreements in connection with the immovable properties.[9]

The Gujarat High Court in *Vasu Healthcare Private Limited v. Gujarat Akruti TCG Biotech Limited*, held that, "*The word "used" denotes "actually used" and it cannot be said to be either "ready for use" or "likely to be used"; or "to be used"*[10] This view has been supported by the Supreme Court.[11] From the aforementioned cases and statute, we can determine that the legislature was mindful of the wide scope of the term "commercial" while drafting section 2(c) and thus even the courts have been hesitant in widening the definition.

10.3 SCOPE OF SECTION 89 OF THE CODE OF CIVIL PROCEDURE, 1908:

Section 89 of the Code of Civil Procedure, 1908 provides that, -

> "(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may re-formulate the terms of a possible settlement and refer the same for-
> (a) arbitration;
> (b) conciliation;
> (c) judicial settlement including settlement through Lok Adalat; or

[8] The Commercial Courts Act, 2015, §2(c).
[9] Jagmohan Behl v. State Bank of Indore, 2017 SCC OnLine Del 10706.
[10] Vasu Healthcare Private Limited v. Gujarat Akruti TCG Biotech Limited, AIR 2017 Gujarat 153.
[11] Ambalal Sarabhai Enterprises Ltd. v. K.S. Infraspace LLP & Anr., Civil Appeal No. 7843 of 2019.

(d) mediation."

This section was introduced by way of the Code of Civil Procedure (Amendment) Act, 1999, and it now casts a mandatory obligation on the civil courts to attempt to resolve the disputes through settlement by way of the different ADR mechanisms.[12] The aim of the Amendment was to promote an early settlement of disputes between the parties by reference to any of the ADR mechanisms elaborated in the section. This policy had been commonplace in the west and its proper implementation can save precious judicial time of the court.[13] The Amendment also added Order X Rule 1A, 1B and 1C to the code. Rule 1A provides that, "*After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in Sub-section (1) of Section 89…"* Rule 1B states that, "*Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit."* And Rule 1C provides that, "*Where a suit is referred under rule 1A, and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it."*[14]

Rule 1C made it clear that the presiding officer of the ADR forum could refer the matter back to the courts if they felt that the dispute was not fit to be decided by them.

One of the foremost issues that arises from a reading of Section 89 and Order X Rule 1C is that whether the court has to mandatorily make a reference to ADR in civil suits. Section 89 seems to give discretion to the court whereas Rule 1A imposes an obligation on the court as it uses the words "shall refer". The Supreme Court dealt with this issue twice, firstly in the *Salem Bar Association case*[15] and then in the *Afcons Infrastructure case.*[16] In the first case, the Court held that, "*where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section and if the parties do not agree, the court shall refer them to one or the other of the said modes."* The Court held that there was a mandatory duty to refer the suit to an ADR forum in every case, the discretion of the courts would be restricted in choosing which of the ADR forums would be suitable for the dispute, it noted that the word "may" used in Section 89 was only with reference to the reformulation of the scheme of settlement between the parties and not with respect to the question of reference to an ADR forum.

However, in the second case, the Supreme Court modified its position and gave a more succinct explanation to the apparent conflict, it pointed out that the opening words of Section 89 were, "*Where it appears to the Court that there exist…".*[17] The Court interpreted this to mean that cases which are not suitable for ADR need not be referred to the same, and the courts would need to apply their mind and conclude on whether a particular case was

[12] Code of Civil Procedure (Amendment) Act, 1999.
[13] Salem Advocate Bar Association v. Union of India (II), AIR 2005 SC 3353.
[14] CODE CIV. PROC., Order X, Rules 1A, 1B, 1C.
[15] Salem Advocate Bar Association v. Union of India (II), AIR 2005 SC 3353.
[16] Afcons Infrastructure Ltd. v. CherianVarkey Construction Co. (P) Ltd., JT 2010 (7) SC 616.
[17] CODE CIV. PROC., §89.

suitable for ADR or not. The Court also gave an illustrative list of which cases would be suitable and not suitable to ADR.

Cases suitable to ADR and requiring mandatory reference:

i. Cases relating to trade, commerce and contracts
ii. Cases arising from strained and sour relationship
iii. Cases involving need for continuation of pre-existing relationship of parties despite the dispute (e.g., Employer employee disputes)
iv. Cases relating to tortuous liability
v. Consumer disputes

Cases which are unsuitable to ADR and which need not be referred to the same are:

i. representative suits under Order I Rule 8 CPC,
ii. disputes relating to election to public offices,
iii. cases involving grant of authority by the court after enquiry, for example, suits for grant of probate or letters of administration,
iv. cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.,
v. cases requiring protection of courts, for example, claims against minors, deities and mentally challenged and suits for declaration of title against government
vi. cases involving prosecution for criminal offences.[18]

Thus, we can see that commercial disputes would be covered under the scope of Section 89 as they would fall under the head, "*cases relating to trade, commerce and contracts*".[19] Reference to ADR for such disputes would also be mandatory. This list laid down by the Supreme Court was merely illustrative and not exhaustive and it would extend to all similar commercial disputes.

10.4 MODES OF DISPUTE SETTLEMENT UNDER SECTION 89

10.4.1 Arbitration

Arbitration is the most formal method of ADR, and Section 89 lists it as one of the modes of dispute settlement which the parties can opt for. Under this section, the court cannot force the parties to refer the dispute to arbitration, and it is only possible with the mutual consent of all the parties.[20] The section also specifies that in case a reference to arbitration is made, then the provisions of the Arbitration and Conciliation Act, 1996 would apply to the proceedings.[21] Furthermore the Arbitration and Conciliation Act, 1996 will apply from the stage of reference and it will be assumed that a valid reference to arbitration has been made by the parties. Once reference to arbitration is made by the court, the suit would stand disposed of and the matter would be resolved as per the terms of the Arbitration and Conciliation Act, 1996.[22]

[18] *Id.*
[19] *Id.*
[20] Jagdish Chander v. Ramesh Chander, 2007 (6) SCC 719.
[21] CODE CIV. PROC., §89.
[22] *Id*.

Subject Matter of Arbitration: Under the Arbitration and Conciliation Act, 1996 ("Act"), the arbitrator has the jurisdiction to adjudicate only upon those issues which are subject matter to the arbitration agreement and he cannot go beyond such term of reference. Section 8 of the Act provides for referring a dispute to the arbitration in terms of the arbitration agreement. The Act provides that if the arbitral tribunal has adjudicated upon issues which were not part of the subject matter, then in such circumstances, the arbitral award can be set aside. Section 34 of the Act also states that if the subject matter of the dispute is such that which is not arbitrable, then even in such cases the arbitral award can be set aside. Similarly, under Section 48 of the Act which deals with international arbitration, the arbitral award can be set aside if the subject matter was not arbitrable. Apparently, the Act does not specifically provide for "categories" of disputes which are non-arbitrable. In the case of *Booz-Allen & Hamilton Inc v. SBI Home Finance Ltd*[23] *(*"Booz Allen*"),* the court has expanded upon the interpretation of the term "arbitrability". The court stated that the term "arbitrability" has three facets:

i. Whether the disputes are capable of adjudication and settlement by arbitration?
ii. Whether the disputes are covered by the arbitration agreement?
iii. Whether the parties have referred the disputes to arbitration?

Over the past years, even the courts have refused to send certain category of works to the arbitration. The Supreme Court in the case of *Booz-Allen* had said that certain category of disputes is non-arbitrable and cannot be sent to arbitration even if parties have agreed upon arbitration for settlement of the dispute. The well recognized non-arbitrable disputes according to the court are:

1. disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
2. matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
3. guardianship matters;
4. insolvency and winding up matters;
5. testamentary matters (grant of probate, letters of administration and succession certificate); and
6. eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction;
7. cases related to underlying validity of patent, copyright or trademark.

Further, in the case of *Vimal Kishor Shah v. Jayesh Shah*[24], the court was faced with the question of whether disputes relating to affairs and management of the trusts are capable of being settled through arbitration. The court held that, disputes related to trusts and its beneficiaries cannot be decided by the arbitrator despite existence of arbitration agreement to the same between the parties as according to courts *"there exists an implied bar of exclusion of applicability of the Arbitration Act for deciding the disputes relating to Trust, trustees and beneficiaries through private arbitration."*

[23] Booz-Allen & Hamilton Inc v. SBI Home Finance Ltd, (2011) 5 SCC 532.
[24] Vimal Kishor Shah v. Jayesh Shah, (2016) 8 SCC 788.

In the case of *Rakesh Malhotra v. Rajinder Kumar Malhotra*[25], the court was faced with the contention of whether an application of oppression and mismanagement arising out of winding up is arbitrable or not. The court held that issues of oppression and mismanagement are not arbitrable despite the existence of arbitration agreement. The court also added that no arbitral tribunal has the power to provide the nature of relief which a Company Law Board (CLB) may provide in cases of oppression and mismanagement.

In many cases, the court has also been faced with the contentious issue of arbitrability of fraud. In the case of *N. Radhakrishnan v. Maestro Engineers & Ors*[26] *("Radhakrishnan"),* it has been held that issues arising out of fraud are not arbitrable. Later, the Supreme Court in the case of *Meguin GmbH v. Nandan Petrochem Ltd*,[27] appointed an arbitrator despite the issue of fraud being involved in the case. Subsequently, in the case of *Swiss Timings Ltd. v. Commonwealth Games 2010 Organizing Committee*,[28] the court said that the judgment of the court in *Radhakrishnan* was *per incurium* and hence is not a good law. Recently, the court in the case of *A. Ayyasamy v. A. Paramasivam & Ors*[29] has attempted to clarify the position and had differentiated between the serious allegation of fraud and fraud simpliciter. If there are serious allegation of fraud, then such cases ought to be treated as non-arbitrable and must be sent to civil court to decide while in cases where allegations of fraud simpliciter are made out, then such issues can be examined by the arbitral tribunal.

From the above discussion, it is clear that there is no exhaustive list which can define the nature of disputes that are arbitrable under the Indian laws. The existence of certain statutory mechanisms excludes certain disputes from purview of arbitration and therefore it would be difficult to say that disputes related to shareholders or companies are outside the scope of arbitration and considering the objective of the government to make the country an arbitration hub, it is most likely that most of the commercial disputes are arbitrable and capable of being settled by arbitration. Though, the country has made significant strides in making the country a hub for both domestic and international arbitration, the consistent stance by certain courts including in *Booz Allen case* to keep certain matters outside the purview of arbitration despite the existence of arbitration agreement is choking arbitration in the country. The parties' intention must be given effect to and if parties intended to send a certain commercial dispute to arbitration, the court should not have interfered in such cases. Arbitration will help significantly in reducing backlog but if courts continue to hold mistrust in arbitration, such backlog is bound to increase and affect India's standing in the indexes.

Third party disputes and Arbitration: The Indian jurisprudence on whether a non-signatory can be bound by the arbitration agreement can be traced to the Supreme Court judgment in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Ors*[30] wherein the Court held that an arbitration agreement will be binding only on the parties which have entered into

[25] Rakesh Malhotra v. Rajinder Kumar Malhotra, (2016) SCC OnLine Bom 5759.
[26] N. Radhakrishnan v. Maestro Engineers & Ors, (2010) 2 SCC 72.
[27] Meguin GmbH v. Nandan Petrochem Ltd, (2014) 10 SCC 422.
[28] Swiss Timings Ltd. v.. Commonwealth Games 2010 Organizing Committee, (2014) 6 SCC 677.
[29] A. Ayyasamy v. A. Paramasivam & Ors, (2016) 10SCC 386.
[30] Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Ors., (2003) 5 SCC 351.

an agreement since the cause of action cannot be bifurcated. Even Section 9 of the Arbitration and Conciliation Act, 1996 ("Act") confers right to interim relief only upon those parties which are party to the arbitration agreement and Section 2(h) of the Act, which defines "party" means a party to the arbitration agreement. This effectively means that parties not a signatory to the agreement are not bound by the agreement. The courts sought to give primacy to the party autonomy and excluded non -signatories irrespective of the intent of the parties.

Subsequently the court in the case of *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors*,[31] ("Chloro Controls") broadened the position and incorporated "Group of Companies" doctrine and thereby diluted the concept of party autonomy. In the present case, the court relied upon the wording of Section 45 of the Act which uses the expression "at the request of one of the parties or any person claiming *through* or under him". The court interpreted the expression "*through*" to state that even the legislature contemplated a scenario where a non-signatory can be made a party to the arbitration agreement.

The court also imported the "group of companies" doctrine predominantly used in foreign jurisdictions in the country and observed that "*whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates." The court further added that "a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties."*[32]

In the case of *Choloro Controls*, the court was dealing with an application filed under Section 45 which deals with international arbitration. The courts have said in the case of *Duro Felguera, S.A. v. Gangavaram Port Ltd*[33] that, since *Chloro Controls* was passed under Section 45, the 'group of companies' doctrines cannot be incorporated in cases of domestic arbitration. In 2015, amendments were made to Section 8 of the Act and the wording of the section was made similar to Section 45 of the Act. Subsequently, in the case of *Ameet Lalchand Shah and Ors. v. Rishabh Enterprises*,[34] the court said that post amendment, the doctrine can be incorporated in cases related to even domestic arbitration and if the parties can prove that all the agreements that were entered into were in pursuance of single commercial project and all agreements were intrinsically connected to each other, then in such cases, all parties can be referred to a composite arbitration. Recently in the case of *Mahanagar Telephone Nigam Ltd. v. Canara Bank*[35], the court has upheld the doctrine adding that sister or affiliate or parent non-signatory party can be bound by arbitration agreement if it can be proved that it was the mutual intention of the parties to bind even the non-signatories.

The use of the doctrine has underscored the point that business understanding should not get diluted because of the complex web of the transactions. If the commercial understanding

[31] Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors, (2013) 1 SCC 641.
[32] *Id.*
[33] Duro Felguera, S.A. v. Gangavaram Port Ltd, (2017) 9 SCC 729.
[34] Ameet Lalchand Shah and Ors. v. Rishabh Enterprises, (2018) 15 SCC 678.
[35] Mahanagar Telephone Nigam Ltd. v. Canara Bank, 2019 SCC OnLine SC 995.

of business is reflected in the laws, it will inspire confidence among the investors and make India arbitration hub. One of the parameters used by World Bank while arriving at ranking is the enforceability of contracts and if the "head" of the transaction hiding behind the "veil" can be made accountable, it will make it is easier to enforce the contract and thus help India in improving the ranks. Also, the World Bank considers the good practices followed by the respective countries and attempted to incorporate into their own laws. The doctrine has been followed by many countries throughout the world and its application in the country will bring in more certainty as well as uniformity in laws as compared to other jurisdictions.

Challenges to Arbitration: Since the enactment of the Arbitration and Conciliation Act ("Act") in 1996, significant changes have been sought to be made to the Act to make the process efficient, cost-effective and less time-consuming. But right since its enactment, the Act has faced criticisms as the process was very time consuming and the Act gave greater discretion to the court to interfere with the enforcement of the domestic and international awards.

Through the amendments made in 2015, the legislature attempted to expedite the process of rendering the arbitral award. The Amendment Act has said that arbitral tribunal must pass the award within 12 months (period being extendable by another 6 months). The time limit seems to be very ambitious as the Law Commission itself has recommended time period of 24 months. Many arbitration matters have complexities and if a tribunal is compelled to work in such haphazard manner, then not only will it incentivize investor to withdraw its investments but also discourages potential investors from investing in the country.

The Law Commission of India has highlighted in its 246th report that the high quantum charged by the arbitrators is one of the constant problems plaguing the arbitration regime. The Amendment has conferred discretionary powers upon the tribunal to determine the costs of the arbitration with the arbitral tribunal. Thus, removing the right of the parties to mutually decide upon the arbitrator fee. This deters trained arbitrators who may refrain from acting as arbitrators as the fees agreed upon by the tribunal may be lower than the international standards.

The Law Commission has recommended that parties should use the phrases like "venue" or "seat" in their arbitration agreement instead of using the phrase "place", but this recommendation has not been incorporated and the debate regarding seat and venue still hounds the country.

One of the areas which still remains a cause of concern is the ground of "public policy". Section 34 of the Act provides that enforcement of an award can be refused if it's against the public policy of India. Over the years, the court has expanded its interpretation and innovated ground of "patent illegality"[36] to refuse the enforcement practically giving unfettered discretion to the court in refusing enforcement by allowing them to entertain the merits of the case. Through the amendment of 2015, the legislature restricted the scope of the term and deterred the court from going into the merits and said that court can only look

[36] ONGC Limited v. Western Geco International Limited, (2014) 9 SCC 263.

into the *"existence of the arbitration agreement"*. But over the recent months, it seems that the court has started refusing enforcement of awards by entering into the merits of the case. Very recently in the case of *NAFED v. Alimenta S.A*[37], the court refused enforcement of award because of violation of export order despite the court in its earlier precedent[38] clarifying that mere violation of statutory provision cannot amount to a violation of "public policy". According to court, the term has a wider connotation and refers to legislative policies and principles on which Indian laws are founded and not mere statutory provision.[39]

Another problem which plagues Indian arbitration is that if two Indian parties intend to be governed by English law, will such an agreement be valid as per Indian law? There have been contrary opinions of the court concerning the same. Bombay High Court[40] has said that such an arrangement is against the public policy of India while the MP High Court[41] had said that such an arrangement is completely valid. The Supreme Court[42] had further obfuscated the situation by saying that even if parties agree to be governed by foreign law, they cannot derogate from the Indian law. Such uncertainty has prevented domestic arbitrations in the country and thus affect India's ranking in ease of business. Primacy must be given to the intention of the parties to make the country arbitration hub.

Questions surrounding the arbitrability of certain issues also plague the arbitration regime in the country. While on the one hand the courts have sought to give effect to the intention of the parties, on the other hand, it has kept certain disputes beyond arbitration despite parties incorporating in the arbitration agreement. Such unfettered discretion with the court also prevents investors from investing as it endangers their autonomy in conducting business.

The 2015 amendment to the Act must be applauded from reigning in significant reforms in the arbitration regime and accepting that the earlier arbitration regime was a failure requiring major overhaul, still much is left to be done for making the country arbitration hub. To make India an arbitration hub, the courts need to stop using interventionist approach but must attempt to give effect to party's autonomy. Further amendments are needed to iron out the flows in the economy.

10.4.2 Conciliation

The Conciliation proceedings would also be governed by the Arbitration and Conciliation Act, 1996. As in the case of Arbitration, the court cannot refer the parties to Conciliation without the express consent of all the parties. As the Arbitration and Conciliation Act,1996 would apply only from the stage of reference, rules can be made under Part X of the Code

[37] National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A., Civil Appeal No. 667 of 2012.
[38] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors., 2020 SCC OnLine SC 177.
[39] Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India (NHAI), Civil Appeal No. 4779 of 2019.
[40]Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd., Arbitration Petition No. 1710/2015, decided on Jan. 14, 2016.
[41] Sasan Power Ltd v. North America Coal Corporation India Pvt. Ltd, First Appeal No. 310/2015, decided on Sept. 11, 2015.
[42] TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271.

of Civil Procedure, 1908 for the determining the procedure for opting for 'conciliation' up to the stage of reference to conciliation.[43]

10.4.2 Lok Adalats

The Lok Adalats are governed by the Legal Services Authority Act, 1987. Court reference to Lok Adalat, by default, does not dispose the suit. The suit is disposed by the court after the matter is heard by Lok Adalat and settlement is affected by way of an award. It is pertinent to note that a reference can be made to Lok Adalats even without the express consent of the parties.[44]

10.4.3 Mediation

The mediation can be conducted by the Lok Adalats or by the court annexed mediation centers through empaneled judges and lawyers. The reference to mediation does not require express consent of the parties.

10.4.4 Judicial Settlement

Judicial settlement implies a settlement made by the courts. If the court thinks fit then it can refer the dispute to another judicial officer, who will attempt to execute a settlement between the parties. If settlement terms are agreed, then the matter would be referred back to the court, which will give effect to the terms by way of a decree.[45]

However, the parties can even choose to avail other forums for settlement of their dispute. In an interesting case, the Delhi High Court allowed parties to avail the use of the process of "Early Neutral Evaluation" (ENE) to settle their dispute.[46] In this case the court had referred the parties to mediation, however since there were various interlinked disputes, the mediators failed to resolve the dispute in question. Thus, they approached the court seeking permission to try to resolve the dispute through ENE instead of Mediation. The Court in allowing the request held that, "*ENE is; thus, a different form of alternative dispute resolution and I see no reason why this process cannot be resorted to towards the object of negotiated settlement in pursuance to Section 89 of the Code of Civil Procedure, 1908 specially when the parties volunteer for the same.*"

10.5 PROBLEMS ASSOCIATED WITH IMPLEMENTATION OF SECTION 89 OF THE CODE OF CIVIL PROCEDURE, 1908

One of the most prominent issues with the Section was the apparent mix up in the meanings given to "mediation" and "judicial settlement". Section 89(2)(c) provided that "*for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat….*" And Section 89 2(d) provided that "*for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed*."[47] The plain

[43] CODE CIV. PROC., Order X.
[44] *Id.*
[45] Sakshi Raje, *An Analysis of Alternative Dispute Resolution under Section 89 of Civil Procedure Code*, LAW TIMES JOURNAL (MAY 24, 2020), http://lawtimesjournal.in/an-analysis-of-alternative-dispute-resolution-under-Section-89-of-civil-procedure-code/.
[46] Bawa Masala Co. v. Bawa Masala Co. Pvt. Ltd, AIR 2007 Delhi 284.
[47] CODE CIV. PROC., §89.

meaning of the term judicial settlement would mean a court effected settlement, and this is the meaning given to the term around the world, however Section 89(2)(c) explains it to mean settlement by way of reference to a Lok Adalat, while mediation is explained to mean a compromise effected by the Court.

A literal reading of Section 89 would mandate the court to formulate and reformulate the terms of settlement before referring the dispute to an ADR forum and this would eat away precious judicial time, defeating the purpose of the amendment itself.

The seemingly contrary wordings of Section 89 and Order X rule 1A cause confusion as to whether a reference to ADR is mandatory or not. This issue was covered in the first part of the chapter by the authors. Section 16 of the Court Fees Act, 1870 was also amended by the 1999 Act[48] to provide that in case a suit is referred to any of the ADR mechanisms, the entire court fees would be returned to the parties. However, the Act is silent as to what would transpire if the ADR forum chose to return the matter to the court as per the provisions of Order X Rule 1C.

10.6 JUDICIAL DEXTERITY IN APPLICATION OF SECTION 89 TO DISPUTES

The Hon'ble Supreme Court interpreted Section 89 for the first time in the *Salem Advocates Bar Association Case*,[49] wherein the constitutional validity of the 1999 Amendment was assailed. Many of the lacunae under Section 89 were pointed out to the Court. The Court reconciled the seemingly contrary provisions of Section 89 and Order X Rule 1 C by holding that it would be mandatory for the courts to refer civil suits to one of the ADR forums, and the discretion of the court was restricted to the reformulation of terms of settlement and choosing which forum of ADR was best suited for the parties.

With regard to the issue of formulation and reformulation of the terms of settlement at a pre-reference stage, the Court stated that preparation of a "summary of disputes" by the courts would be sufficient at a pre-reference stage.

With regard to Section 89(2)(d) which provided that the court would "effect the compromise" between the parties in cases of mediation,[50] the Court held that this would simply mean that the court would give "effect" by passing a decree recording the terms of settlement finalized by the parties before the mediator. This case was the Supreme Court's first attempt to fix the problems with the section by giving it a purposive interpretation.

Further, in the landmark *Afcons Infrastructure Case*,[51] the Hon'ble Supreme Court described the Section as a "trial judge's nightmare". The Court differed from its earlier pronouncement on a number of issues, with regard to the seemingly incorrect meanings ascribed to "judicial settlement" and "mediation" under Section 89 (2) clauses (c) and (d), the Court pointed out that the plain meaning of the term judicial settlement would mean a

[48] Code of Civil Procedure (Amendment) Act, 1999.
[49] Salem Advocate Bar Association v. Union of India (II), AIR 2005 SC 3353.
[50] CODE CIV. PROC., §89(2)(d).
[51] Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., JT 2010 (7) SC 616.

Court effected settlement, and this was the meaning given to the term around the world. Thus, to give a proper interpretation of the Section, the Court held that the terms "judicial settlement" and "mediation" should be interchanged in clauses (c) and (d) of Section 89(2). Thus, it differed from its earlier decision as judicial settlement would now mean a compromise effected by the court, and mediation would mean settlement by an authority deemed to be the Lok Adalat.

Secondly, a literal reading of Section 89 would mandate the court to formulate and reformulate the terms of settlement before referring the dispute to the ADR forum wasting precious judicial time thereby defeating the purpose of the Amendment itself. Thus, the Supreme Court read this requirement down and held that formulation and reformulation of settlement terms would not be necessary at a pre-reference stage.

With regard to the seemingly contrary provisions of Section 89 and Order X rule 1A, the Court differed from its earlier decision. While Section 89 gave discretion to the court to refer disputes to ADR mechanisms as it began with the words "*where it appears to the court that there exist elements of a settlement*", Rule 1A imposed a mandate on the court to refer every dispute to ADR after recording the admissions and denials of the parties. The Court chose to harmoniously construe these two provisions, and held that the court has to determine whether a suit would be suitable for ADR or not, in case the suit was found to be suitable, the court would have to mandatorily refer it to ADR.

Thus, the Supreme Court gave a more meaningful interpretation to Section 89 in this case and attempted to make the section workable.

The issue regarding the payment of court fees was dealt with by the Delhi High Court, in which it held that, "*On a proper construction, therefore, this Court is of the considered view that Section 16 can be made applicable only when parties are able to reach a settlement after a reference to ADR under Section 89 of the Code*".[52]

After the decision of the Supreme Court in the *Afcons Infrastructure Case*[53], the Government of India tasked the Law Commission with formulating suitable amendments to Section 89. In its report, the Commission largely agreed with the views taken by the Supreme Court in the *Afcons Infrastructure Case*, except one notable deviation on the interchanging of the words "judicial settlement" and "mediation" under clauses (c) and (d) of Section 89(2). The Commission pointed out that there was no rationale for treating the mediator as the Lok Adalat and investing the status of Lok Adalat Award to an agreement entered through mediation. For mediation, the Commission felt that the view of the Supreme Court in the *Salem Bar Association case* was more fitting,[54] and the mediator should be required to submit the terms of settlement to the court, which can then pass a decree as per the terms of settlement. Thus the Commission recommended that the section be redrafted in the following manner: -

"89: Settlement of disputes outside the court -

[52] Nutan Batra v. M/s. Buniyaad Associates, 255 (2018) DLT 696.
[53] Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., JT 2010 (7) SC 616.
[54] Law Commission of India, 238th Report, 2011.

> 1) Where it appears to the court, having regard to the nature of the dispute involved in the suit or other proceeding that the dispute is fit to be settled by one of the non-adjudicatory alternative dispute resolution processes, namely, conciliation, judicial-settlement, settlement through Lok Adalat or mediation the court shall, preferably before framing the issues, record its opinion and direct the parties to attempt the resolution of dispute through one of the said processes which the parties prefer or the court determines.
> 2) Where the parties prefer conciliation, they shall furnish to the court the name or names of the conciliators and on obtaining his or their consent, the court may specify a time- limit for the completion of conciliation. Thereupon, the provisions of sSections 65 to 81 of the Arbitration and Conciliation Act, 1996, as far as may be, shall apply and to this effect, the court shall inform the parties. A copy of the settlement agreement reached between the parties shall be sent to the court concerned. In the absence of a settlement, the conciliator shall send a brief report on the process of conciliation and the outcome thereof.
> 3) Where the dispute has been referred:-
>
> a) for judicial-settlement, the Judicial Officer shall endeavour to effect a compromise between the parties and shall follow such procedure as may be prescribed;
> b) to Lok Adalat, the provisions of Sub-sections (3) to (7) of section 20, sections 21 and 22 of the Legal Services Authorities Act, 1987 shall apply in respect of the dispute so referred and the Lok Adalat shall send a copy of the award to the court concerned and in case no award is passed, send a brief report on the proceedings held and the outcome thereof;
> c) for mediation, the court shall refer the same to a suitable institution or person or persons with appropriate directions such as time-limit for completion of mediation and reporting to the court.
>
> (4) On receipt of copy of the settlement agreement or the award of Lok Adalat, the court, if it finds any inadvertent mistakes or obvious errors, it shall draw the attention of the conciliator or the Lok Adalat who shall take necessary steps to rectify the agreement or award suitably with the consent of parties.
> (5) Without prejudice to Section 8 and other allied provisions of the Arbitration and Conciliation Act, 1996, the court may also refer the parties to arbitration if both parties enter into an arbitration agreement or file applications seeking reference to arbitration during the pendency of a suit or other civil proceeding and in such an event, the arbitration shall be governed, as far as may be, by the provisions of the Arbitration and Conciliation Act, 1996. The suit or other proceeding shall be deemed to have been disposed of accordingly."

This amendment would have removed all the lacuna from the Section, and it incorporated the suggestions made by the Supreme Court in the *Salem Bar Association Case*[55] (w.r.t. reference to arbitration) and the *Afcons Infrastructure case*.[56] Unfortunately, this Report has been languishing since 2011. The Delhi High Court had placed reliance on it to come to its conclusion in the *Nutan Batra Case*.[57]

[55] Salem Advocate Bar Association v. Union of India (II), AIR 2005 SC 3353.
[56] Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., JT 2010 (7) SC 616.
[57] Nutan Batra v. M/s. Buniyaad Associates, 255 (2018) DLT 696.

10.7 COMPARATIVE ANALYSIS

10.7.1 United Kingdom

In the United Kingdom, ADR has been seen as a completely voluntary process and neither the court nor the party can force ADR on any of the parties.[58] However in a recent decision, the UK Court of Appeal has held that the courts can refer the parties to ADR even without the express consent of all the parties.[59] In this case the issue was whether the Court could grant one parties request for an Early Neutral Evaluation (ENE) without the consent of the other party. The issue resolved around the interpretation of Rule 3.1 (2)(m) of the Civil Procedure Rules (CPR), which allows a court to "*take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case."*[60]

ENE is one form of ADR which was inserted in the CPR in 2015. In ENE, an independent authority wherein usually a judge is appointed by the court and he gives the parties a neutral assessment of their case. The ENE mechanism allows the parties to have a realistic overview of their case and serves as a basis for negotiation between the parties.[61]

The Court noted that the ENE mechanism did not prevent the parties from having recourse to the Court in case the ENE failed and the parties could not come to a settlement; the court proceedings would be resumed. Thus, the Court held that the CPR did not impose any restriction on the courts' power to refer the parties to ENE in the absence of express consent of all the parties.[62]

The Court went on to note that, in any event, ENE does not prevent the parties from having their disputes determined by the court if they do not settle their dispute at or following an ENE hearing.

This is the only form of mandated ADR in the UK, and the court cannot refer the parties to other ADR forums without the consent of all the parties.

10.7.2 United States of America

In the United States the federal district courts are charged with the implementation and administration of an ADR program which would be used in the civil cases.[63] As a result of this most of the civil suits require the courts to mandatorily refer the matter to one ADR forum.[64]

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[58] Richard M. Little and Ahmed Abdel-Hakam, *A Step Toward Mandatory ADR in English Courts*, WILEY ONLINE LIBRARY (May 24, 2020), https://onlinelibrary.wiley.com/doi/full/10.1002/alt.21817.
[59] Lomax v. Lomax, [2019] EWCA Civ 1467.
[60] Civil Procedure Rules, Rule 3.1 (2)(m).
[61] Lomax v. Lomax, [2019] EWCA Civ 1467.
[62] *Id.*
[63] 28 U. S. C. §651(a).
[64] Jim Wagstaffe, *Court-Ordered Alternative Dispute Resolution,* LEXIS NEXIS (May 24, 2020), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/court-ordered-alternative-dispute-resolution.

Every court designates one authority who is "*knowledgeable in alternative dispute resolution practices*" to supervise the courts ADR program.[65] Furthermore, the courts have been given the power to direct parties to participate in any ADR process even if it is not been specified in the local rules.[66] The court can also exempt any category of cases from the mandatory reference requirement rules subject to consultation with the members of the Bar and the concerned district attorney.[67] The ADR rules cannot conflict with any federal agencies' authority to litigate on behalf of the United States of America.[68]

The different forms of ADR which the courts mandate in the USA are:-

a. Early Neutral Evaluation
b. Mediation
c. Arbitration
d. Judicial Settlement Conferences

In these pre-trial conferences, the judges/magistrates usually hold a meeting with the attorneys, then meet each side separately. This is to evaluate the credibility of the parties and the strength and weaknesses of the case, after which they would give their suggestion.[69]

10.8 CONCLUSION

Apart from the above, India, when compared to the major developed countries like UK and USA has taken a commendable step in making pre-institution mediation mandatory under the Commercial Courts, 2015. In addition to these, the mode of dispute settlements in other countries can be taken a look at. This, over the long run will ease the burden on the legal system and improve the commerce sector by saving precious time wasted in long drawn litigation. The conclusion that emerge from the research under this chapter are –

1. Arbitration as an effective contractual dispute resolution in India has not been very successful in India due to the following reasons-
    a. Majority of the arbitrators are retired judges who tends to follow the conventional court layout for submission of documents and pattern to be followed during arbitration proceedings which hinders the efficiency of arbitration in India.
    b. Overlapping effect of different laws – Many laws including the recent Commercial Courts Act, 2015 refers to alternative dispute resolutions mechanism such as mediation and arbitration which creates an overlapping effect and creates confusion and valuable time is spent in clearing this confusion instead of resolving the dispute.

[65] 28 U. S. C. §651(d).
[66] *In re* Atl. Pipe Corp. , 304 F. 3d 135.
[67] 28 U. S. C. §652(b).
[68] 28 U. S. C. §652(c).
[69] Jim Wagstaffe, *Court-Ordered Alternative Dispute Resolution,* LEXIS NEXIS ((May 24, 2020), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/court-ordered-alternative-dispute-resolution.

   c. Court interference in Arbitral proceedings – due to intervention of judiciary in the arbitral proceedings a plethora of issues arises which causes delay in conclusion of arbitration.
2. However, as compared to ad hoc form of arbitration, institutional arbitration has enjoyed relatively more success by framing standardized rules of conduct, evidence etc. This brings stability and trust in the institutional arbitration.
3. Theoretically and practically there are many advantages of arbitration as a commercial dispute resolution mechanism due to confidentiality enjoyed by the parties, informal settings as compared to regular courts as well it reduces the burden and workload of the courts.
4. To improve the arbitration in India few points that can be looked into include –
   a. India should take a queue form UK where Dispute Resolution Boards have been established. It is our recommendation that such Dispute Resolution Boards should also be established in India. DRB should be brought in India through by providing a statutory status.
   b. For every Infrastructure project a DRB should be established at the commencement of the project. Any dispute arising out the project should be referred to this Board. This will ensure that where differences between the parties escalates into disputes, the issues are resolved equitably and as expeditiously and cost-effectively as possible, so that relationships are enhanced (rather than harmed) for the future.
   c. The success story of National Highway Authority of India Society for Affordable Resolution of Disputes should be replicated in each infrastructure sector to provide for cost and time effective dispute settlement mechanism.

Having a robust alternate dispute resolution mechanism will ensure that differences and disputes between the parties do not escalate into time-consuming court battles which deteriorate the business relationship between the parties. It will boost confidence in the ADR mechanism and will reduce the number of cumbersome court battles. This mode of ADR will surely go a long way in improving the ease of doing business environment in India.

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CHAPTER 11: PARAMETERS TO MEASURE THE QUALITY AND EFFICIENCY OF DISPUTE RESOLUTION IN INDIA

11.1 INTRODUCTION

Dispute resolution has been present in India since time immemorial. The primary distinction with the law is its codification and applicability to every citizen in the country. Judicial mechanisms have been present in India since the cultivation of the first society, the Indus Valley civilization in around 2300 BC. Various methods of mediation, arbitration and negotiation as well can be seen throughout history, although not in the form in which it exists today. Litigation, however, was not as popular as it is today due to lack of awareness as well as dissatisfaction in the dispensation of justice. It often led to organised crime or the formation of mafias as the people would always either end up winning or losing. This would often create hatred and animosity between the ruler and the convicted.

Alternate dispute resolutions were highly sought after in the period of the Indus valley civilization. When trade existed in terms of the barter system, the value of each material and the quantity of the trade had to be agreed upon by both the parties. This system soon evolved during the Vedic period when the whole territory of India was divided into small kingdoms and each kingdom was ruled by a king. There were distinct spheres of activities that could be controlled by the king. A hierarchy of courts was set up with the king having the highest form of appeal, hereby the ultimate authority[1]. The king was also the head of a 'Samiti' which was not only a sovereign body but also consisted of the advisors to all religious matters in the kingdom. The Mughals, Sultans and Marathas too helped in furthering the idea of a concrete judicial mechanism as a means of justice. They decided to have a mechanism of functioning courts with a group of people adjudicating the matter while the final say in the dispute was held by them.

The derivation of arbitration may be devised back to the elementary method of village Panchayats widespread throughout India. Major issues resolved were family disputes, disputes among social groups and other minor issues regarding trade and property.[2] A panchayat system consisted of elderly and seemingly knowledgeable people from a certain village termed as the *panch*. The commandments provided by the *panch* sitting together as a panchayat commanded great respect. They seem to have spoken the voice of god and believed in utter good faith. The decision that the *panch* gave out involved hearing out both the parties and coming to a consensus on what is to be followed and the punishment of the one who has faulted, if any.

The next significant change was seen during the British Raj. One of the most important changes they brought about was the evolution of the language from Sanskrit to English. Although Indians at that time had been hesitant to accept this change, it was one of the most

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[1] DR. RADHA KUMUD MOOKERJEE, LOCAL GOVERNMENT IN ANCIENT INDIA (1920).
[2] DR. SHRADDHAKARA SUPAKAR, LAW OF PROCEDURE AND JUSTICE IN ANCIENT INDIA (1986).

impacted changes as of today. The alternative dispute resolution mechanism was found not only in the procedure of working of judiciary but was also seen as politically safe and significant in the period of British Raj. Commercial arbitration came back into the picture when the East India Company had to resolve trade disputes between other companies it traded with. The first uniform charter was seen in 1729 which provided for counts in the towns of Bombay, Calcutta and Madras.

Post-independence, the drafters of the constitution resorted to an assortment of history along with the influence from the west to create the constitution. It was considered the primary duty for the government to provide equal and fair representation to every citizen. On the enforcement of the constitution, we were provided with an apex court known as the Supreme Court, which had original as well as appellate jurisdiction, with every state having a High Court, as well as every district having their own courts known as the district court or sub-courts. Each of these courts can hear matters that are both civil and criminal in nature.

ADR as well has been a vital part of the framing of the constitution. It is the voice of the past and strongly propagates the "People's court verdict" ideology that had been present in India. It is also, in present day and age, seen as more efficient than litigation as it requires a consensus of parties therefore a compromise, shorter time periods and reduced spending.

11.2 TYPES OF DISPUTE RESOLUTION IN INDIA

The aim and objective of reviving Section 89, as stated in the Statement and Objects of the Code of Civil Procedure (Amendment) Bill initiated in 1997, was to ensure effective implementation of conciliation schemes, following recommendations of the 129th Law Commission and also to make it obligatory for courts to refer to disputes to alternate forums. Initiation of suits in courts shall be the last resort of parties if all other alternatives fail. Under Section 89 of the CPC, the following are prescribed methods for dispute resolution:

11.2.1 Litigation

Litigation involves a case moving from the bottom of the court hierarchy all the way to the apex court. Parties can file cases on civil and criminal matter. There are several special courts such as family courts that discuss only disputes regarding family law; Commercial Courts that deal with matters of constitution of Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and connected matters. The course of a suit involves a pre-trial stage, trial proceedings, or a summary suit if required. The parties can appeal the verdict to a higher court if they are dissatisfied with the same. Overall, the process is extremely lengthy and requires a large amount of investment.

11.2.2 Mediation

Mediation as an ADR mechanism is largely informal in nature and does not focus deeply on procedural aspects. The mediator, in dissimilarity with the conciliator, plays a passive character, and simply sets the manner of negotiation between the parties.[3] Such a setting

[3] Laura Fishwick, *Mediating with Non-Practicing Entities*, 27(1) HARVARD J. L. TECH. 331, 349 (2013).

encourages people to voluntarily approach the mediation centres to adjudicate their disputes, assisting in shifting the perception of systems of justice as a last resort.[4] This informal and party-oriented nature of mediation could also possibly provide assistance in disobeying structural barriers that render justice unreachable to sections of the population.[5]

In 1999, the Government of India enacted the Code of Civil Procedure (Amendment) Act, 1999 where a new Section 89 was introduced into the CPC. This newly inserted section introduces the concept of 'judicial mediation', as opposed to voluntary 'mediation'. This helped the courts in identifying cases where an amicable settlement is possible, formulating the terms of such a settlement, and directing the parties towards a mediation. This practice is most utilized in matters of family law disputes, labour laws and corporate settlements.

The Commercial Courts Amendment Act of 2018 has provided incentive to mediation.[6] The Amendment has inserted a new Chapter IIIA into the Act. It contains matters where a suit does not demand for urgent interim relief, the plaintiff must undergo pre-institution mediation. The word 'must' makes it compulsory. It also introduces the "Commercial Courts (Pre-institution Mediation and Settlement) Rules, 2018". These Rules lay down the procedure that must be followed in due course of the mediation. The rules, read with the Act state that the Central Government may authorize the Authorities constituted under the Legal Services Authorities Act, 1987. This would be the regulating authority of the mediation process by initiating the proceedings once an application is filed by any party. It also assigns the dispute to a mediator and decides the venue of proceedings.

The time period for the mediation process to be completed is within three months from the date of the receipt of the application for pre-institution mediation. This time period can be extended by two months with the consent of both the parties. The rules also provide for the obligations of the parties to be honest and act in good faith. The mediator too is compelled to maintain confidentiality of the proceedings, among other ethical norms laid down. It further entails that the settlement arrived at by such mediation shall have the status and effect of an arbitral award under section 30(4) of the Arbitration and Conciliation Act, 1996. The application of such pre-institution mediation provisions across the world have been positive.

Mediation in India is most commonly used in matrimonial disputes. According to Section 9 of the Family Courts Act, 1984 it is the duty for every family court to make sure that if reconciliation between the parties can be brought about through any means, they should resort to those means rather than granting a divorce or allowing separation of the family. Section 9 of the Family Courts Act, 1984 makes is it mandatory to settle a matrimonial dispute in relation to maintenance, child custody, divorce, etc., through the process of mediation. It also states to refer the parties to visit a mediation centre with their consent. A

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[4] John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOTIATION L. REV. 1 (1998).

[5] Bingham Centre for the Rule of Law, *International Access to Justice: Barriers and Solutions* (Oct. 22 2014), https://www.biicl.org/documents/485_iba_report_060215.pdf?showdocument=1.

[6] Law Commission of India in its 238th report on the amendment of Section 89 of CPC has recommended a similar clause.

similar provision is contained in Order XXXIIA of the Code of Civil Procedure, which deals with family matters. According to Section 4(4)(a) of the Family Courts Act, 1984 in selecting persons for appointment as judges in family courts, every endeavour shall be made to ensure that persons dedicated to the need to protect and preserve the institution of marriage and promote the welfare of children, and are qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling.[7]

In the case of *K. Srinivas Rao v. D. A. Deepa*[8], the Apex Court held that mediation is a must before a divorce. When any case occurs under Section 489A of IPC, the apex court directs the criminal courts not to deal with this complaint unless the matter is dispensed by the mediation centres but in few cases where the cruelty is seen to be rigorous and dangerous, the criminal courts can take up the case without referring it to the meditation centres. Mediation law propagates a settlement which is also important in sensitive issues other than family law disputes where either party does not want to go to court but still needs to enforce changes in their life.

11.2.3 Conciliation

Conciliation is a boon and it is a better procedure to settle any dispute as this process is at the discretion of the parties to decide to come to a settlement and resolve the dispute. Black's Law dictionary defines conciliation as "A process involving a neutral third party who will listen to the argument presented by both opposing parties and render a non-binding suggestion of how to resolve the conflict."[9] The role of the conciliator is to bring parties together and to create an atmosphere where parties can resolve their disputes amicably. Conciliation tries to individualize the optimal solution and direct parties towards a satisfactory common agreement.

The process of conciliation as an alternate dispute redressal mechanism is advantageous as it is cost effective and expeditious, simple, fast and convenient than lengthy litigation procedures. It also eliminates any scope of biasness and corruption. The parties who wish to settle their disputes can be provided great incentive by the process of conciliation. In order to enable the conciliator to play his role effectively, the parties should be brought together face to face at a common place where they can interact with the conciliator, separately or together without any distraction and with only a single aim to sincerely arrive at the settlement of the dispute.

Conciliation has been inserted in Part III of the Act and it has been adopted as one of the efficient means of settlement of disputes. The Act is drafted on the lines of the UNCITRAL Model Arbitration Law and the UNCITRAL Conciliation Rules and it is the first time that the process of conciliation has been given statutory recognition by providing elaborate rules of engagement. It is a proceeding that is non-binding on both the parties and is arrived at by a neutral conciliator. This conciliator helps the parties arrive to mutually agreeable

[7] KRISHNA AGRAWAL, JUSTICE DISPENSATION THROUGH ADR IN INDIA (2014).
[8] K. Srinivas Rao vs. D.A.Deepa, Civil Appeal No. 1794 of 2013.
[9] BLACK'S LAW DICTIONARY,552 (9th ed. 2009).

settlement. Section 61 of the Act reads that "conciliation shall apply in disputes arising out of a legal relationship whether contractual or not, and to all proceedings relating thereafter."

11.2.4 Arbitration

Arbitration refers to "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."[10] Any commercial matter including an action in tort if it arises out of or relates to a contract can be referred to arbitration. However, public policy would not permit matrimonial matters, criminal proceedings, insolvency matters, anti-competition matters or commercial court matters to be referred to arbitration. Employment contracts also cannot be referred to arbitration but director - company disputes are arbitrable (as there is no master servant relationship here).[11] Generally, matters covered by statutory reliefs through statutory tribunals would be non-arbitrable.

Due to the huge pendency of cases in courts in India, there was a dire need for effective means of alternative dispute resolution. India's first arbitration law enactment was the Arbitration Act, 1940. Other parallel legislations were formed the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards Act, 1961. Arbitration under these laws was never successful and led to additional litigation because of the extensive challenges of passing awards. The legislature enacted the Arbitration & Conciliation Act, 1996 to make arbitration, both domestic and international, more effective in India. The Act is based on the UNCITRAL Model Law (as recommended by the U.N. General Assembly) and facilitates International Commercial Arbitration as well as domestic arbitration and conciliation.

The road to the Arbitration Amendment Act 2015 was set by the Law Commission of India's Report No. 246, which projected several amendments to the principal Act of 1996. An attempt was also made in 2010, wherein the Ministry of Law and Justice had released a consultation paper suggesting certain amendments to the Arbitration law in India. Majority of the amendments brought in the through Act are a reflection of the Law Commission Report.

Accordingly, a High-Level Committee to Review the Institutionalizing of Arbitration Mechanism in India was set up under the chairmanship retired Justice B.N. Srikrishna. The Committee was formed for the purpose of classifying the hurdles to the development of institutional arbitration, scrutinise particular issues distressing the Indian arbitration landscape, and formulate a roadmap for making India a full-bodied centre for international and domestic arbitration.

As a result of these recommendations, the Arbitration and Conciliation (Amendment) Bill, 2019 was introduced and successfully enacted as the Arbitration and Conciliation (Amendment) Act on August 9, 2019. The 2019 Amendment Act was passed with a view to make India a hub of institutional arbitration for both domestic and international arbitration.

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[10] BLACK'S LAW DICTIONARY 119 (9th ed. 2009).
[11] Comed Chemicals Ltd. v. C.N. Ramchand, 2008 (13) SCALE 17.

The Arbitration Amendment Act 2019 brings about several key changes to the arbitration landscape in India:

- The Arbitration Amendment Act 2019 seeks to establish the Arbitration Council of India (ACI), which would exercise powers such as grading arbitral institutions, recognising professional institutes that provide accreditation to arbitrators, issuing recommendations and guidelines for arbitral institutions, and taking steps to make India a centre of domestic and international arbitrations.
- Further, Arbitration Amendment Act 2019 amends the Arbitration Amendment Act 2015 by providing the Supreme Court and the High Court with the ability to designate the arbitral institutions which have been accredited by the ACI with the power to appoint arbitrators.
- The Arbitration Amendment Act 2015 had introduced a time-limit of 12 months (extendable to 18 months with the consent of parties) for the completion of arbitration proceedings from the date the arbitral tribunal enters upon reference. The Arbitration Amendment Act 2019 amends the start date of this time limit to the date on which statement of claim and defence are completed.
- The Arbitration Amendment Act 2019 also excludes 'international commercial arbitration' from this time-limit to complete arbitration proceedings.
- The Arbitration Amendment Act 2019 introduces express provisions on confidentiality of arbitration proceedings and immunity of arbitrators.
- The Arbitration Amendment Act 2019 further prescribes minimum qualifications for a person to be accredited/act as an arbitrator under the Eighth Schedule.
- Importantly, the Arbitration Amendment Act 2019 also clarifies the scope of applicability of the Arbitration Amendment Act 2015. Arbitration Amendment Act 2019 provides that Arbitration Amendment Act 2015, which entered into force on 23 October 2015, is applicable only to arbitral proceedings which commenced on or after 23 October 2015 and to such court proceedings which emanate from such arbitral proceedings.[12]

On August 30, 2019, the Central Government notified Sections 1, 4 –9, 11–13 and 15 of the Arbitration Amendment Act 2019. The notified amendments include those relating to the timeline for arbitration, confidentiality and applicability of the 2015 Amendments. However, it must be noted that the provisions pertaining to the ACI have not been notified yet.

With respect to the matters being compelled to arbitrate and that the matters wouldn't come back to the referred court, the supreme court cautioned the courts on arbitration without consent and said:

[12] NISHIT DESAI ASSOCIATES, REPORT ON DISPUTE RESOLUTION IN INDIA (2020).

"It should not also be overlooked that even though Section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there cannot be a reference to arbitration even under Section 89 CPC, unless there is mutual consent of all parties, for such reference."[13]

With several recent landmark judgments of the Supreme Court, the arbitration regime in India has witnessed an exemplary change with greater degree of sanctity being granted to arbitral decisions and arbitration as a fully functioning mechanism for resolution of disputes. Even prior to the coming into force of the Arbitration Amendment Act 2015 and 2019, courts were taking an increasingly pro-arbitration approach. Showing importance towards the enactment of this act as well as facilitating a shift in the entire judicial system.

11.2.5 Judicial settlement through Lok Adalat

National Legal Services Authority (NALSA) along with other Legal Services Institutions conducts Lok Adalats. Lok Adalats are fora where mutual decisions are taken on cases pending in the court of law or are at pre-litigation stages. They have a statutory recognition under the Legal Services Authorities Act, 1987. The award passed under the mentioned Act by Lok Adalats is held as a decree of a civil court and is final and binding on all parties of the dispute. No appeal against such an award can lie before any court of law. However, if the parties are dissatisfied with the award, they may start litigation proceedings by approaching the court of appropriate jurisdiction by filing a case and following the required procedure, in order to exercise their right to litigate.

There is no court fee payable when a matter is filed in a Lok Adalat. If a matter pending in the court of law is referred to the Lok Adalat and is settled subsequently, the court fee originally paid in the court on the complaints/petition is also refunded back to the parties. Those who have the power to decide the case in a Lok Adalat are called members of the Lok Adalat, they have the primary role of a statutory conciliator and do not have any judicial role; therefore they can merely persuade the parties to come to an amicable agreement outside the court (in the Lok Adalats). These members cannot pressurize or force either party to compromise or settle a matter either directly or indirectly. It is a voluntary act and what comes out of it is up to the parties. The Lok Adalat shall not decide any matter referred to them at their own disposal, however, the same would be decided based on the compromise or settlement the parties are willing to make. The members shall assist the parties in an independent and impartial manner in their attempt to reach amicable settlement of their dispute.

As on 30.09.2015, more than 15.14 lakhs Lok Adalats have been organized in the country since its inception. More than 8.25 crore cases have been settled by this mechanism so far. a total 7,81,84,525 cases were taken up in the National Lok Adalat organized during the period of 2016 – 2018(June) and 4,09,35,185 have been disposed of. For the same period, a total 1,70,60,679 cases were taken up in regular Lok Adalats and 1,08,13,538 were disposed of. In the Lok Adalat of Balodabazar district in Chhattisgarh itself, 5552 cases have been

[13] Jagdish Chander v. Ramesh Chander, [2007] (5) SCC 719.

taken up in 2019 out of which 317 have been disposed of.[14] This shows the speed at which Lok Adalats dispose of cases.

11.3 COMMERCIAL COURTS IN INDIA AND EASE OF BUISNESS

11.3.1 Legislation for Commercial Courts

An overworked legal system in India exaggerates the potential for inefficient case management and unspecified delays in disposal of cases. There has been a long-standing obligation for a stable and efficient dispute resolution system ensuring quick enforcement of contracts, easy salvage of monetary privileges, and award of just compensation for damages suffered - all of which are critical in reassuring investment and economic activity.

After more than a decade of extended debates and a fresh incentive by the government to improve India's legal system and its image as an investment-friendly terminus, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015 was propagated on October 23, 2015. On December 31, 2015, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was enacted replacing the 2015 Ordinance. However, the Commercial Courts Act was deemed to have come into force on October 23, 2015. The Commercial Courts Act was amended in August 2018. The amendments were deemed to have come into force on May 3, 2018.

The Commercial Courts Act provides for the constitution of Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts for refereeing commercial disputes of specified value and connected matters. It is in line with international trends, aided by the in-depth study of Commercial Courts of United Kingdom, United States of America, Singapore, France etc. as carried out by the Law Commission of India in its 188th and 253rd reports.

Section 2(c) of the Commercial Courts Act provides a comprehensive definition of Commercial Disputes. It covers every commercial transaction including general commercial contracts, shareholder & joint venture agreements, intellectual property rights, contracts relating to movable and immovable property and natural resources, amid others.

Earlier, commercial divisions of High Courts were established in places where High Courts have ordinary original civil jurisdiction. These divisions dealt with commercial disputes of specified value i.e. INR 10,000,000 (Rupees Ten Million) or higher. However, the specified value is now reduced to INR 300,000 (Rupees Three Hundred Thousand). Consequently, the Amendment now establishes commercial courts at the level of district judge even in places where High Courts exercise ordinary original civil jurisdiction. The State Government may specify the pecuniary jurisdiction of such Commercial Courts. However, the State Government cannot specify an amount which is less than three hundred thousand and more than the pecuniary jurisdiction of the District Courts in the said areas.

[14] E-courts website, available at https://districts.ecourts.gov.in/sites/default/files/nla14dec19.pdf.

The Commercial Courts Act paid little attention to specialization within commercial dispute resolution, neither does the legislation specifically provide for the appointment or nomination of judges of the commercial courts or division who have expertise on trade and commerce issues. Section 3(3) specified that the judge or judges of the commercial courts would be appointed from the cadre of higher judicial service in the state, thus indicating that experienced personnel shall be appointed to the commercial courts. However, the 2018 Amendment Act reworked the language of the legislative provision enabling members of the district judiciary as well to be appointed to these courts. There, however, remains a statutory duty upon the State Government to impart training to the judiciary at consistent intervals, as per Section 20.

11.3.2 Ease of business due to Commercial Courts

According to the World Bank's Doing Business report 2020, India is among the top 10 improvers. One of the parameters World Bank uses to determine Ease of Business is Court efficiency. Judicial efficiency is essential not only for the formation of businesses but also the productivity of the firm. The problem of dealing with insolvency was one that was cited in the past reports of World Bank.

Before the implementation of the Insolvency and Bankruptcy Code, 2016 it was extremely hard for the creditors to seize companies in default of their loans. The most common way for secured creditors to recover the debt was through very lengthy and burdensome foreclosure proceedings that lasted almost five years, making efficient recovery almost impossible. The new law brought about the concept of reorganization for corporate parties as an alternative to liquidation or other debt enforcement mechanisms, allowing companies with an out to restore their financial ability or close down. With the availability of reorganization, companies have tools that are more effective to restore financial abilities, creditors have better access to negotiate successfully and revert the money loaned at the end of insolvency proceedings.

Subsequently, more than 2000 companies have used this new law. About 470 have commenced liquidation and more than 120 have approved reorganization plans, with the remaining cases still pending. Earlier on, foreclosure was the most common practice reported in both Delhi and Mumbai, the duration of resolving insolvency cases has approximately been 4.3 years. Despite some challenges in the implication of the reform – particularly regarding application of law by multiple stakeholders – the number of reorganizations in India has been gradually increasing. As a result, reorganization has immensely impacted the ease of carrying out business in India. The increase in recovery rate is based on a standardized method to do so.[15]

India has also made trading across borders immensely easier by enabling post-clearance audits, integrating trade stakeholders in a single electronic platform, upgrading port infrastructure and enhancing electronic submissions of documents. International Arbitration is also great step in resolving cross border commercial disputes. In the

[15] WORLD BANK GROUP, DOING BUSINESS 2020: COMPARING BUSINESS REGULATION IN 190 ECONOMIES (2019).

Commercial Courts of Delhi, after the reduction in the pecuniary jurisdiction the pendency of commercial disputes was recorded at 3754 commercial cases as of 2019 which is a 4.7% increase in pendency. This situation can be solved by increasing judges in the state. Out of 160 cases filed under the Commercial Courts Act, 148 were decided within one month.[16]

11.4 RECOMMENDATIONS OF LAW COMISSION REPORTS AND INTERNATIONAL LEGISLATIONS

The Law Commission of India in its 222nd report emphasised the need for an alternative dispute resolution to primarily allow access to justice for all. Several people of the country have inadequate funds and resources to access justice through litigation. The report focused on the development of Lok Adalats as an alternative dispute resolution centre to not only increase access to justice but to also allow matters of emotional importance such as family, property, commercial disputes, to be dealt with in a give-and-take environment. It highlighted the advantages of ADR in general stating that these will not only be an important step in revolutionizing the justice system but would also help in reducing the burden of the courts and create a more transparent justice system. It distinctly helps differentiate between an ad hoc arbitration and an institutionalised arbitration system.

As recommended by the Law Commission in its draft paper,[17] the courts' administrative procedure should be streamlined to ensure organized listing of the cases according to the description of the dispute, and better-quality service of notices and summons to help observe to the timeline prescribed. Procedures relating to transfer to the Commissioner for recording of evidence need to be carefully used, as this could lead to delay in the dispute resolution system. A distinctly separate group of judges should be exercising their expertise in commercial disputes which would further the success of the commercial courts significantly. India should also consider the segregation within this cadre of judges based on the categorical specialization of each.

In UK a Directive issued in 2013,[18] stated that ADR is going to be made more accessible for an individual by making it available online. UK has been a propagator of ADR since their Civil Procedural Codes were amended in 1999. It had been made obligatory at the initial step from its very orientation in the country. In UK, the first step to resolve the dispute is through ADR, i.e. that the claimant will send a letter to the defendant with a form of ADR the claimant wants to resolve the dispute with, if the dispute is not resolved through ADR then the court during the questionnaire asks the reason for the rejection of the ADR mechanism. This procedure is not followed in India, which leads the lawyers to choose litigation over ADR mechanism. Judges who would like to carry out mediation, arbitration or conciliation are given special training under the courts wing so as to increase the efficiency

[16] GARIMELLA ET AL., COMMERCIAL COURTS IN INDIA -ALL FOR EASE OF DOING BUSINESS (2019).

[17] Law Commission of India, *Consultation Paper on Court Management*, http://lawcommissionofindia.nic.in/adr_conf/casemgmt%20draft%20rules.pdf.

[18] Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.165.01.0063.01.ENG.

of the ADR system. The ICADR situated in Hyderabad provides training to arbitrators and mediators but till now only eleven training sessions have been organized across India.[19]

UK is one of the few countries that had recognized the need for Online Dispute Resolution (ODR) as early as 2013. The EU Justice Scoreboard[20] is important in this regard and comprises of tools that aid in providing a more efficient judicial system. They resorted to three major aspects that play a role in the efficiency a judgement, namely: a) Quality of the judgement system, b) Its independence c) The efficiency with which it operates. The subordinate courts are required to monitor the process and enter day-to-day data online. This creates a complete shift of courts to an online platform. UK has been inspired by Slovenia, which has carried out complete computerisation of courts, the establishment of a single statistical database for statistical monitoring of the courts' work based on uniform criteria, The establishment of a coordinating body in charge of statistical monitoring of the courts' work by the Ministry of Justice, the Judicial Council and the Supreme Court and data from the single statistical database should be made available to all users: the Ministry of Justice, the Judicial Council, the Supreme Court and all other courts, taking into account the legislation on protection of personal data.[21]

An increasing number of papers have cited the efforts implemented by UK in mending its legal position. Dispute resolution having utmost importance in the economic activity and growth, it is important for India to infer from other countries as well. The existing court administration procedures need to be refurbished for time and procedural efficiency. For example, the judges spend significant amount of time on matters that are not related to the substantive part of the case but those relating to matters such as: (a) whether notices have been served, (b) whether defects have been cured, (c) whether affidavits, reply or rejoinders have been filed, (d) whether the notices in applications for bringing in legal representatives have been served, (e) whether the parties have taken various steps laid down to be performed at various stages of the case. Instead of the judge dwelling into details of the administration, there should be a qualified court manager appointed to look into these matters for easy and efficient disposal of the cases, a lot of time can be saved through this. Case management under the Commercial Courts Act could take suggestions made in the Case Flow Management Rules, 2005[22] which provides for timelines for disposal of cases based on their subject matter and mandate a separation of cases into two – the first being before the judge only on substantive matters and the second being called upon by a registrar or a deputy registrar on procedural matters.

The 246th Law Commission Report also points out the need to integrate technology into the dispute resolution system. It could help in speedy disposal of claims and ensure case management more efficiently. Technological aspects of analysis could also further the

[19] ICADR, ANNUAL REPORT 2015-2016, http://icadr.nic.in/file.php?123?12:1490865651.
[20] The EU Judicial Scoreboard, https://ec.europa.eu/esf/BlobServlet?docId=18578&langId=en.
[21] For more information on the Lukenda project, see CEPEJ Studies No. 13, pp 92-110.
[22] The genesis for these rules lies in the decision of the Supreme Court of India Salem Advocate Bar Association v. Union of India (2005) 6 SCC 344 that endorsed the Model Draft Rules for case flow management prepared as a draft consultation paper by the Law Commission of India, for the High Courts and for the subordinate courts as well.

understanding of the judges in terms determining the time within which a case must be disposed by taking an input on various factors such as the age of the case, the subject matter of the case, the timeline between each hearing, etc. The electronic data would ensure transparency and accountability as well.

Although electronic records are admissible before courts, the legislation does not allow for electronic filing of applications related to commercial disputes. The e-courts of India are not being utilized to their full potential and hence creating barriers in the settlement of disputes as well as enforcement of contracts. While the Legislation mandated collection and disclosure of statistical information related to the number of suits, applications and appeals filed, according to Section 17 of the Commercial Courts Act, there is little access to such information, given that they are not maintained exclusively but as part of the data maintained by the High Courts in each federal unit.

Drawing guidance from the Law Commission's reports, the CPC must be amended in a manner where there is strict adherence to the timelines of disposing cases. The Supreme Court directed the Bar Council of India in *Bar Council of India v. A. K. Balaji*[23] to allow certain foreign lawyers to provide guidance and advice to Indian clients in terms of the matters of foreign law.

Singapore International Commercial Court (SICC) and the Dubai International Financial Centre (DIFC) are the best in the industry practice of commercial law. India could adopt a hybrid arbitration-litigation model that offers the best of each – choice of forum, International Bar Association and Rules of evidence, such that the benefits of arbitration could be combined with that of litigation like the joinder of third party for instance. This would surpass the procedural delays and help implementing a more robust dispute resolution system in India.

11.5 PARAMETERS OF ASSESING QUALITY AND EFFCIENCY OF DISPUE RESOLUTION

According to a report from the Centre for Research & Planning, Supreme Court of India:

> "The 2013-2015 statistics show that the judicial system to tackle the flow of fresh cases. In 2013, the institution was 1.86 crore with the disposal of 1.87 crore cases. In 2014 the institution stood at 1.92 crores and disposal at 1.93 crore cases and in 2015 the figure of the institution was 1.90 crore while disposal was 1.83 crore. Over the last 3 years period, the pendency has remained at 2.68 crores, 2.64 crores, and 2.74 crore cases respectively. In contrast to these figures, the Indian subordinate judiciary has a sanctioned judicial workforce of merely 20,558 officers and a working strength of 16,176 officers. Keeping these figures in mind, it is simple arithmetic to conclude that the existing judicial officers are not sufficient to keep pace with the existing situation."

It is important to note that according to this statistic, over $4/5^{th}$ of the cases are civil in nature. This calls for a shift in the judicial system where the cases can be disposed of quicker and more efficiently. IIM Kashipur along with the Ministry of Law and Justice, came up with the following parameters to access the quality and efficiency of civil dispute cases in India:

[23] Bar Council of India v. A. K. Balaji, Civil Appeal Nos.7875-7879 of 2015.

1. Infrastructure: Infrastructure of the courts includes the physical infrastructure, the efficiency of channel flow of communication as well as the infrastructure for support staff for the court. The court is the physical space where the parties disputing a case come to present their cases before the judge. An appropriate infrastructure is required to enhance the efficiency of the judges. The court should have ready access to accommodate needs of every person approaching it, especially those with special needs, such as differently abled people.

Technological advancement is an important channel to streamline information within the court. The information regarding court hearings should be easily accessible on an online platform. Currently, litigants can access case status and information over the internet. According to "Subordinate Courts of India: A Report on Access to Justice 2016[24] staff positions for subordinate court staff is not efficient as about 40,000 positions are lying vacant.

2. Institution/Disposition Ratio: The pendency of a case has been a long-standing issue in the country. It is important to have cases filed in a manner where they can be easily found along with all the relevant documents relating to the case. The case filing to disposition ratio should be such that frivolous cases are not given additional time and in a particular quarter the ratio for cases filed should not exceed the number of cases disposed by a huge margin. The High Courts of Rajasthan, Sikkim and Uttar Pradesh follow an efficient system portraying the same.

3. Quality of Judgment: In addition to the number of cases disposed, the quality of judgement delivered is also an important aspect of determining the efficiency of a dispute resolution system. Judgements act as precedents to future cases as well as project the reasonability of the court. As higher court judgements directly impact the lower courts, the judgements must be made based on reasonability and full understanding. The intention is to regulate the quality of judgements through classifying the process into multiple spheres. They are:

    a. The process – whether the process has been open and transparent, the judge has acted independently and impartially, the proceedings have been organised in an expedient manner, active measures have been taken to encourage the parties to settle, process must be managed efficiently and actively and the proceedings should be open to the public.

    b. The decision – should be just or lawful, the reason behind the judgement should be accepted by both the parties as well as professionals in the legal field, the reasons must be transparent and without any personal bias, the decision should have a clear structure, decision should be announced in a comprehensive manner and should be easily understood.

    c. Treatment of the parties and the public – The parties of the matter should always be treated with dignity, appropriate advice is to be given to the parties (if

[24] http://supremecourtofindia.nic.in/pdf/AccesstoJustice/Subordinate%20Court%20of%20India.pdf.

required), parties of the suit must be provided with all necessary information, the publication of court documents should be accessible to the public readily.

d. Promptness of the proceedings – The proceedings should be within optimum processing time, the time taken to file for the case should also be taken into account, the parties should be happy with the promptness of the hearings.

4. Number of Adjournments: Adjournment is one of the reasons behind delay and pendency in cases. The court may, according to Order 17 of the Civil Procedural Code grant an adjournment, if sufficient cause is shown at any stage of a case. Even though litigants are filing the applications for the adjournment time and again, the courts keep on granting the adjournment more than the prescribed limit. Hence, unnecessary adjournment of cases should be kept in check and unaccounted delays should not exist in the process of providing justice.

5. Encouragement of ADR: According to an Apex Court judgement,[25] all cases related to trade, commerce and contracts (including all kind of money), all cases arising from strained or soured relationships, all cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, all cases relating to tortious liability, including claims for compensation in motor accidents/other accidents, all consumer disputes, etc should be handled through alternative dispute resolution. ADR as mentioned in this paper earlier has been adopted by India in several spheres especially through the various acts as well as Section 89 of the CPC. ADR is not only cost effective and efficient when it comes to time but a method that required transparent compromise and hence will be more accepted by the parties.

6. Training of Judicial Officers: The judge's skills and competency are the most relied upon during delivery of justice. Subordinate courts practice the system of 'Annual confidential reports' which every high court of the state maintains. These are reports of every subordinate court and include a self-evaluated performance and an evaluation by a competent authority of the High court. This method however has been slacking in the country and is being exploited by some judges. A new system has been recommended by the Vidhi centre for legal policy to include the concept of Judicial Performance Evaluation. This should be an important criterion in determining the judge's verdict on the basis of recommendations from other legal practitioners. The Judicial Standards and Accountability Bill was an attempt in furtherance of this aspect but the bill has lapsed so far. The judges must, from time to time, be educated on new policies or techniques to improve the efficiency in their hearings as well. For example, in Uttar Pradesh, Judicial Training & Research Institute was established with the main aim of providing induction training and in-service training to the judicial officers of U.P., to make the subordinate judiciary more skilled, sensitive and responsible. This can help efficiently uploading case reports on the website as well as efficient e-filing.

[25] M/S. Afcons Infra. Ltd. & Anr v. M/S Cherian Varkey Constn, decided July 26, 2010.

11.6 BENEFITS OF THE PROPOSED PARAMETERS

1. Transparency – The proposed performance indicators aim to convey transparency to the prevailing system. As stated earlier, the updates and status reports of a court shall be presented on the e-court website of the respective district courts. Any layman, who wishes to check the performance of a court, can do so by simply visiting the e-court website of the concerned court and can have a fair idea of the performance of the court.
2. Accountability – Since their performance will be displayed on the websites, judges will be more accountable. Hereafter, they will try to dispose cases within the specified time. This will rebuild the trust of the common man in the judicial system of the country.
3. Preparation of Annual Confidential Reports – These Annual Confidential reports shall be made timelier and will easily be able to determine a judge's efficiency in their work. The indicators will be linked to the National Judicial Grid (NJD) and will be displayed on the e-court website of the respective district. It is important to note that the judges dispose a public function and hence must be accountable to the public at large.
4. Motivation and Recognition of Judges – The judges will be rewarded with recognition on passing timely and efficient judgements. This would also act as a motivation for the judges to maintain a standard of decision making as well as be transparent with their work.

11.7 ADR IN THE TIME OF AN EMERGENCY

Online Dispute Resolution has been one of the most important judicial reform with respect to the enhancement of ADR. This allowed for the process of dispute resolution to take place remotely, without any physical exchange of paperwork in a more comfortable and conducive environment. The National Judicial Data Grid reflects a total of 32 million pending cases with research indicating an average wait time of 17 years from filing to the final judgement[26]. ODR has been validated through Arbitration and Conciliation Act, 1996, Information Technology Act, 2000, and Indian Evidence Act, 1872. It also overcomes jurisdictional issues, eliminated geographical barriers, promotes paperless and eco-friendly hearings and saves a huge amount of time.

Recently, the Supreme Court of India in a *suo motu* writ petition and took note of the observations in *Meters and Instruments Private Limited and Anr. v. Kanchan Mehta*,[27] that:

> "Use of modern technology needs to be considered not only for paperless courts but also to reduce overcrowding of courts. There appears to be need to consider categories of cases which can be partly or entirely concluded "online" without physical presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated."

However, it must be understood that ODR has certain problems that need to be dealt with. Confidentiality and safety of the parties is a major concern. All kinds of dispute resolution,

[26] National Judicial Data Grid, https://njdg.ecourts.gov.in/njdgnew/index.php.
[27] Meters and Instruments Private Limited v. Kanchan Mehta, Criminal Appeal No. 1731 of 2017.

especially those pertaining to commercial contracts, have particularly important technical and sensitive information passed during the proceedings. While practising ODR, this information will have to be submitted and uploaded on servers of the service providers.

Recently, the Supreme Court has laid down a Standard Operating Procedure (SOP) for the functioning of courts remotely. This SOP also laid down the procedure for mentioning, e-filing, and hearings through video conferencing. This gives a clearer understanding of the procedure to be followed along with the validity of certain types of evidences. Overall, the ODR system in India is picking up pace and has added a great stepping-stone in removing the burden of cases from other courts. However, certain specified details such as checks and balances on these hearings, the procedure for appeal (if any), the process of an arbitration matter having turned into litigation are still vague in the legislation of the country.

11.8 RECOMMENDATIONS AND CONCLUSION

The judicial system in India caters to the entire population of India which has the second largest population in the world. A robust and efficient judiciary providing accessible justice to every citizen is the main goal of India. This chapter gives an insight into the various types of dispute resolution processes that can take place within the country. It also points out several Law Commission Reports that not only recommend but also provide certain solutions that can solve the current problems that our judiciary is facing. ADR or Alternate Dispute Resolution has been one of the most vital changes that the judiciary has seen in the past 10 years. This process not only helps in easing the burden of the higher courts but also provides an easier, cheaper and faster way of providing justice. This chapter specifically helps in deriving certain parameters that should be kept in mind to judge the efficiency and quality offered by dispute resolution system in India. Several other countries such as UK, Singapore, etc have been talked about to understand the standing of our country's dispute resolution as well as to learn from those that have been able to succeed in providing justice efficiently. Innovative means such as Online Dispute Resolution have now taken a higher role in providing justice. Some might even consider ODR as a mechanism of the hour.

The author proposes the following recommendations to be implemented:

1. The major reason behind huge pendency of cases is the shortage of judges and an increased number of judges will help in solving cases faster. There is no shortage in the number of skilled professionals to be appointed as judges.
2. As mentioned earlier, the judges waste a lot of time in administering the matters that do not hold substantial value to a case. Training of other individuals is required to fill in administrative positions so that the judges can apply their judicial mind without having to investigate matters that include filling of certain documents.
3. Adopting of performance indicators will not only increase the efficiency of the courts but also increase accountability of the judges. It will act as a motivator and keep a check on the performance of a judge as well. Though the internal judicial mechanism does adopt a point system for rating performance of judges but it is not widely published. These performance indicators should be made widely available to the public as it will bring transparency in the justice delivery system. Some of the performance indicators could be –

a. Total cases listed before the Judge
b. Total cases decided
c. Rate of disposal
d. Average Time taken in disposal
e. Number of decisions appealed against
f. Number of decisions upheld in appeal
g. Number of decisions reversed in appeal
h. Upheld/reversed Ratio

4. Although parameters of assessing the quality and efficiency of a dispute resolution can be found out easily, it is extremely hard to determine such quantitative and qualitative changes in every case. An easier and more concise questionnaire should be created that can answer every parameter required in a more standardised and realistic manner. This could be filled out by the administrative staff appointed in a court.
5. As postponement of cases is the most common issue faced in the Indian legislation, there should be strict action taken against adjournment of cases that is not necessary. Although fines have previously been implemented as a means to reduce adjournment of a matter without reasonable cause, these fines are not high enough to create a deterrent effect in the minds of those still doing so.
6. Every court, including a small tribunal should have a presiding officer based on the number of cases heard in a day (the higher the number of cases, the more the officers appointed). This presiding officer should be trained to fill out required information of every case online, so as to implement a more efficient online system.

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CHAPTER 12: STEPS TO BE TAKEN FOR SPEEDY ADJUDICATION OF COMMERCIAL DISPUTES

12.1 INTRODUCTION

Increase in the number of commercial disputes in India can largely be attributed to the growth of business and supporting policy mechanism. Litigation in India has been perceived to be slow and time consuming. The litigation system in India is based on the Common Law system which is robust and the judicial processes are based on rule of law. The overall objective is to ensure access to justice, provide efficacious remedy in a time bound manner. This robust mechanism has both substantive and procedural laws separately to guide the courts and other authorities to follow the constitutional mandate i.e., to ensure the delivery of justice.

The change in economic policies led to huge investments to tap the market in the country. Massive economic changes in the country brought to the fore issues such as handling of high value cases and its disposal. Speedy disposal of high value commercial cases and need for fast track, high tech commercial courts in India was felt necessary. The need for change from the traditional court set up was felt after the country opened up its economy for liberalisation, privatisation and globalisation in 1991. Traditionally, the courts in India are perceived to be slow and sometimes inert. This inertia has percolated everywhere irrespective of the urgency that a matter may demand and commercial matters are no exception to this trend. Problems of delay and arrears in courts are not the problems of recent past. Delay and prolonged disposal of matters have dented the country's image as being unfriendly for litigation and also having an impact on the conduct of business.

Adjudication of civil matters in India is governed under the British colonial legislation, Code of Civil Procedure, 1908 (hereafter 'CPC'), which is a comprehensive central law applicable throughout the country. However, the Constitution of India has placed the Civil Procedure and related aspects, including limitation and arbitration under the concurrent list of the Seventh Schedule.[1] The implication of this being that both State Governments and the Central Government will have the power to amend the law on Code of Civil Procedure. Trial process in India has evolved over a period of time with timely intervention from the Central Government, various State Governments, Judicial precedents, and the recommendations of Law Commission of India.

12.2 RECOMMENDATIONS OF LAW COMMISSION OF INDIA

The Law Commission of India has time and again considered the issue of judicial administration for speedy disposal of matters with emphasis on cost. The 14th Report of the Law Commission of India released in the year 1967[2] first took note of the problem of accumulation of arrears in various courts including the High Courts and conducted the

[1] India Const., seventh sched., list III, entry 13.
[2] Law Commission of India, Fourteenth Report on Reforms of Judicial administration in Vol.(I) and (II).

review of the functioning of the courts across the country. The review encompassed civil, criminal and other matters pending before the courts at that point in time.

In order to address the delay and to suggest remedial measures, the Law Commission in its 27th and 54th Report suggested various recommendations. These recommendations were specific to the civil matters and accordingly recommended amending the CPC. This was eventually implemented which led to the amendment of CPC in the year 1977.

The issues of delays and arrears were taken up for consideration by the Law Commission of India[3] in the year 1978. The 77th Report focussed on the Civil and Criminal matters and came up with certain set of recommendations which included the disposal of civil cases within a period of one year from the date of institution of suit. The Report's main focus was on the cases decided by the Trial Courts. However, in the year 1979, Law Commission of India came up with 79th Report[4] to address the issue of delay and arrears in the higher and appellate courts.

Recommendations which were made by the earlier Law Commission Reports did not specifically focus on commercial disputes. Therefore, in the year 2003,[5] Law Commission of India, recommended for the establishment of Commercial Courts for the purpose of bringing about confidence in the investors and also to facilitate the speedy disposal of high value commercial suits. The recommendation was primarily to establish the Commercial Divisions in the High Court rather than entrusting the responsibility to the District Court or to the Single Judge of the High Court. It was, however, in favour of taking away the District Courts and Sub-ordinate Courts out of the picture and to entrust the High Courts with the power to enforce the decrees. The power to appeal before the Supreme Court against the decrees in suits passed by the Commercial Divisions was also emphasised. The background for coming up with this recommendation can be witnessed from the fact that the judgments of United Kingdom and United States of America had declared that the Indian court system has collapsed because there are delays up to twenty years or more. Therefore, the Indian defendants can be sued in United Kingdom and United States of America even if there is no cause of action in those countries, provided the Indian defendant has a branch or local representative in that country, is trading in the stock exchange of that country.[6] The intended objective behind the *suo moto* taking up of the issue by Law Commission of India was to address the growing number of litigations which retarded the economic growth. Several developed countries across the world had already established Commercial Courts including in the United Kingdom, way back in the year 1895. There was a growing demand from the business community for a tribunal or court manned by judges with knowledge and experience in handling commercial disputes expeditiously and economically, thereby

[3] Law Commission of India, Seventy Seventh Report on Delay and Arrears in Trial Courts November, 1978; http://lawcommissionofindia.nic.in/51-100/Report77.pdf.
[4] Law Commission of India, Seventy-Ninth Report on "Delay and Arrears in High Courts and other Appellate Courts", May, 1979; http://lawcommissionofindia.nic.in/51-100/Report79.pdf.
[5] Law Commission of India, One Hundred Eighty Eighth Report on the Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts December 2003; http://lawcommissionofindia.nic.in/reports/188th%20report.pdf.
[6] *Id.*

avoiding tediously long and expensive trials.[7] Based on the recommendations of the Law Commission of India and demands from sections of businesses led the Government to consider the establishment of commercial courts through the Commercial Division of High Courts Bill, 2009.[8] However, the Bill introduced in Parliament in 2009 by the then government was met with staunch opposition. The Bill was censured for setting up courts that would be favouring rich litigants over poorer ones and also the Bill would unreasonably encumber High Courts with more work. The Bill never made it through the Rajya Sabha and lapsed. In 2014, the newly formed government endorsed several economic reforms as its priority. There was a shift in the focus and approach which was more towards facilitating business and to improve the Ease of Doing Business rankings, published annually by the World Bank. The Law Commission of India, accordingly gave its 253rd Report[9] which led to the enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court Act, 2015 (hereinafter 'Commercial Courts Act').[10] Fast-track resolution of the commercial disputes in India is the need of the hour. The Commercial Courts Act, seeks to address that particular issue by establishing a specialised Court to adjudicate Commercial disputes. Several developed nations like Singapore have a disposal period of nearly 150 days for a matter, which when compared to India is nearly 1400 days.[11] Having business relations with more than 70 countries established by way of Bi-lateral Investment Treaties (BITs), countries prefer judicial forum in their countries even though cause of action has arisen in India. This can be credited to the inordinate delays in the justice delivery mechanism as was contended by *White Industries,*[12] in a landmark decision which went against India.

12.3 ADJUDICATION OF COMMERCIAL DISPUTES

Prior to the enactment of Commercial Courts Act, irrespective of the nature of case, courts having appropriate jurisdiction were adjudicating matters under the general code provided for civil procedure. Businesses in dispute, often prefer to have their matter settled out of

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[7] Courts and Tribunals, History and working of the Commercial Courts in the United Kingdom, https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/commercial-court/about-us/.

[8] The main aim of the Bill was to set up Commercial Courts at the level of High Courts. However, the Bill did not materialize and as a result the Bill remained for further examination.

[9] Law Commission of India, Two Hundred and Fifty Third Report on The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015, January, 2015. http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf.

[10] Statement of Objects and Reasons for the Commercial Courts Act, inter alia provides for - "The proposal to provide for speedy disposal of high value commercial disputes has been under consideration of the Government for quite some time. The high value commercial disputes involve complex facts and questions of law. Therefore, there is a need to provide for an independent mechanism for their early resolution. Early resolution of commercial disputes shall create a positive image to the investor world about the independent and responsive Indian legal system."

[11] Seventy-Eight Report, The Commercial Courts Commercial Division and Commercial Appellate Division of High Courts Bill, 2015, Department related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Rajya Sabha Secretariat, New Delhi, December, 2015. https://www.prsindia.org/sites/default/files/bill_files/SCR-_Commercial_Courts_bill.pdf (last visited Apr. 4, 2020).

[12] White Industries v. Republic of India, IIC 529 (2011).

courts, by way of arbitration. Such a method of dispute resolution has been successful and has often been resorted to, as it provides the parties liberty to choose the way the proceedings takes place. Nevertheless, arbitration and conciliation is governed under the Arbitration and Conciliation Act, 1996, which has not been dealt with specifically in this research. Adjudication of commercial disputes in India has to be considered from two perspectives – *firstly*, Pre- Commercial Courts Act era; *secondly*, Post- enactment of Commercial Courts Act.

12.3.1 Prior to Commercial Courts Act

Disposal of civil cases has been significantly increasing, adding up to the arrears and pendency, burdening the courts, which seemed equally helpless to address the situation. Therefore, a specialised Court called Tribunal were thought of and was recommended by the Law Commission of India as early as in the 14th Report[13] and subsequently in its 58th Report.[14] Forty-Second Constitutional Amendment,[15] which provided for the establishment of Tribunals laid down the scope and foundation for the matters to be dealt with by the Tribunals including the Statutory tribunals under various Acts including matters related to Service. The shackles created by technical aspects of CPC and Indian Evidence Act, 1872, led businesses to slowly lose their confidence in the adjudication system of Indian courts.

Despite all these efforts to free the courts from various types of matters and establishment of specialised courts, one area of concern among the business fraternity still remained as to the adjudication of commercial disputes. Most of the matters which were being filed before the civil courts were for - recovery of money or damages along with interest, specific performance, declaratory suits, suit seeking injunctive relief, suit for rendition of accounts, attachment of property, interpretation of contractual agreements and related aspects. This issue could not be resolved until 2009, when the first attempt was made to create a specialised court for addressing the needs of businesses. Despite there being amendments made to CPC from time to time, the courts were not able to successfully dispose of the matters in a timely manner. It was noted by the Supreme Court of India recently in the case of *Desh Raj v. Balkishan (D) through proposed LR Ms. Rohini*[16] as follows – "Routine condonations and cavalier attitudes towards the process of law affects the administration of justice, affecting docket management of Courts and causes avoidable delays, cost escalations and chaos. The effect of this is borne not only by the litigants, but also commerce in the country and the public-in-general who spends decades mired in technical processes."

The Supreme Court has time and again highlighted the issue of delay and pendency in plethora of judgments. But, the Court itself has taken lenient view[17] in several matters by exercising the discretion vested on it. Such leniency could be attributed to the fact that, individual parties to the litigation should not suffer and by making strict observations and

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[13] Law Commission of India, Fourteenth Report, *supra* note 2.
[14] Law Commission of India, Fifty-Eighth Report on Structure and Jurisdiction of the Higher Judiciary, January, 1974. http://lawcommissionofindia.nic.in/51-100/Report58.pdf.
[15] Based on the recommendations of the Swaran Singh Committee, Part XIV-A was added to the Constitution of India, titled as 'Tribunals' establishing the Administrative Tribunals under Article 323-A and 'Tribunals for other matters' under Article 323-B.
[16] Desh Raj v. Balkishan, Civil Appeal No.433 of 2020, decided on Jan. 20, 2020 (SC).
[17] *Id.*

by imposing exorbitant costs/penalties to remedy the situation. Courts have time and again condoned the delay. As per CPC, there are specific timelines prescribed for completion of each stage in a particular suit. Subsequent to the filing of a suit, it proceeds in a stage wise manner and the time line has been prescribed for completion of each stage which includes for –

a. filing of written statement[18] - to be filed within 30 days maximum extendable up to 90 days from the date of service of summons to defendants;
b. adjournments[19] - No adjournments more than three times to a party during hearing;
c. filing of written arguments – to be filed 4 weeks prior to commencement of oral arguments.
d. pronouncement of judgment[20] – within 30 days maximum extendable up to 60 days.

The list provided above is not comprehensive and is only indicative as to the specifications under CPC. Even though the timeline for different stages has been prescribed by CPC, the courts have the tendency to grant more adjournments than what is prescribed to meet the ends of justice. In order to address the issue of delay in disposal of civil cases, one has to address the bottlenecks where delays actually take place.

Issuance of Summons - Post the filing of plaint, it is scrutinised by the Court of first instance as to the fulfilment of all requisites and an order to register the suit is then made. The major reason for delay could be attributed to the service of summons.[21] As has been noted by the Law Commission of India in its 77th Report,[22] delays could be majorly because of the defendant's attitude to evade the service of summons in order to cause delay and drag on the proceedings. In some cases, the process servers also make false reports in order to favour a particular party, which results in delaying the process of administration of justice.

Pleadings and Pre-trial Procedures - Laxity in enforcing the provisions of CPC has been the main reason for increasing number of cases and not filing written statements within the prescribed time has been one of the major reasons. Hence, strict implementation of Order X[23] of CPC is required as it lays down the parameters for the Courts to ensure compliance prior to the commencement of trial. Non-application of mind by trial judge while framing of issues has been a major cause of delay. Counsel for the parties supply the draft issues which the courts usually tend to adopt without application of mind, and this leads to filing of appeals by the aggrieved party.

[18] CODE CIV. PROC., Order VIII, Rule 1.
[19] *Id.*, Order XVII Rule 1.
[20] *Id.*, Order XX Rule 1.
[21] CODE CIV. PROC., Order V.
[22] Law Commission of India, Seventy Seventh Report, *supra* note 3.
[23] Examination of parties by the Court. Clearly lays down the procedure for the Courts to deal with the allegations in pleadings, discretionary power of the court to opt for dispute resolution mechanism and other processes.

In the year 1999, when CPC was amended,[24] Section 89 was inserted which earlier provided scope only for arbitration, but after the amendment was carried out, other forms of dispute resolution including arbitration, conciliation, mediation, judicial settlement including the Lok Adalat. However, the provisions were not invoked despite there being elements of settlement in matters. This has only led the matters prolonging without actually reaching any logical conclusion. Further, compulsory use of alternate dispute resolution mechanism has been provided under Order X Rule 1-A of CPC, to encourage the parties to settle the dispute amicably. Often parties are reluctant to settle the matters amicably, due to their inability to sit across the table to negotiate.

Non-adherence to court orders - Despite court summons being issued from time to time, parties have the tendency to not appear when called before the Court. Repeated issuance of summons, amounts to massive wastage of court time. It is also to be noted that the parties seldom fear and respect the court and its process, which hinders the administration of justice. Furthermore, upon passing of an adverse order, the parties have an option to appeal before the higher courts and get a favourable order, which adds to the delay in not just completion of trial but also poses challenges in the higher courts, which may take up to an year or more in some cases.

Evidence and Interlocutory applications – The parties usually have the tendency to over prove the allegations leading to unnecessary prolongation. Some examination, if not controlled by presiding officer, may lead to harassment of witnesses. That apart, the counsels usually have the tendency to file interlocutory applications under various provisions which may not be relevant to the case at hand. Rival parties to the case, in order to defeat the purpose of suit, may resort to filing frivolous applications which the court will have to consider and dispose in a timely manner. Such applications add on to the burden for the courts to go through every application filed and pass a reasoned order, which is elementary in deciding any case. The aggrieved party may, however, resort to filing an appeal with an ill intention to again protract the proceedings.

Arguments, judgments and decree – Soon after closing the evidence, the arguments of the parties must be heard. Cases which require perusal of voluminous records as evidence take hours together and, in some cases exceed days for the court to complete arguments of one side. Unduly lengthy arguments with tendency to cite needlessly large number of authorities and quoting lengthy passages of judgments is one of the major reasons for delay in deciding the cases. When it comes to pronouncement of judgments, the Courts usually have the tendency to procrastinate the pronouncement and may exceed the time limit of 60 days as provided under the CPC. As the Court of first instance, the Trial judge has a duty to write a judgment in detail, so as to not miss out on any facts relevant to the case. Until the time or pronouncement of judgment and preparation of decree, the time should not exceed 15 days. However, this is not strictly complied with adding to the delay.

The issues as summarised above are general in nature and it was no different for the commercial suits as the dilatory tactics adopted by the parties hampered the proceedings in

[24] Code of Civil Procedure (Amendment) Act, 1999, came into effect from 01.07.2002.

a great way thereby affecting the business interest. Growing frustration among the parties to proceedings were evident, as most of them despite having the remedy hesitated to approach the courts due to the sheer amount of time that the courts would take to decide a matter. Arrears of cases, multiple appeals/revisions, procedural hindrances and the adversarial system led to the creation of judicial laxity. Effective remedy to resolve the disputes through alternate fora was highlighted by the Justice Malimath Committee[25] and the 129th Report of Law Commission of India.[26] The recommendation to make alternate dispute resolution mechanism mandatory for the courts to explore was to reduce the workload of the courts and also to maintain the good relations of the parties. In the year 2015, the Commercial Courts Act, was passed and it brought in several changes in the adjudication of the commercial disputes and suggested some fundamental changes in the way courts were functioning.

12.3.2 Post Enactment of Commercial Courts Act

The reasons for bringing about Commercial Courts Act were several, as there was a dire need for the commercial matters to be resolved expeditiously. The Seventeenth Law Commission, triggered by growing international criticism of the Indian justice system (India being accepted as forum *non conveniens*), took *suo motu* notice and proposed the constitution of a Commercial Division in the High Courts. After extensive study of diverse commercial courts across jurisdictions, it submitted the 188th Report proposing to constitute the Hi-tech Fast-track Commercial Division in the High Courts of India. The Law Commission of India came up with the 253rd Report which recommended, amongst others, measures to address the provision for specialised legal services. As in the 188th Law Commission Report there were no provisions in the Act for judicial members with expertise in commercial disputes resolution, and neither was there a provision for skill upgradation at regular interval, uniform pecuniary jurisdiction, amendments to the Code of Civil Procedure to reduce procedural delays and, importantly, institutional arrangements for training and skill upgradation of the judges.

The Commercial Courts Act governs the manner in which 'Commercial Disputes' of a 'Specified Value' are to be tried and disposed of. It provides for the establishment of Commercial Courts, Commercial Divisions and Commercial Appellate Divisions.[27] The terminologies used in the Commercial Courts Act for different court establishments are as follows;

"Commercial Court"[28] has been designed to be established at the District level and where the High Courts have original jurisdiction, Commercial Courts shall not be constituted in that territory. The State Governments have been granted the power to establish the Courts which shall be in consultation with the concerned High Court.

[25] Dr. Justice V.S. Malimath Committee Report, 1990.
[26] Law Commission of India, One Hundred and Twenty Ninth Report on Urban Litigation – Mediation as Alternative to Adjudication (August 1988), http://lawcommissionofindia.nic.in/101-169/Report129.pdf.
[27] The Commercial Courts Act, 2015, Chapter II.
[28] *Id.*, §3.

"Commercial Division of High Court"[29] has been mandated to be established at the level of High Courts, which have ordinary original civil jurisdiction. The Chief Justice of the concerned High Court shall have the power to notify one or more Single Judge Bench of the High Court for exercising powers under the Act.

"Commercial Appellate Division"[30] appeals under this Act shall be dealt with specifically by the Division Bench of the High Court consisting of Two Judges, who are experienced in dealing with the Commercial matters.

The term 'Commercial Disputes' has been defined under Section 2(c) of the Act by providing an exhaustive list of subjects which includes all disputes arising out of commercial transactions. 'Specified Value' as per Section 2(i) read with Section 12 of the Act relates to the value of the subject matter of the commercial dispute which shall not be less than one crore rupees or such higher value as may be notified by the central government. Through an amendment to the Commercial Courts Act, in 2018, the specified value of a commercial matter was reduced from One crore rupees to Three lakh rupees.[31]

In order to make the Commercial Courts Act effective, some changes had to be made in the CPC as well. CPC being the general code governing the civil procedure in the country required some changes in timelines prescribed to facilitate the smooth implementation of the Commercial Courts Act. The following changes have been brought about to the CPC after the introduction of the Commercial Courts Act;

- Section 16 of the Commercial Courts Act provides for the amendments to the CPC in its application to commercial disputes, reads as –

  > "16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes.—(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.
  > (2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a specified value.
  > (3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908, by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail."

- Award of Costs – Section 35 of CPC provides for award of costs which includes for the commercial disputes. However, costs under Section 35A[32] is not applicable to the commercial disputes.

[29] *Id.*, §4.
[30] *Id.*, §5.
[31] Definition of Specified value, in relation to a commercial dispute, shall mean the value of the subject matter in respect of a suit as determined with Section 12 which shall not be less than three lakh rupees or such higher value, as may be notified by the Central Government.
[32] Code Civ. Proc., §35A (Compensatory costs in respect of false or vexatious claims or defenses).

- Time for filing written statement – As per Order VIII Rule 1[33] time limit specified for filing written statement is 120 days from the date of service of summons.
- Disclosure, discovery and inspection of documents – Order XI of CPC has been amended to include disclosure, discovery and inspection of documents in suits before the commercial division of a High Court or a Commercial Court.
- Summary Judgment – Insertion of Order XIII-A i.e., Summary Judgments without recording of evidence, the Court may dispose of the suit on such grounds as mentioned under Rule 3 of the Order by following such procedure as has been mentioned under Rule 4. However, the provision contained herein is not applicable for the suits filed under Order XVIII – Summary suits.
- Case Management Hearing – Order XV-A has been inserted vide this Amendment to include the Case Management Hearing which provides for the court to fix timelines for completion of various stages in the suit, filed before the Commercial Court. Through this Order, the court has abundant powers to navigate the case through the timelines as specified by way of an order and non-compliance of this may lead to dismissal of plaint, foreclose the non-compliant party's right to file affidavits, conduct cross examination or to address arguments in the trial.
- Bar on revision application or petition against an interlocutory order[34] - In order to avoid multiplicity of proceedings, the Commercial Courts Act itself has set a bar on any challenges or filing of revision petition on any interlocutory orders of Commercial Courts including the issue of jurisdiction. Any such issue shall be raised only in an appeal, so that the case may be disposed of on the whole.
- Judgments and Decree[35] – The Commercial Courts are mandated to dispose of the case by pronouncement of judgment within a period of 90 days from the day of conclusion of arguments.

Apart from the aforementioned changes to CPC, there were some amendments which were necessitated as the Act had some ambiguities to clear. Therefore, amendment of 2018 to Commercial Courts Act[36] brought about several changes. This includes the following –

- Changes in the constitution of the Courts – Prior to 2018, Commercial Courts could be set up only at the district level, however, as of 2018, judges below the District Judge cadre may also become a Commercial Court Judge.
- Commercial Appellate Courts[37] – Appeals were only to be tried by the High Court, but post amendment, the District Judges have been granted the power to hear appeals. The reason for this being the reduction in the specified value should

[33] *Id.*, Order V, Rule 1, proviso (provides for the time limit for filing written statement by defendants).
[34] The Commercial Courts Act, 2015, §8.
[35] CODE CIV. PROC., Order XX, Rule 1(1) (Judgment and Decree).
[36] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018.
[37] The Commercial Courts Act, 2015, §3A.

correspond to the pecuniary value or jurisdiction conferred on each court. Hence, judges below the cadre of District Judge have been included under this regime and appellate powers have been granted to the District Judges.

- Pre-Institution Mediation and Settlement – Insertion of Section 12A to the Act has been one of the major highlights of the amendment. This provision mandates mediation prior to the institution of suit. This creates an additional opportunity for the parties to explore the remedies available rather than directly approaching the court seeking relief. An additional layer of remedy has been created for the parties to explore.
- Provision of appeal – Sixty-day period has been granted by the Act for the aggrieved party to appeal either to the District Court or to the High Court exercising the appellate power.

12.4 ISSUES PREVAILING POST ENACEMENT OF COMMERCIAL COURTS ACT

Establishment of Commercial Courts Act is an important milestone in the history of litigation. It tries to achieve the dual objective of ensuring speedy remedy for all business in conflict and also to improve the overall ranking of the country which will alleviate the business prospects in India, increasing the scope and potential for economic revival of the country. Nevertheless, the issues are abundant and by enacting the Commercial Courts Act, the fundamental problems are yet to be resolved. Here are some issues that are still hampering the functioning of the Commercial Courts and have become an encumbrance in speedy disposal of the case. As per the empirical study conducted by the research team, several issues have been identified which are still plaguing the courts and causing hindrance in disposal of the matters as prescribed under the law. The issues are as follows –

a. Constitution of Courts and transfer of cases[38] – Powers have been vested with the State Governments to implement the provisions of Commercial Courts Act, in consultation with the Chief Justice of the concerned High Court. Taking the example of Karnataka, Notifications have been issued by the Government of Karnataka to set up Commercial Courts within the state. Soon after the Notification of the Commercial Courts Act, District Judges in 25 districts[39] of the state were appointed to adjudicate the matters under the Commercial Courts Act. Thereafter, another Notification was brought in which specified that the number of Courts in the State would be only 3 at the District level. As of now, only three Commercial Courts have been designated for the whole State.[40] The implication of this being that the litigants from other parts of the State have to travel to the place where the matters are adjudicated. Two courts have been set up in Bangalore wherein one court caters to

[38] Details provided for the State of Karnataka is based on the empirical study conducted by the team at CEERA- National Law School of India University after visiting and speaking to the Commercial Court judges in Bangalore.
[39] Notification by the Government of Karnataka dated 30th January 2018.
[40] Notification by the Government of Karnataka dated 31st July, 2018.

the litigants of Bangalore City while the other court for other 15 districts of the state. Whereas, the third court is established in Bellary for the northern districts of the state. The issue with this being that the parties who are intending to file a suit before the Commercial Court are deprived of filing case in their own jurisdictional court, which is majorly hindering access to justice as has been provided under the Constitution of India. Insufficient number of courts coupled with the distance which the litigants have to travel for contesting a case will be disproportionate to the claim amount and the amount of time spent for fighting the case. Subsequent to the amendment of 2018, the Government has decided to establish 40 Commercial Courts throughout the State, at all levels and not just at the level of District Judges.[41]

That apart, the other major issue plaguing the adjudication of commercial cases are mainly related to the transfer of cases. Once the State Government issued a Notification notifying three courts and a subsequent order was issued in October, 2019, reversing the previous orders. The case files and dockets have to be transferred from whichever district the matter was filed. This administrative process of transferring back and forth has consumed sufficient time which is impacting commercial litigation in Karnataka. Furthermore, those matters which were filed prior to Commercial Courts Act came into effect are also being classified under the said legislation. This has had a drastic impact, as the courts adjudicating these matters are now to shift from the conventional method of proceedings to the timelines prescribed by the Commercial Courts Act. Such a classification will create ambiguity in the minds of the parties to the litigation.

b. Infrastructure – Court infrastructure and utilisation of technology has been lacklustre. Insufficient budgetary allocation for improvement of court infrastructure including the Court buildings, technological equipment, support staff all contribute to the functioning of the Courts. Continuing with the traditional court set-up system during the modern times does not augur well with the administration of justice. Small and cramped court halls, filled with files in major cities like Bangalore, have slowed down the rate of deciding cases. Serving of summons is still done by way of process servers and postal services. Such a process will only contribute to the delay in deciding the matters. Section 19[42] of the Commercial Courts Act clearly puts the responsibility on the State Government to provide necessary infrastructure to facilitate the functioning of the Commercial Courts in the respective States.

c. By-passing Pre-Institution Mediation – Section 12A of the Commercial Courts Act provides for the mandatory mediation prior to the institution of the suit. The rationale behind this is that, the parties to a contract would be having an opportunity to settle the difference amicably rather than going through the technical and procedure ridden court system which will not just exhaust the resources of the party,

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[41] Notification by the Government of Karnataka dated 9th October, 2019, https://www.deccanherald.com/state/karnataka-districts/40-courts-designated-as-commercial-courts-in-state-772476.html.

[42] The Commercial Courts Act, 2015, §19 (Infrastructure facilities - The State Government shall provide necessary infrastructure to facilitate the working of a Commercial Court or a Commercial Division of a High Court).

but will also pose a burden on the State and its resources. Albeit parties choose to not opt for this remedy and have an option to by-pass this process by filing of an interlocutory application at the time of filing the suit. Section 12A(1) provides that any suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation. In practise, most of the matters filed before the court are filed with an interlocutory application seeking for attachment before judgment,[43] injunctive relief[44] or any other relief under the Code. The issue is not with regard to the filing of the interlocutory application, but in most cases, the interlocutory applications filed by the parties are frivolous and without bona fides. The fallacy in this process is that, the parties generally tend to not prosecute the interlocutory application filed by them. This is done only to avoid mediation and ensure that the case is filed before the court for adjudication. This is a determinantal practice which has to be curbed.

d. Case Management Hearing – Commercial Courts aren't strictly adhering to the provisions of CPC. Non-adherence to procedural mandate prescribed by the Act impairs the whole justice delivery system. Case Management Hearing, as prescribed under Order XV-A is not being followed which prescribes the Courts to strictly adhere by the timelines which are set by the court. This has to be passed as an order by the court for completion of different stages of the suit. This process of Case Management Hearing isn't being followed, even though it is mandated. This non-adherence to the procedural mandate will lead to disruption and eventually towards delayed disposal of cases.

e. Data disclosure - There is a clear mandate under the Commercial Courts Act to disclose the data of all the cases that are filed before the respective courts. It is clearly mentioned under Section 17[45] of the Act that pendency of cases, status of each case whether disposed or pending are to be published in the website of the relevant High Courts every month. High Court of Karnataka has maintained and published the list as mandated under the Act till the month of February, 2020.[46]

f. Training facilities and continuous education[47] – Judges appointed to the Commercial Courts are to be necessarily trained and the responsibility of training the Judges have been assigned to the State Governments which will in consultation with the High Courts concerned establish such a facility. Continuous education and

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[43] CODE CIV. PROC., Order XXXVIII, Rule 5.
[44] *Id.*, Order XXXIX, Rules 1, 2.
[45] Collection and disclosure of data by Commercial Courts, Commercial Appellate Courts, Commercial Divisions and Commercial Appellate Divisions.—The statistical data regarding the number of suits, applications, appeals or writ petitions filed before the Commercial Courts, Commercial Appellate Courts, Commercial Division, or Commercial Appellate Division, as the case may be, the pendency of such cases, the status of each case, and the number of cases disposed of, shall be maintained and updated every month by each Commercial Courts, Commercial Appellate Courts], Commercial Division, Commercial Appellate Division and shall be published on the website of the relevant High Court.
[46] Statistical information regarding Commercial Cases pending in the Commercial Courts, https://karnatakajudiciary.kar.nic.in/commCourt.asp.
[47] The Commercial Courts Act, 2015, §20 (Training and continuous education).

training of the Judges appointed to the Commercial Courts are also a necessary measure which has to be implemented by the State Government.

Adjudication of commercial disputes in a speedy manner is still an objective left to be achieved. The issues that have been mentioned above are comprehensive and are common. The issues that are mentioned prior to the enactment of Commercial Courts Act and post the enactment of Commercial Courts Act are related and connected. Even though some issues are sorted after the Commercial Courts Act came into the picture, other issues remain and require to be addressed on a fast-track basis to achieve the desired objectives.

12.5 STEPS FOR CONSIDERATION

Delay may be attributed to both administrative and legal procedures that create unnecessary impediments in the adjudication of the commercial disputes. The following steps may be considered as a remedial measure to be implemented for the speedy adjudication.

i. Primary means of serving summons should be by way of adoption of technology like mails, messages and telephonic communications. In case of failure to deliver summons, or to contact the defendants, substituted service by way of postal service, utilisation of process servers appointed by courts or newspaper publications are to be implemented.

ii. Framing of issues has been dealt with under Order XIV of CPC, one of the pre-trial stages, where no specific timeline has been prescribed. In this regard, an amendment to the extent of bringing in a specific duration within which issues must be framed by the court has to be introduced. Subsequent to the filing of written statement by the defendant, or failure to do so, the court shall frame issues subject to the provisions contained in the Code.

iii. Process of justice delivery should be dynamic which means participation of the judges akin to inquisitorial system has to be developed, to be proactive to ascertain the truth from the parties to the case. In the adversarial system, judges refrain from participating in the case will only act as an Umpire who only gives a decision.

iv. Mandatory dispute resolution mechanism to be followed by judges. In case parties to the suit are bye-passing the pre-institution mediation, the court must dispose of the application and encourage the parties to settle the matter rather than relying on the court to decide the matter.

v. In Case Management Hearing, Judges taking up commercial matters must be well trained in order to equip them with the process of Case Management Hearing, as this will bring in a system within each case to be followed by the parties. The Higher Courts must strictly direct the lower courts to follow the procedural mandate and not to deviate from it.

vi. Infrastructure needs to be ready for implementing any reforms, which is lacking in the present court system at the lower level. Requisite number of Judges, supportive staff, equipment and other necessary measures should be implemented as mandated

under the Act. This also includes the training facilities to be provided for the Judges of the Commercial courts.

vii. Clear guidelines must be issued to dispose of cases which are pending even before Commercial Courts Act came into place and have been classified as Commercial matters. The suggestion regarding this being such matters which are still in the stage of summons shall be classified as 'commercial matters' and those other matters which are in advanced stage of trial shall not be classified under this particular Act for the purpose of adjudication.

viii. There should be strict adherence to the statutory timelines prescribed and periodical review by the Higher Courts to ensure that the matters are not pending for a long period of time. High Courts must direct the lower courts to abide by the timelines prescribed, as this will bring in accountability and reduce frequent adjournments granted by the courts during the course of trial.

12.6 CONCLUSION

Post the enactment of Commercial Courts Act, several major changes have been incorporated both substantially and procedurally. After a perusal of the Law Commission of India reports and the empirical data available, these are the observations that have been identified. While improvement in Ease of Doing Business Rankings has definitely been impacted after the enactment of this legislation but, there seems to be an earnest effort on the part of the Government to bring about changes on ground. A long-standing demand of the business community to have an alternate forum for quick adjudication of commercial matters has been established. There are several loopholes in the present system which can be rectified, as has been mentioned in the report. The provisions of the Act are comprehensive when read along with the Code of Civil Procedure. But it remains to be seen as to how the law will be implemented in the State level. The issues highlighted above are one of the primary concerns that requires to be addressed. Failure to address these issues will amount to wastage of resources that have been invested in establishing this system if the desired objective is not fulfilled.

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CHAPTER 13: CONTRACTS IN INFRASTRUCTURE: PUBLIC PRIVATE PARTNERSHIP PROJECTS

13.1 INTRODUCTION

The National Infrastructure Plan (Report of the Task Force)[1] sets out a total projected infrastructure investment of Rs. 111 lakh crores during the financial years 2020 to 2025, out of which the Central Government share is 39%, State Governments with 40% and remaining 21% is expected to be invested by the private sector. Nearly two-thirds of the infrastructure project pipeline is ready according to the Report. Therefore, significant amount of private sector investment is expected in the next few years.

From the public sector perspective, it is envisaged that the private party will manage the Greenfield or Brownfield project during the contract period, provide long-term sustainable services to the users and upon completion of the contract period, hand back the asset in a working condition to the Authority. It is also expected that the asset developed and maintained by the private entity provides *"value for money"* for the Authority, delivers the objectives of the political class, creates employment and boosts the economy as a whole. Amongst other aspects, the slowdown of PPP projects is on account of long drawn out dispute resolution process.[2]

The concession agreement entered into between the Authority and the concessionaire is the central document that is referred to while assessing whether the risks of the project are equitably distributed between the parties. Investment decisions by the private party is based on the extent of risks they are burdened with when they take up a project. Concession agreements under a Public Private Partnership (PPP) framework stands on a different footing than conventional contracts. These types of agreements are essentially entered into by a public sector agency (the Concessioning Authority or Authority) with a private entity for the development, operations and maintenance of a new infrastructure asset (Greenfield project) or undertake operations and maintenance of an existing asset (Brownfield project). The private entity (concessionaire)[3] is expected to bring in the necessary investments for the project, construct the asset, manage the same and provide public services throughout the concession period. Finally, the public asset is transferred back to the Authority. Investments made by the concessionaire are recovered either through user fee payments (as in a toll road) or directly from the Authority by means of annuity payments. Payments to the concessionaire is based on the outputs delivered.

The usual concerns that act as decision point before investing in a project by a private investor under a PPP arrangement are –

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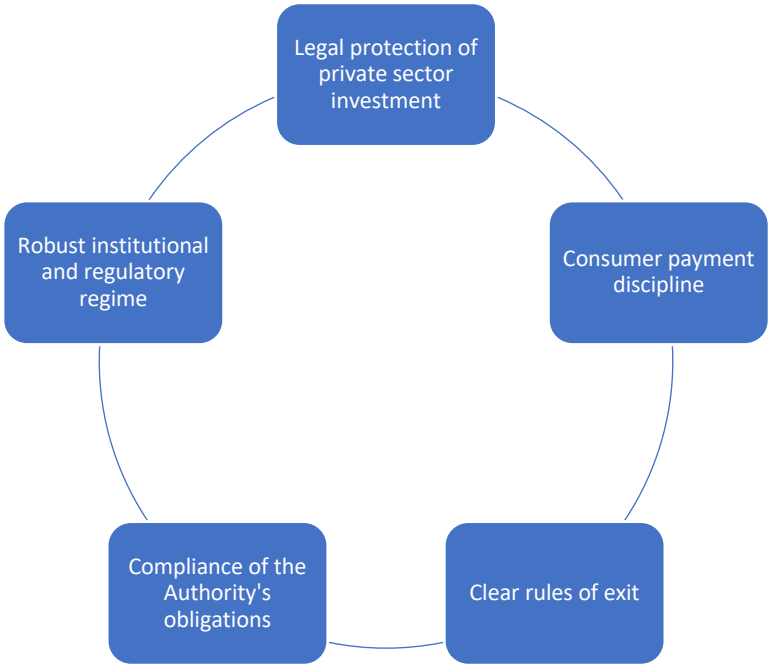
[1]Report of the Task Force, Department of Economic Affairs, Ministry of Finance, Government of India (Vol. 1, 2020).

[2] Infrastructure (Para 2.5) – Department of Economic Affairs, Ministry of Finance, GoI (2015).

[3] The words 'private entity', 'private investor', 'private sector', 'private party and 'concessionaire' have the same meaning and are intermittently used as the context may require in this Chapter.



Important Concerns in the PPP Sector

13.2 RISK MANAGEMENT

Appropriate risk management techniques need to be applied at the initial stage of project preparation to get maximum benefits. A wholesome approach towards risk management is to be integrated for better project management during construction and operations phase of a PPP project. It is important to identify the risks in a timely manner, monitor them constantly during the contract period and set in place mitigation mechanisms so as to minimize disputes.

The key risks transferred to the private sector under a concession agreement include construction risk, operations & maintenance risk and revenue risks. The other equitably shared risks between the parties are the risks related to insurance, change in law, environmental, force majeure and termination. The Authority typically retains the risks related to archeological find, variation or change orders and other unknown risks.

From a private entity perspective, the key project related aspects that may lead to disputes are given in Table 1.

TABLE 1 – Private sector concerns leading to contract disputes[4]

Issues	**Concerns**
Land related	• Government ownership over the land and delays in handover of the project land to the concessionaire • Timely approvals /clearances by the Government agencies for the project

[4] PPP Risk Allocation Tool 2019 Edition-Water & Waste, Global Infrastructure Hub, 2019; IBRD & WORLD BANK, PPP REFERENCE GUIDE (2017).

TABLE 1 – Private sector concerns leading to contract disputes[4]	
Issues	**Concerns**
	• Expropriation by the Government • Environmental impacts
Taxation related	• Stability of taxation regime and compensation in case of changes to the taxation system • Categories of taxes (entry tax, income tax, import duties)
Labor related	• Laying off employees to achieve operational efficiencies • Transfer of public sector employees to private operator • Employee service conditions
Lenders perspective	• Security by the concessionaire/Government • Insolvency arrangements • Rights to step in if there is a payment default by the concessionaire • Direct agreement between government and lenders
Audit /Transparency related	• Need for audit of the books of account of the private developer • Information to be provided under the Right to Information Act • Declaring the Concessionaire SPV as a Government entity under Article 12 of the Constitution of India
Dispute resolution mechanism	• Whether the court systems satisfy the need of the private investors for a fair, transparent and efficient dispute resolution mechanism • Whether domestic or international arbitration a possibility under the PPP contract and if international arbitration awards are recognized and enforced. What are the other modes of dispute resolution mechanisms that are possible? For example, whether other mechanisms, such as high-level negotiations between the parties, mediation, expert determination etc. are available or not?

13.3 RESEARCH QUESTIONS

From a reading of the above, the following questions emanate:

1. What are the typical remedies available and granted in PPP projects?
2. Whether the remedies provided are effective or efficient for *'ease of doing business in India'?*
3. What are the changes, reforms that can be suggested to facilitate public works and contractual enforcement with special focus on encouraging PPP projects in India?
4. What contractual measures, clauses are needed to strengthen the business environment in India?

An important area of consideration for the private sector is whether there is an efficient and credible dispute resolution mechanism that would ensure settlement of disputes in a timely manner. From the public sector perspective, the public service delivery should not get affected during the dispute resolution period. Government of India has developed Model Concession Agreements (MCA) for several sectors[5] which sets out specific dispute resolution mechanism such as amicable settlement, mediation and arbitration. The National Highway Authority of India (NHAI) has of late adopted a new model of concession agreement known as the Hybrid Annuity Model (HAM) which is a combination of BOT and engineering, procuring and construction (EPC) contract model. These types of contracts are increasingly

[5] For instance, National Highways, ports, railway stations, ropeways, electric buses etc.

being used not only by NHAI but also by Namami Gange-Integrated Ganga Conservation Mission for the development and management of Sewage Treatment Plants.[6]

In cases where a procurement entity adopts the Government of India Model Agreements, then in-principle approval by the Public Private Partnership Appraisal Committee (PPPAC) is not necessary. However, PPPAC approval is required before inviting the technical and financial bids.[7] As this is the latest model document issued by Government of India and is being widely used in the highways and river conservation sector, it is being referred to for further discussions in this Chapter. Each of the above research questions is answered in the following sections.

13.4 TYPICAL REMEDIES AVAILABLE AND GRANTED IN PPP PROJECTS

Before proceeding further, it would be important to understand what are the present key PPP contractual conditions that may lead to raising of disputes by the parties to a concession agreement? The key conditions of the Model Concession Agreement for highways (Hybrid annuity model) are discussed at Table 2.

TABLE 2: Key Conditions of Model Concession Agreement

S. No.	Key conditions of Model Concession Agreement	Impact of failure to perform by a party	Dispute Resolution Procedure
1.	As part of the Conditions Precedents the Authority has to procure - a) at least 80% of the Right of Way of the project highway to the Concessionaire b) applicable permits relating to environmental protection and conservation for the land forming part of the Right of Way c) forest clearance for the land forming part of the Right of Way d) approvals of the General Arrangement Drawings (GAD) for the Road Over Bridges and under bridges at level crossing of the project highway	Authority to pay to the Concessionaire damages of an amount equal to 0.2% of the Performance Security for each day of delay till the fulfillment of the conditions precedent.	Three level dispute resolution process as set out below is envisaged, however detailed guidelines on the process of adopting these procedures are not provided by the Government, which could have helped the parties. The guidelines for instance can set out the time limit within which amicable settlement, mediation should be completed as has been done in case of Arbitration matters: **Mediation** - between the parties. Either party may call the Independent Engineer to mediate and assist them in resolving a dispute. The role of the Independent Engineer will be that of facilitating negotiations without giving his

[6] https://nmcg.nic.in/writereaddata/fileupload/56_Press%20brief%20presentation%20.pdf (last visited Apr. 22, 2020).

[7] Para 14 of the Guidelines for Formulation, Appraisal and Approval of the Central Sector Public Private Partnerships Projects issued by the Department of Economic Affairs, Ministry of Finance, Government of India.

TABLE 2: Key Conditions of Model Concession Agreement			
S. No.	**Key conditions of Model Concession Agreement**	**Impact of failure to perform by a party**	**Dispute Resolution Procedure**
2.	As part of the Conditions Precedents, the Concessionaire to - a) Provide Performance Security[8] to the Authority b) Execute the Escrow Agreement,[9] Substitution Agreement[10] and the Financing Agreement.[11]	In case of delay, concessionaire to pay an amount equal to 0.3% of the performance security for each day of delay till achievement of the conditions precedent.	own opinion in the matter disputed. Once a consensus is reached between the parties, the same can be recorded as an enforceable contract and shall be binding upon the parties. **Amicable settlement -** Upon failure of mediation with or without the involvement of the Independent Engineer, the matter may be resolved through amicable settlement between the Chairman of the Authority/ Departmental Head and the Chairman of the Board of Directors of the Concessionaire. This type of dispute resolution is faster, low cost and within the control of the parties. Major disputes can also be broken up into smaller ones and the differences removed between the parties at this stage only so that the public service delivery continues without any hindrance. . **Arbitration** - If the dispute is not resolved through amicable
3.	Achieving of Commercial Operation Date (COD) by the Concessionaire upon issuance of Project Completion Certificate[12] by the Scheduled Project Completion Date[13] (SPCD)	In case of delay in achieving of Commercial Operations Date in accordance with the interim project milestones and achieve SPCD, the Concessionaire is required to pay to the Authority damages as provided in the Model Concession Agreements. This will be an amount equivalent to 0.2% of the performance security for each day of delay until Commercial Operations Date is achieved. Failure to pay this amount by the concessionaire shall entail interest at the 3% above the bank rate for sum due and payable.	

[8] Bank guarantee provided by the Concessionaire for performance of its obligations in terms of the concession agreement.
[9] Agreement entered into between the Concessionaire, the Authority, the Escrow Bank and the Lenders' Representative on behalf of the Senior Lenders.
[10] Agreement entered into between the Concessionaire, Authority and the Lenders' Representative on behalf of the Senior Lenders.
[11] Agreements entered into by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders.
[12] Certificate indicating completion of construction works.
[13] Scheduled date for completion of the Project (550th day from the Appointed Date).

TABLE 2: Key Conditions of Model Concession Agreement			
S. No.	**Key conditions of Model Concession Agreement**	**Impact of failure to perform by a party**	**Dispute Resolution Procedure**
4.	The Concessionaire is required to submit to the Authority a performance security in the form of a bank guarantee within thirty days of the date of the agreement. This is typically is for 5% of the cost of the project.	In case of default by the Concessionaire, the Authority is entitled to en-cash and appropriate the damages due and payable to it from the Performance Security. In case the Concessionaire does not cure the default within the specified period given in the Agreement, the Authority is entitled to terminate the Agreement.	settlement, then it shall be decided by a reference to the Arbitral Tribunal comprising of three arbitrators. Each party shall select one arbitrator, and the third arbitrator is appointed by the two arbitrators so selected. The arbitration proceedings shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. In this process, the parties are able to appoint sector specific experts to help them. A final decision on the dispute can be reached more quickly than a decision by the civil court. However, the Model Agreement does not define the word "expert". .
5.	The Concessionaire is required to achieve Financial Close within 150 days from the date of the agreement.	Failure to achieve Financial Close within 150 days entails payment of damages. Upon payment of damages, this period is further extended. In case the Concessionaire still fails to achieve the Financial Close, the agreement is terminated.	
6.	The Concessionaire is required to construct the project in terms of the MCA and achieve the interim project milestones as provided in the Schedule thereof.	Failure to construct as per the scheduled project milestones, will attract damages to the extent of 0.1% of the performance security for each day of delay beyond 90 days for each project milestone.	
7.	a) The Concessionaire shall maintain the project asset in accordance with the Maintenance Requirements. b) If the Concessionaire does not maintain the project in accordance with the Maintenance Requirements, the Authority is entitled to undertake remedial measures and recover its costs from the Concessionaire.	a) Failure to repair or rectify any defect as per the Maintenance Requirements, will invite damages payable by Concessionaire. However, the agreement envisages that at the discretion of the Authority, a smaller sum of damages may be claimed when the breach is cured promptly. b) In addition to the recovery of costs incurred by it, the Authority is entitled to recovery of damages from the Concessionaire to the extent of 20% of the costs incurred.	

TABLE 2: Key Conditions of Model Concession Agreement			
S. No.	**Key conditions of Model Concession Agreement**	**Impact of failure to perform by a party**	**Dispute Resolution Procedure**
8.	Authority to make payment as per the agreement upon the Concessionaire achieving the construction milestones and subsequently annuity payments during maintenance period	In case of breach of the conditions of payment by the Authority, the agreement provides for payment of compensation which includes interest payments on debt, O&M expenses, increase in capital costs on account of inflation and all other costs directly attributable to such breach.	
9.	As per the provisions of the concession agreement, the Concessionaire is required to maintain the books of accounts, recording all its receipts. The Authority is to inspect the records and in case of discrepancy, communicate to the Concessionaire and seek its rectification.	In case there is a point of difference between the Auditors representing the Authority and the Statutory Auditor of the Concessionaire, they shall meet to resolve the dispute. If it is not resolved, the Authority shall have recourse to the Dispute Resolution Procedure.	
10.	Force majeure conditions are divided into three categories – Non-political event, Indirect political event and Political event.	Either party can issue a termination notice if a Force Majeure event is subsisting for a period of six months or more. Termination payments are envisaged before Commercial Operations Date and after Commercial Operations Date which provides for payment of debt due or a percentage of the bid project cost, whichever is lower.	

The next important aspect is to see whether India has a robust legislative framework. Few states in India have specific legislations that provide for an effective dispute resolution mechanism which are discussed herein. Few of the legislations and dispute resolution mechanism envisaged therein are discussed in Table 3:

TABLE 3: State Legislations Governing PPP[14]	
State Legislation	**Mode of Dispute Resolution**
Andhra Pradesh Infrastructure Development Enabling Act, 2001	A Conciliation Board is set up, which shall have the powers of a civil court. The settlement award shall have the same effect as that of an arbitral award under the Arbitration and Conciliation Act, 1996. There is a bar on the parties to resort to arbitral or judicial proceedings during the conciliation procedure.
Bihar Infrastructure Development Enabling Act, 2006	A Conciliation Board is set up which shall assist the Government Agency, or Local Authority and any Developer in an independent and impartial manner to reach an amicable settlement of their disputes arising under the Act or the Concession Agreement. Every proceeding before the Board shall be deemed to be a judicial proceeding and it shall be deemed to be a Civil Court. Jurisdiction of subordinate courts is barred by providing that dispute settlement or dispute resolution in respect of any matters under the Act shall be heard only by the High Court and by no other court or courts subordinate to the High Court
Gujarat Infrastructure Development Act, 1999	No specific dispute resolution mechanism provided except mandating that a Concession agreement shall contain an arbitration clause providing inter alia that all parties to the agreement shall submit to arbitration. No procedure provided for selection of project or concessionaire.
Punjab Infrastructure Development and Regulation Act, 2002	Punjab Infrastructure Regulatory Authority, with powers of civil court to adjudicate disputes between two or more Concessionaires, operators of infrastructure projects, the State Government and the Board. Appeals can be preferred to the High Courts. Punjab Infrastructure Development Board, the apex and nodal agency to grant approval to projects or award concession contracts. Appeal may be preferred against PIDB order in HC. Bar on the jurisdiction of civil court where the Authority and Board are given powers. The concession agreement must lay down methods of dispute resolution including conciliation and arbitration.

As all the States in India do not have specific legislations for dealing with disputes arising out of PPP contracts, it may therefore be useful to have an overarching dispute resolution framework so as to lend assurance to the private sector.

13.5 EASE OF DOING BUSINESS IN INDIA AND EFFICACY OF REMEDIES

Before the contractual remedies discussed above are dealt with, it is important to refer to a research study conducted by Naoya Kawamura,[15] in which the author has discussed the role of foreign direct investments in infrastructure projects and how the regulatory and institutional framework of a country determines decision making by the investors. The author has analyzed this aspect in India, Vietnam, Malaysia and Philippines. He concludes that India stands on a firm footing in terms of attracting private investment into infrastructure projects. He has reviewed the progress of Foreign Direct Investments (FDI) investments in infrastructure projects in India during the period 2000-2018. He has noted that institutional structures such as PPP Appraisal Committee, PPP Cell at DEA, Empowered Committees at Central and State level, regulatory institutions for airports & telecom, amendments to series of legislations such as the Electricity Act & National Highways Act, schemes such as the Viability Gap Fund (VGF), India Infrastructure Project

[14] HARISHANKAR K.S. & SREEPARVATHY G, RETHINKING DISPUTE RESOLUTION IN PUBLIC–PRIVATE PARTNERSHIPS FOR INFRASTRUCTURE DEVELOPMENT IN INDIA (2013).

[15] Public Private Partnership and Foreign Direct Investment: Case Studies for four Asian Countries; Toyo University Repository for Academic Resources, http://id.nii.ac.jp/1060/00011583/ (last visited Apr. 22, 2020).

Development Fund (IIPDF) and the availability of Model Concession Agreements for several sectors have helped build investor confidence.

Having said that, specific PPP contract related conditions are discussed in the following section and remedies proposed for ease of doing business in India:

13.5.1 Handover of project land to the concessionaire

Typically, providing of the Right of Way and obtaining of environmental clearances are the primary reasons for delay from the Authority's side. The PPP Guide for Practitioners[16] provides that the land acquisition process should be started at the project structuring stage itself, before the procurement process for the project commences. If the project land belongs to a government department, the ownership of the same may be transferred through inter-departmental transfer. It is recommended that before signing of the concession agreement, the Authority should have acquired the entire parcel of land to the extent of 80% of the Right of Way and obtained the forest clearance and GAD approvals. The Task Force Report on the National Infrastructure Pipeline has emphasized the need to award the projects only after the condition precedent are fulfilled with respect to acquisition of 90% of contiguous land and obtaining all project clearances.

In the post-Covid 19 situation, it is likely that the economy will take a significantly long time to recover. As a result, the expected returns on investment by the private sector may also be diminished or take time to recover. Hence, a number of concessionaire firms are likely to approach the Authority for re-negotiations to make good their losses due to the lockdown or seek extension in the concession period. In cases where concession agreements are already entered into and the 80% or 90% of the land for the project is yet to be handed over to the concessionaire in terms of the Model Agreement, the Authority, in order to expedite the land acquisition process, may consider issue of long-term land bonds to land owners with a tenure of 10 to 15 years in lieu of cash compensation to the land. Such bonds can be tradable so that the land owners can get regular cash flow as they could be enchased on fixed dates or on semi-annual basis. Countries like Guyana, Jamaica and Ireland have enacted specific legislations on the issue of land bonds by the Government.

Land pooling can be another mechanism for which standard policy frameworks may be enunciated by the Central Government so that the State Governments may adopt them suitably. This has been effectively used in the development of urban land in Gujarat, Andhra Pradesh (Amravati), Chandigarh, Navi Mumbai etc.

13.5.2 Achieving of Commercial Operation Date

It is important to have a robust project management framework during the contract period. For achieving of the Project Milestones and SPCD as envisaged in the concession agreement, it is recommended that the Contract Manager appointed for the project should have a key role to play. The Contract Manager who is expected to protect Authority's interest has to ensure that the contract terms are complied with in its totality by the parties. The Post Award Contract Management Guidelines for PPP Concessions (2015) issued by

[16] Issued by the Department of Economic Affairs, Ministry of Finance, GoI in 2016.

the DEA, Ministry of Finance, GoI may be referred to – Appendix D of which provides a Dispute Resolution Checklist.

13.5.3 Achieving of Financial Closure

Presently, the concession agreement provides that it is the obligation of the concessionaire to achieve financial closure and it is reflected as part of the conditions precedent. To expedite this in a more efficient way, it is felt that the concessionaire may be asked to procure a letter from his banker agreeing to lend for the project. This letter should be submitted to the Authority after the Letter of Award of the project is received by the successful bidder or by the date of signing of the concession agreement. The ADB South Asia in its Working Paper Series[17] has noted that the Hybrid Annuity Model projects have typically taken more than 150 days to achieve financial closure according to a newspaper report. Therefore, it is proposed that before signing the agreement, the Concessionaire should be asked by the Authority to furnish a letter from his banker that they are willing to finance the project. To such an extent, a condition can be put in the Request for Proposal document. This would expedite early financial closure.

13.5.4 Maintenance of the Project Asset

During the maintenance period, the concession agreement envisages that the concessionaire shall perform as per the standards specified therein. However, there may be certain performance standards that are not comprehensively written out in the concession agreement. For instance, in a hospital PPP project, the agreement may provide that the doctors and nurses shall provide smart services to the patients or it may provide that the hospital canteen shall provide good food. In such cases and similar other PPP contracts, it may be useful to provide for guidelines on consumer surveys during the period of the contract. Consumer satisfaction surveys may be carried out at pre-specified intervals so as to ensure that the concessionaire does not get away with poor quality services especially in projects where it is not easily measurable. Such consumer satisfaction surveys should be done through independent third-party agencies.

The Task Force Report on National Infrastructure Pipeline has recommended that international contract standards (such as FIDIC standards) must be adopted with clear procedures on change of scope, standardization of contracts and safe exits of parties.

13.5.5 Payment guarantees by the Authority

As far as the private investor is concerned, he will consider the speed of development, density of the population, political and cultural background of the country for making an investment decision.[18] It is therefore necessary for the government to ensure that the investor confidence is built up with suitable policies and regulations. To lend comfort to investors that their investments into a PPP project are safe and they can be assured returns of both capital and

[17] Ravi Peri et al: *Hybrid Annuity Contracts for Road Projects in India:* ADB Working Paper Series: No. 68, (December 2019).

[18] Zhaorong Mu1 & Tian Gao, *PPP Project Life Cycle Renegotiation Trigger Event Identification*, in IOP CONF. SERIES: MATERIALS SCIENCE AND ENGINEERING 768 (2019).

operating costs, as has been recommended by the Task Force of Infrastructure, independent regulators or a legislative framework for fixing of the user fee (similar to the Fare Fixation Committee under Section 34 of the Metro Railways Act 2002) may be set forth. In the alternative, suitable clauses may be inserted in the concession agreement, so as to assure the private investor that the user fee will be revised suitably from time to time to protect return on their investments towards capital expenditure and operating expenditure.

13.5.6 Audit of accounts of the private sector

Pursuant to a decision of Hon'ble Supreme Court of India[19] and in line with the Kelkar Committee Report, the Comptroller and Auditor General of India (CAG) has issued a Guidance Note on compliance audit of PPP projects.[20] The guidelines provide detailed audit process for (a) projects that directly generate revenues to an Authority or (b) where an Authority is in a neutral position under a PPP arrangement or (c) an Authority has agreed to pay an annuity or Viability Gap Funding (VGF) to the concessionaire. In such cases, while the audit department has to conduct audits of the Authority's books of account, the guidance also provides that the concessionaire company's records are also to be audited. The guidance provides detailed checklist as to the information that need to be culled out during the audits. It also envisages that the field offices of the audit department shall devise ways and means to obtain the information from the concessionaire company. Annexures (I, II and III) to the guidance provides details on the type of records and information to be sought from the Authority and the concessionaire. This guidance provides adequate transparency on the process adopted by the government in the conduct of audit of the records of the private party. However, it may be useful if the requisite formats in this regard are shared with the concessionaire at the time of signing of the concession agreement or they are made as one of the schedules to the concession agreement.

13.5.7 Labor Related

Private investors typically consider availability of right kind of labor at all times during the contract period as one of the important aspects. It will avoid time and cost over runs in a PPP project. Non-availability of labor or the right kind of people to work on the project during construction and maintenance period is a residual risk. The best way to handle this is to consider this aspect as an important and inherent part of the risk management plan. The Australian Highway PPPs mitigate this risk by developing in advance a procurement plan for appointment of labor and technical consultants. Different contract sizes are used to attract both local and national level contractors to ensure steady supply of labor during the project period.[21] In India too, the risk management framework could include this aspect

[19] In Association of Unified Teleservices Providers & others v. Union of India, Unreported Judgements, Civil Appeal No. 4591 of 2014, decided on Apr. 17, 2014 (SC).
[20] Guidance Note No. 727/16-PPG/2016 dated 24.8.2016 issued by the Office of the Comptroller and Auditor General of India, Professional Practices Group.
[21] Best Practice Case studies, Dec 2010 (Department of Infrastructure and Transport, Australian Government) cited in *Guidelines for Post- Award Contract Management for PPP Concessions*, Department of Economic Affairs, GoI (2015).

suitably and guidelines prepared for ensuring availability of workforce at least for large labor-intensive infrastructure projects.

13.5.8 Tax related

The Kelkar Committee[22] had suggested that an infrastructure related cell be set up separately for facilitating infrastructure investment so as to lend comfort to the investors and extend help in the proper comprehension of the tax laws in the country. Presently, the Infrastructure Finance Division in DEA deals with matters relating to Infrastructure Debt Funds (IDFs), Real Estate Investment Trusts (REITs)/Infrastructure Investment Trust InvITs, Tax Free Bonds, Municipal Bonds and other instruments meant for infrastructure financing and credit enhancements.

The Report of the Task Force that has proposed the National Infrastructure Pipeline envisages that the GST and the Insolvency and Bankruptcy Code, 2016 once streamlined will create, *"an efficiency led"* growth increases in the medium term. It also suggests that the corporate tax cut extended in the year 2019 will enable the corporates to de-leverage at a greater pace and this will facilitate further investments in the infrastructure sector. This fact could be suitably disclosed to the investor community while reaching out to them.

13.5.9 Force Majeure conditions

Jeydev C.S. & another in the Chapter, Model Public Partnership Clauses[23] have stated that typically in the drafting of force majeure clauses, three aspects are required to be considered. Firstly, the force majeure clause should have an indicative or an exhaustive definition; secondly, the consequences that follow in case of a force majeure event should be clearly set out and finally, in what type of cases a force majeure event leads to termination of the concession agreement should be specified. The MCA lays down detailed force majeure conditions by setting out several specific conditions that are beyond the reasonable control of the parties which may impact performance. These conditions are categorized in the Model Agreement as non-political, indirect political and political events. Further, the Model Concession Agreement provides for action to be taken by a party affected by a force majeure event in the matter of reporting to the other party typically within seven days of its occurrence. Further weekly reports on the status are to be sent. Also, the effect of the force majeure event on the concession is to be communicated to the other party. Detailed provisions on cost sharing during force majeure period and termination conditions are set out clearly. In case of dispute, the conditions set out in the Dispute Resolution Procedure in the Model Agreement is to be complied with. However, with respect to the present-day challenge of lockdown conditions in the country due to COVID 19 pandemic, there is likelihood of parties contesting as regards the duration and extent to which a party can seek suspension of its obligations. This may ultimately lead to significant disputes as well as suspension of the PPP contracts or termination. It may therefore be necessary to consider suitable statutory remedies as has been done recently by Singapore. A new law known as

[22] Report of The Committee on Revisiting and Revitalizing Public Private Partnership Model of Infrastructure, Department of Economic Affairs, Ministry of Finance, GoI (2015).
[23] SAIRAM BHAT, PUBLIC PRIVATE PARTNERSHIP IN INDIA: A SECTORAL ANALYSIS (2019).

Covid 19 (Temporary Measures) Act, 2020 has been introduced by the Singapore Government. It provides for a clear mechanism to prevent disputes and mitigate the economic fallout of Covid 19.

13.5.10 Dispute resolution process

Recognizing the fact that the arbitral awards are often challenged before the court of law, NHAI has been recommending using of a dispute settlement process in the form of an Independent Settlement Advisory Committee (ISAC). It is envisaged that the ISAC[24] will undertake the following three steps:

(i) Initial negotiation carried out by a Committee of three Supervisory Level-Headquarter Officers nominated by the Chairman. Subsequently, the matter is placed before an ISAC consisting of a retired a High Court Judge and two other Members having sufficient experience in administration / finance and technical field.

(ii) ISAC can agree to have three Supervisory Level- Headquarter Officers Committee or if need be, can call the Concessionaire / contractor for clarifications / negotiations.

(iii) The recommendations of the ISAC to be placed before the NHAI Board for approval. If no negotiable settlement is arrived, the matter shall continue to be pursued legally as per contract.

To facilitate speedy resolution of the disputes raised during the concession period, exclusively to deal with PPP projects, a suitable independent institution is required to be set up under the Commercial Courts Act, 2015. The Specific Relief (Amendment) Act, 2018 and New Delhi Arbitration Centre Act, 2019 enables speedy resolution of disputes.[25]

In the matter of invoking writ jurisdiction where the parties to a contract have recourse to an alternative dispute resolution remedy such as arbitration, the Hon'ble Supreme Court of India[26] has said that the *"rule of exclusion of writ jurisdiction by an availability of an alternative remedy is a rule of discretion and not one of compulsion"*. Further, three contingencies, as follows, have been laid out when a High Court may exercise its writ jurisdiction:

(i) Where the writ petition seeks enforcement of any of the fundamental rights;

(ii) Where there is failure of principles of natural justice; or

(iii) Where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

Therefore, what follows is that an aggrieved party in case of a dispute under the PPP contract where alternative dispute resolution such as arbitration is provided, cannot rush to the court

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[24] *Post Award Contract Management Manual: Volume I Highway Sector:* PPP Cell, Infrastructure Division, Department of Economic Affairs, Ministry of Finance, GoI (2015).
[25] Report of the Task Force on the National Infrastructure Pipeline, Department of Economic Affairs, Ministry of Finance, GoI 2019.
[26] See Harbanslal Sahni and Anr. v. Indian Oil Corpn. Ltd. and Ors, AIR 2003 SC 2120.

seeking a remedy by filing a writ petition unless the above circumstances prevail. An appropriate dispute resolution framework will lend comfort to the investors. The present framework envisaged in the Model Agreement, the mediation and amicable settlement process may need to be further streamlined by issue of suitable guidelines.

13.5.11 Interpretation of contract clauses

In the matter of interpretation of terms and conditions set out in a contract, the Hon'ble Supreme Court[27] while dealing with a dispute that had arisen out of a building contract awarded by the U.P. Government observed as follows:

> "Firstly, the contract between the parties is a contract in the realm of private law. It is governed by the provisions of the contract Act or may be, also by certain provisions of the sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for civil court as the case may be."

In another case, the Hon'ble High Court of Delhi[28] had taken up a matter regarding a dispute raised on the interpretation and implementation of clauses of a concession agreement entered into between the Ministry of Road Transport and Highways, Government of India and VHPCL-ADCC Pingalai Infrastructure Pvt Ltd for the construction and maintenance of a high-level bridge in Amravati District, Maharashtra. The concession period was for 12 years, nine months and nine days from the commencement date. The petitioner's challenge was based on Article 14 of the concession agreement which dealt with the capacity augmentation and additional facility of the project (the bridge). The Court noted that the words *"capacity", "augmentation" or "capacity augmentation"* were not defined in the concession agreement (para 62) Therefore, the Court decided to take their ordinary meaning as applicable in the general context in which such terms are used. It may be useful to review the Model Agreement conditions and suitably define such words for better clarity and to avoid future litigation in the matter of interpretation of clauses by the parties.

13.6 RECOMMENDATIONS AND SUGGESTIONS

In the above background, the concerns raised by the private sector and suggested reforms are as follows:

TABLE 4: Recommendations and Suggestions

Sl. No.	Event	Suggested reform
1	Making available land for the project in a timely manner as per concession agreement	The Authority may acquire at least 90% of the continuous land before signing of the concession agreement. To expedite faster land acquisition, Central Government may issue a land pooling guideline. For State Government led infrastructure projects, model land pooling guidelines may be proposed for consideration and issue by State Governments.
2	Contract management	Typically, disputes arise on the validity, enforceability, interpretation or non-performance of a contractual obligation. A party may seek injunctive relief, compensation and specific performance by the other

[27] State of U.P. v.. Bridge & Roof Company (India) Ltd, (1996) 6 SCC 22.
[28] VHPCL-ADCC Pingalai Inftrastructure Pvt Ltd. v. Union of India, W.P. (C) No. 13034/2009 (Date of decision: 10th August 2010).

TABLE 4: Recommendations and Suggestions		
Sl. No.	**Event**	**Suggested reform**
		party. In order to avoid delay on account of litigation, the preferred way of resolving the dispute is through expert adjudication. The need for expert adjudication in issues arising out of infrastructure projects is emphasized by the Supreme Court[29]. However, it is important to identify and appoint the right expert who is familiar with the infrastructure sector in which a dispute is arisen. The Model Agreement does not define the word *"expert"*. It may be relevant to provide specific guidelines on the appointment of *"expert"*, his qualification, past experience in handling contractual disputes and so on.
3.	Construction period	Strict monitoring during construction period may be introduced. This would include not only monitoring of physical progress but also drawdown by the Concessionaire of the project funding both from the Lenders as well as the Authority (in case of VGF and HAM projects). A project steering committee may be set up during the construction period comprising of nominees from the Authority, Concessionaire, Independent Engineer and the Lenders so as to monitor each project milestone diligently. This committee can be wound up on achieving of Commercial Operation Date. This committee will manage risk mitigation activities, conduct financial appraisal, assess whether the drawdown of the funding is as per approved financial model, and suggest mitigation strategies in case of delays.
4.	Ensuring sustainable performance by the private sector	In case of delays in achieving the project milestones as set out in the concession agreement, there are several clauses that envisage damages payable by the concessionaire. As part of the contract management framework, a penalty point may be awarded to the concessionaire on each occasion he is required to pay damages or has paid damages to the Authority. When a penalty point is awarded to the concessionaire, a communication is sent to the Senior Lenders to the project. This will encourage the concessionaire to take early remedial actions so as to avoid loss of reputation with the Lenders. In case of a dispute on the ground that delay caused is not attributable to the concessionaire, the dominant cause of the delay can be apportioned between the parties. Only thereafter it can be determined if damages are really payable or not. In *City Inn v. Shepherd Construction Ltd. [2010] CSIH 68* the Scottish Court held that the apportionment approach may be taken where there are two competing reasons for delay and neither of which is dominant. The delays caused in completing the relevant project milestone should be apportioned between the concessionaire and the Authority based on the relative culpability of each of the factors in causing delays. This approach is also approved by the High Court of Hong Kong in *Hing Construction Co. Ltd. v.. Boost Investments Ltd. [2009] BLR 339.*
5.	Efficient dispute resolution mechanism	Guidelines on the procedure to be followed by the parties for amicable settlement may be issued. Further, a consultation or coordination committee be set up during the project management with the nominees of the independent engineer and auditor being part of the committee so as to ensure compliance of contract conditions. This committee may meet on a fortnightly/monthly basis to discuss and sort out differences (if any) in the implementation of the project. The FIDIC form of contract provides for an independent engineer who shall act as a balancer of interests by determining, certifying and approving the manner in which the contract is administered. It is also relevant to note at this juncture that the Second Report of the Chaturvedi Committee on the faster implementation of NHDP also

[29] See UPSEB v. Banaras Electric Light & Power Co Ltd, (2001) 7 SCC 637.

TABLE 4: Recommendations and Suggestions		
Sl. No.	**Event**	**Suggested reform**
		emphasizes the adoption of FIDIC model in all kinds of contracts where the engineer holds a key role in the adjudication of disputes at the first level. In addition, there is also the method of mediation where by the parties can get their differences sorted out through a mediator appointed by the High Court under the particular High Court mediation rules. Thus, resolution of differences at the earliest possibility through conciliation or mediation would be highly desirable in terms of saving time and cost. However, it may be noted that success of conciliation and mediation being legally non-binding, depends on the flexibility and acceptance of the settlement by the parties. As has been recommended by the Task Force on infrastructure, to resolve complex contractual disputes, a Ministry level Committee may be set up to conduct mediation between the parties so as to facilitate out of court settlement.
6	Transparency	As provided by the Central Vigilance Commission at the time of procurement of private entities for large infrastructure projects beyond a certain value say Rs. 150 crores and above, Integrity Pact may be adopted with the prospective bidders at the bidding stage itself. Such a pact would ensure that transparency, equity and competitiveness is maintained in the procurement process.[30] The integrity pact is already being used in many countries around the world. It will be a signed document that will facilitate the bidders to comply with best practices and maximum transparency. There will be a third party, usually a Civil Society Organization, which monitors the terms and conditions of the integrity pact.[31]

TABLE 5: Proposed Changes in Contractual Measures		
Sl. No.	**Contractual Measures**	**Proposed changes**
1.	Construction period	With regard to interim Project Milestones, the Model Concession Agreement envisages that the Concessionaire ought to have achieved certain percentage (20%) of physical progress and also expended the specified capital cost towards construction. A project steering committee with representation from the Authority, the Concessionaire and the Independent Engineer may be set up. Representatives of the concerned utilities (water supply, electricity, telecom) where the project site situated may also be the members of this committee. This will facilitate better formal coordination between the parties. The role and responsibilities of this committee can be included in the concession agreement as a separate schedule.
2.	Maintenance period	In sector specific concession agreements such as health, education, solid waste management, water supply, street lights etc., the performance standards should include consumer surveys. In case of better performance, the concessionaire can be rewarded and for poor performance, damages imposed. FIDIC standards must be included in the concession agreement, setting out clear procedures on change of scope, standardization of contracts and safe exits of parties.

[30] Refer Circular No. 02/01/2017 dated 13.01.2017 issued by the Central Vigilance Commission.

[31] Jacqui De Gramont; *Creating Open and Clean Contracting in Public Infrastructure Projects*; Model Monitoring Agreement and Integrity Pact for Infrastructure: An implementation guide for civil society organizations: pages 5-9; Transparency International (2018).

TABLE 5: Proposed Changes in Contractual Measures		
Sl. No.	**Contractual Measures**	**Proposed changes**
3.	Facilitating achieving of early Financial Close	The Authority may insert a specific clause in the Request for Proposal document asking the successful bidder to submit a letter from the banker agreeing to finance the project. This letter is to be submitted to the Authority by the successful bidder upon receiving of the Letter of Award of the project or by the date of signing of the concession agreement.
4.	Audit of books of account of the concessionaire firm	The Model Agreement provides that the Authority shall have the right to inspect the records of the concessionaire firm and take copies of the relevant extracts of the books of account. It will be useful if the Model Agreement contains greater details providing therein the format of information to be sought in accordance with the Guidance Note on compliance audit of PPP projects issued by the CAG.
5.	Labor and raw material related issues	During construction period, it is possible that due to unforeseen circumstances (such as the present Covid 19 situation), the required labor force may not be available. Also, crucial raw material may not be accessible to the concessionaire at the right time. For greater coordination between the Authority and the Concessionaire, it may be useful to issue suitable guidelines to deal with such a situation. The Contract Management Committee can be entrusted with the responsibility to look into this aspect and help the concessionaire if needed.
6.	Force majeure conditions	A specific legislation or guidelines/law to deal with Covid 19 like situation may be introduced.
7.	Dispute resolution process	An Independent Settlement Advisory Committee (ISAC) may be set up to expedite efficient dispute resolution process.

13.7 CONCLUSION

In conclusion, it is necessary that the government should re-visit the existing dispute management frameworks under the PPP arrangement. The Model Concession Agreements may need to be reviewed in the context of what has been discussed in this chapter and the experiences in contract management phase during the last four years. In view of the ongoing situation due to COVID 19, delays may be caused in the completion of construction due to supply side issues of continued availability of raw material, workforce and machinery. It is likely that several disputes may arise in the ongoing PPP contracts which can be divided into three different phases - (a) the period after signing of the concession agreement and before the Appointed Date, (b) the period between the Appointed Date and the Commercial Operations Date and finally (c) the period between the Commercial Operation Date and the expiry of the concession. Short term, medium term and long-term solutions to deal with this situation may need to be developed. The present state of affairs of lockdown conditions and reduced economic activity due to COVID 19 would have a bearing on the performance of the concessionaire in terms of affecting their balance sheet, recovery of their investments, continued availability of the workforce and prolonged impact on the other stakeholders. As recommended above, a combination of policies, guidelines and re-writing of the terms and conditions of the Model Agreement may be required.

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CHAPTER 14: IMPLEMENTATION OF THE COMMERCIAL COURTS ACT, 2015

14.1 INTRODUCTION

It is no secret that Indian judicial and dispute resolution system is plagued with several issues. But the major issues that exist are delayed disposal of litigation, the legal costs and congestion.[1] This is not a good sign for any country especially India. If litigants have to fight out lengthy and expensive court battles to get their disputes resolved and rights adjudicated, then the economic environment in the country takes a big hit. This is particularly true in case of India as demonstrated by several pronouncements of various foreign courts which have critiqued the Indian judicial system for inordinate delays.[2] These inefficiencies in India's legal infrastructure predominantly created difficulties for not only foreign investors but also domestic investors to enforce their rights in an expeditious manner. This led to the tendency of avoiding courts in India, by not only foreign investors but domestic investor as well, and taking their disputes to foreign courts.

This situation was taken very seriously by the Law Commission of India which initiated a *suo motu* study into the matter.[3] And after taking a note of these judgements and reviewing the functioning of specialised courts dealing with commercial matters in several jurisdictions[4] recommended the constitution of Commercial Divisions in High Courts in India.[5] The pursuit of establishing specialised commercial courts in India was thus initiated by the Law Commission of India with its report in 2003, which after several bills and reports,[6]

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[1] Garimella Sai Ramani & Ashraful M Z. – *Commercial Courts in India: All for Ease of Doing Business* (2019), https://www.researchgate.net/publication/336914399_Commercial_Courts_in_India_All_for_Ease_of_Doing_Business.

[2] *See* Shin-ETSU Chemical Co. Ltd. v. ICICI Bank, 777 N.Y.S. 2d 69, 75 (2003); Bhatnagar v. Surendra Overseas Ltd, (1995) 52 F.2.d. 1220 (3rd Cir.); Modi Enterprises v. ESPN Inc, N.Y. S.C. (decided on Mar. 3, 2003); European Asian Bank v. Punjab & Sind Bank, (1982) 2 Lloyd's Rep. 356 (CA); *In re* Vishwas Ajay, 1989 (2) Lloyd's Rep. 558; *In re* Jalakrishna, 1983(2) Lloyd's Rep. 628 (in all these cases the US & UK courts have made generalized remarks about the inordinate delays in Indian Courts and litigation that goes on for decades and termed the Indian Judicial System nearing a 'virtual collapse', termed the situation 'intolerable' & 'clearly unsatisfactory'. The foreign courts have also stated that such inordinate delays provide 'no remedy at all' and have used the principle of 'forum non conveniens' to entertain suits which should have been properly instituted in Indian Courts).

[3] LAW COMM'N OF INDIA, REP. NO. 188, PROPOSALS FOR CONSTITUTION OF HI-TECH FAST-TRACK COMMERCIAL DIVISIONS IN HIGH COURTS, ch. II, 10-23 (Dec., 2003) (disagreeing with the reasons giving by US & UK Courts to utilize the principle of forum non conveniens, The Law Commissions discussed the anomalies in US & UK decisions. The US & UK Courts have in earlier decisions such as the Bhopal Gas Tragedy case have refused to intervene in the matter stating that 'the Indian courts have the proven capacity to mete out fair and equal justice'. However, the Law Commission was of the opinion that these judgements do call for constitution of a separate division of the High Court for disposal of high-value commercial cases on fast track basis with high-tech facilities.).

[4] *Id.*, ch. III.

[5] *Id.*, ch. X.

[6] *See* Commercial Division of High Courts Bill, 2009, Bill No. 139 of 2009 (India); RAJYA SABHA, SELECT COMMITTEE, REPORT OF THE SELECT COMMITTEE ON THE COMMERCIAL DIVISION OF HIGH COURTS BILL, 2009, AS PASSED BY THE LOK SABHA (2010); LAW COMM'N OF INDIA, REP. NO. 253, COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION OF HIGH COURTS AND COMMERCIAL COURTS BILL,

culminated into the enactment of the Commercial Courts Act, 2015[7] which was recently amended by the Commercial Courts (Amendment) Act, 2018.[8]

In this chapter we take an analytical look at the Commercial Courts in India. We first undertake a doctrinal study of the Commercial Courts Act, 2015 by first discussing the legislative history of the Commercial Courts briefly,[9] starting from the 188th Report of the Law Commission of India,[10] and going through Commercial Division of High Courts Bill, 2009,[11] and the 253rd Report of the Law Commission of India.[12] The doctrinal study then proceeds to discuss the various provisions of the Commercial Courts Act, 2015 and Commercial Courts (Amendment) Act, 2018 highlighting their salient features and drawbacks. We have also discussed some key judicial pronouncements. After this doctrinal study, the chapter discusses the empirical study that we have undertaken with respect to the implementation of the Act, and functioning of the Commercial Courts in the State of Karnataka.

14.2 188TH REPORT OF THE LAW COMMISSION OF INDIA, 2003

Looking into the political tussles surrounding the enactment of suitable legislations to ensure speedy disposal of commercial disputes and concerned about the exercise of extra-ordinary jurisdictions by foreign courts in Indian cases, the Law Commission of India undertook *suo moto* cognizance of the matter and came up with recommendations that needed to be adopted and implemented in order for India to grow and be a convenient place for doing business in the global scenario.

Many foreign courts have demonstrated a tendency of assuming extraordinary jurisdiction of Indian cases by citing the inordinate delays and breakdown of the judicial system.[13] And the trend continues as in one of the recent cases, a tribunal had considered the sluggish Indian judiciary to be in breach of its ICSID treaty obligations.[14] Furthermore, there were 3 US Court cases and 4 UK Court cases, wherein extraordinary jurisdiction was assumed by courts citing the fact that inability to resolve such disputes in a quick manner tantamount to inability to render effective relief.[15] Concerned with this criticism of the Indian judicial

2015 (2015); Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 (India).

[7] The Commercial Courts Act, 2015, (Originally called the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015).

[8] Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018.

[9] *See* AMEEN JAUHAR & VAIDEHI MISRA, COMMERCIAL COURTS ACT, 2015: AN EMPIRICAL IMPACT EVALUATION, VIDHI CENTRE FOR LEGAL POLICY (July 2019), https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf (for an elaborate and detailed exposition of the legislative history of commercial courts in India).

[10] LAW COMM'N OF INDIA, REP. NO. 188, *supra* note 3.

[11] The Commercial Division of High Courts Bill, 2009.

[12] LAW COMM'N OF INDIA, REP. NO. 253, COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION OF HIGH COURTS AND COMMERCIAL COURTS BILL, 2015 (2015).

[13] *See* LAW COMM'N OF INDIA, REP. NO. 188, *supra* note 3.

[14] White Industries Australia Ltd. v. Union of India, Final Award, Nov. 30, 2011, http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf (last visited May 14 2020).

[15] *Id.*, *See also* LAW COMM'N OF INDIA, REP. NO. 188, *supra* note 3.

system, the Law Commission of India in its 188th Report recommended constitution of Commercial Division of High Courts in India. This Report laid the foundation and groundwork for emergence of specialised commercial courts in India. The major suggestions and recommendations of the Law Commission are as discussed below.

14.2.1 Important suggestions of the Commission

i. Firstly, it talked about the introduction of Commercial Courts that would deal with these high-stakes litigations and be specially equipped to deal with these commercial matters they would be able to expeditiously dispose of the cases.[16] This was with the intent to expedite trials pertaining to high-stake commercial matters; the pecuniary jurisdiction was set at Rs 1 Crore.

ii. Secondly, the Commission suggested the creation of commercial divisions in the High Courts, wherein it exercises original jurisdiction and there can be more than one such Bench in each High Court depending upon the need. The Commercial Courts/Divisions would be the courts for execution of decrees.

iii. Thirdly, it looked into the jurisdiction of courts and transfer of cases by defining and broadening of the term 'Commercial Disputes'. By giving it a broad definition, it would ensure that a wide number of commercial disputes if not all are automatically incorporated. Suggestions were also made to look into the definitions that were adopted by many of the foreign legislations. It also looked into laying down procedures for transfer of existing cases.

iv. Fourthly, suggestions were made on fast track procedure for disposal and hearing of cases. Studies had shown that elongated procedures, which were easily flouted by parties, were also a reason for the inordinate delays. This was based on the need of the Courts to balance interests of natural justice and ensure that equal opportunity is afforded.

v. Fifthly, a proposal was made for special budgetary allocation to fulfil the needs of commercial courts and divisions thereby ensuring that the necessary materials and infrastructure would be in place to accommodate this new division/court.

vi. Sixthly, it was believed that setting up of a Commercial Division with high-tech facilities with online systems and e-filing possibilities was necessary. This would ensure that there is no longer any scope for foreign courts to make generalisations or assumptions about delays in Indian Courts.

vii. Seventhly, the Law Commission recommended that the strength of High Court Judges in Commercial Division be maintained consistently (including Judges appointed under article 224A of the Constitution).

viii. Lastly, another major aspect this report looked into was the setting up a separate hierarchy of courts, with statutory right of appeal to the Supreme Court, thereby

[16] LAW COMM'N OF INDIA, REP. NO. 188, *supra* note 3.

ensuring speedy disposal without burdening the courts with more litigation whilst it was still grappling with a litany of cases.

14.3 COMMERCIAL DIVISION OF HIGH COURTS BILL, 2009

After nearly 6 years from the 188th Report, a Bill was tabled in Parliament that incorporated largely the suggestions made in the Law Commission of India report of 2003. The Bill had managed to cover broadly many of the necessary aspects of setting up fast track commercial courts.

The main object of the Bill was to provide for the establishment of dedicated divisions called the Commercial Division in each High Court of India, for the purpose of speedy disposal of commercial disputes valued at not less than INR 5,00,00,000 (Rupees 5 crore) or such higher amount as the Central Government may notify.

14.3.1 Advantages

i. The Bill was the first step by the legislature in enabling fast and efficient delivery of justice in India and had several advantages. This Bill sought to bring in uniformity across the country with regard to Commercial Disputes of a Specified Value. Therefore, creating a sense of surety in the business community.

ii. A laudable attempt was made to ensure streamlined procedures and quicker resolution of disputes by mandating that the plaintiff has to inter alia file documents like affidavits containing his as well other witnesses' statements in examination- in-chief, application for discovery and production of documents and all other material considered necessary by him at the time of filing the plaint itself to quicken the process thereby, avoiding vexatious encumbrances and inordinate delays.

iii. A radical change was incorporated through mandating of case management conferences to fix schedules for finalization of issues, cross-examination of witnesses, filing of written statements and oral submissions, record evidence etc.

iv. The Bill also incorporated technological innovations with regard to the service of summons and issuance of copies of the judgments via email.

14.3.2 Disadvantages

However, there were multiple issues pertaining to the Bill that had created uproar and opposition in the Rajya Sabha.

i. The pecuniary jurisdiction was argued to be too high and therefore prima facie provided protection and favoured the richer litigants and ousted the less economically sound litigants.

ii. It was criticised for burdening the already burdened courts with litigation and not allocating resources to set up a separate division and creating a separate hierarchy which could effectively deal with the commercial issues.[17]

[17] Setting up of a separate division was one of the key recommendations of the 188th Report of the Law Comm'n of India.

iii. With regard to the transfer of existing cases, the drafting was superficial and was compared to when the Debt Recovery Tribunal was set up. The seemingly similar transfer section did not consider the logistical and practical difficulties that could be encountered.[18]

iv. The definition of "Commercial Dispute", should have included the State and Central Governments wherein they are party to the dispute and also differing view on specific performance suits showed the inefficiency of the definition to be wide yet succinct enough to encompass commercial transactions.[19]

v. The Bill provided for creation of bench with 2 judges but it did not stipulate any procedure for resolving a deadlock situation.

vi. Taking away of cases from lower courts and giving it to High Courts was deemed perplexing as the lower courts were faster in disposing cases and this would burden the already burdened High Courts.[20]

Therefore, this Bill was not enacted and India remained without an effective system to redress the commercial disputes in an efficient manner.

14.4 253RD REPORT OF THE LAW COMMISSION OF INDIA, 2015

After the opposition of the 2009 Bill it was referred back to the Law Commission. In 2015 the report of the Law Commission was released with numerous recommendations and shortly after the Commercial Courts Act, 2015 was passed. Many attributed this speedy set up to the new NDA regime and their robust slogan and commitment to "Make in India".

The Report talked about having a broad definition of "Commercial Disputes", Commercial divisions to be set up in High Courts, the pecuniary value to be Rs 1,00,00,000 or more, constitution of commercial courts and commercial divisions after taking note of the high pendency of commercial disputes in five High Courts of India with original jurisdiction. The Report also discussed the appointment of judges and appropriate procedures to ensure speedy disposal of cases.[21]

The Reports in its additional provisions made 3 more recommendations which are as follows:

1. Applications arising out of an international commercial arbitration involving more than one crore and filed in a High Court are to be heard by Commercial Division of High Court and in its absence a regular bench of the High Court.

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[18] Debashree Dutta, *An Analysis of the Commercial Division of High Courts Bill, 2009*, INDIAN L.J., https://www.indialawjournal.org/archives/volume3/issue_3/article_by_debashree_dutta.html (last visited May 15, 2020).

[19] AMEEN JAUHAR & VAIDEHI MISRA, *supra* note 9.

[20] *Id.*, Select Committee (n 13) see comments of Sh. Arun Jaitley 344-345.

[21] LAW COMM'N OF INDIA, REP. NO. 253, COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION OF HIGH COURTS AND COMMERCIAL COURTS BILL 2015, (Jan. 2015), http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf.

2. Applications arising out of domestic arbitration are to be heard by Commercial Division of High Court or a regular High Court bench in its absence or a civil court depending on the pecuniary jurisdiction.
3. All appeals from arbitration cases involving commercial disputes of more than one crore against Commercial Division or commercial court are to be heard by Commercial Appellate Division.

Many of the recommendations of the Law Commission in this report were incorporated into the 2015 Act, thereby ushering in a new age for enforcing contracts and ensuring that a judicial system exists that can deal with the commercial side of litigation purely and render efficient resolutions. This helped improve India's ranking on the Ease of Doing Business Index.

14.5 COMMERCIAL COURTS ACT 2015

Before we discuss the various key provisions of the Commercial Courts Act, 2015, it is pertinent to point out at this stage that special courts are not uncommon in India. However, what the Commercial Courts Act contemplates is **not merely a special court, but a specialist court** to adjudicate commercial disputes i.e. to say the Courts not only deals with special matters (commercial disputes) but the Judges are also contemplated to be specialists in the field of commercial adjudication.[22] This is in consonance with the objects of the Act i.e. to create a positive image to the investor world about the independent and responsive Indian commercial dispute resolution system.[23]

14.5.1 Object of the Act

The long title of the Act states that it is "An Act to provide for the constitution of Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value…"[24]

The statement of objects and reasons acknowledges the fact that high value commercial disputes involve complex facts and questions of law which mandates the establishment of an independent mechanism for their early resolution. It is also stated that early resolution of commercial disputes shall create a positive image to the investor world about the independent and responsive Indian legal system. It was also hoped by the legislature that establishment of Commercial Courts and the Commercial Division of High Courts will accelerate economic growth, improve the international image of the Indian justice delivery system; and improve the faith of the investor world in the legal culture of the nation.[25]

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[22] Commercial Courts Act, 2015 §§ 3(3), 4(2) & 5(2) (Section 3(3) stipulates appointment of persons having experience in dealing with commercial disputes to be the judge or judges or a commercial court, Section 4(2) stipulates that the Chief Justice of High Court shall nominate such judges of the High Court who have experience in dealing with commercial disputes to be judges of the commercial division, Section 5(2) stipulates that the Chief Justice of the High Court shall nominate such judges of the High Court who have experience in dealing with commercial disputes to be the judges of commercial appellate division).

[23] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015, Statement of Objects & Reasons.

[24] The Commercial Courts Act, 2015, long title.

[25] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015, Statement of Objects & Reasons.

The Commercial Courts Act, 2015 (hereinafter, the "**2015 Act**") was seen as an important step for increasing the efficacy of India's judicial system and to help dispose of cases in a quick and effective manner.[26] Even though it was for "commercial matters", but reports have stated that nearly 51.4% of the civil disputes as of 2013 (32,656 cases) were commercial disputes[27] meaning that the commercial courts exercised jurisdiction over the bulk of civil litigation.

14.5.2 Important Definitions under the Act

a. Commercial Disputes[28]: The definition has been made as broad and exhaustive as possible by attempting to bring within its ambit the widest number of possible cases that are related to business transactions.[29] In it, the legislature opted to specify 22 transactions, which would qualify as commercial disputes under the 2015 Act. The transactions specified are:

1. Ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;
2. Export or import of merchandise or services;
3. Issues relating to admiralty and maritime law;
4. Transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;
5. Carriage of goods;
6. Construction and infrastructure contracts, including tenders;
7. Agreements relating to immovable property used exclusively in trade or commerce;
8. Franchising agreements;
9. Distribution and licensing agreements;
10. Management and consultancy agreements;
11. Joint venture agreements;
12. Shareholders agreements;
13. Subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;
14. Mercantile agency and mercantile usage;
15. Partnership agreements;
16. Technology development agreements;
17. Intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;
18. Agreements for sale of goods or provision of services;
19. Exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;
20. Insurance and re-insurance;
21. Contracts of agency relating to any of the above; and

[26] Kandla Export Corporation v. OCI Corporation, 2018 SCC 170.
[27] *Id.*
[28] The Commercial Courts Act, 2015, §2(1)(c).
[29] Dhir & Dhir Associates, *Article on Commercial Courts Act*, https://www.dhirassociates.com/images/Article_on_Commercial_Court%27s_Act.pdf (last visited May 15, 2020).

22. Such other commercial disputes as may be notified by the Central Government.[30]

Importantly, as per the explanation to Section 2(1)(c), disputes involving the realisation of monies with regard to immovable property or for any other relief considering immovable property shall also be considered "commercial" in nature. Also, disputes involving States and its instrumentalities shall still be within the purview of a 'commercial dispute'.

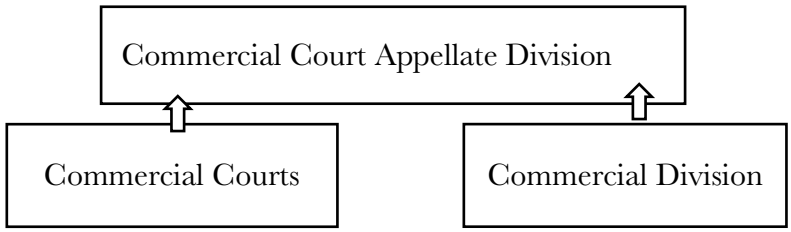
b. Specified Value[31]: Specified value is defined as the value of the subject matter in respect of a suit, as determined in accordance with Section 12 of the 2015 Act and which shall not be less than Rs. 1 Crore or such higher value as may be notified by the Central Government.

A detailed methodology was also provided to arrive at the specific value of the suit. It focused and accommodated instances wherein the subject matter of the dispute differs from being movable, immovable or intangible and shall be a cumulative of the claim and counter-claim, if any.

Despite the definitions the Supreme Court had specified that if a matter is brought forth wherein the value of the suit is below the pecuniary jurisdiction and the matter is claimed to be arising out of a commercial dispute, it is the duty of the plaintiffs to establish that it is.[32]

14.5.3 Constitution of Courts

The Act, in its very essence, changes the structure of fora that will hear 'Commercial Disputes'. It provides for the establishment of Commercial Courts/ Commercial Division and Commercial Appellate Division.[33]



a. Commercial Courts: The State Government after consulting with the concerned High Court may constitute an appropriate number of Commercial Courts at District level, as it may deem necessary for the purpose of exercising the jurisdiction and powers conferred on those Courts under this Act.[34]

It also provides that the State Government shall notify the local limits for exercising jurisdiction and also accommodate for instances increasing or reducing its limit, by

[30] This particularly addition allowed for a certain amount of flexibility whereby the central government would be able to expand the list if need be.
[31] The Commercial Courts Act, 2015, §2(1)(i).
[32] Shriram EPC v. Rioglass Solar SA, 2018 SC 1471.
[33] The Commercial Courts Act, 2015, ch. III.
[34] *Id.*, §3(1).

notification[35] and appoint judges with adequate Commercial knowledge,[36] Both functions are to be done after consultation with the High Court and its Chief Justice.

b. Commercial Divisions of High Courts: In all High Courts, having ordinary original civil jurisdiction, the Chief Justice of the High Court will constitute Commercial Division[37] and also appoint judges who have knowledge in dealing with matters of commercial disputes to the bench.[38]

c. Commercial Appellate Division[39]: The Chief Justice of the concerned High Court shall, by order, constitute Commercial Appellate Division having one or more division benches and appoint judges with appropriate experience in dealing with commercial disputes.

14.5.4 Jurisdiction of Courts

a. Commercial Courts: For the purposes of this section, a commercial dispute shall be considered to arise out of the entire territory of the State over which a Commercial Court has been vested jurisdiction and if it is of a Specified Value[40], if the suit or application relating to such commercial dispute has been instituted as per the provisions of Sections 16 to 20 of the Code of Civil Procedure, 1908 (5 of 1908).[41]

b. Commercial Divisions of High Courts[42]: All suits and applications which are concerned with commercial disputes of a Specified Value shall be filed in a High Court having such ordinary original civil jurisdiction which thereby will be heard and dealt by the Commercial Division of such High Court.[43] Also in the event of a counter-claim it shall be assigned to the Commercial Court in the manner specified.[44]

c. Bar on Jurisdiction:

   i. Bar against revision application or petition against an interlocutory order[45] - disregarding anything contradictory in any other Statute, no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction; Any such challenge, shall only be raised in an appeal subject to Section 13.

   ii. Section 11 of the 2015 Act, stipulates that Commercial Court or any Commercial Division is not empowered to adjudicate upon any specified suit, application or proceedings linking to a commercial dispute in relation of which the jurisdiction

[35] *Id.*, §3(2).
[36] *Id.*, §3(3).
[37] *Id.*, §4(1).
[38] *Id.*, §4(2).
[39] *Id.*, §5.
[40] Dhir & Associates, *supra* note 29.
[41] The Commercial Courts Act, 2015, §6.
[42] *Id.*, §7.
[43] Samsung Leasing Ltd. v. Samsung Electronics Co. Ltd. & Anr, 2017 Del 9374.
[44] The Commercial Courts Act, 2015, §9.
[45] *Id.*, §8.

of any such civil court is barred expressly or impliedly by any other law for the time being in force in the territory.

d. Arbitration Matters[46]:

i. For International Commercial Arbitration, all applications or appeals, which are arising out of such arbitration, will be heard and dealt with by such Commercial Division where Commercial Division has been established in the concerned High Court.[47]

ii. In case of any other Arbitration, all those that have been filed on the original side of the High Court shall be heard and disposed of by the Commercial Division[48] and those that would ordinarily lie before any principal civil court of original jurisdiction in a district shall be heard and disposed of by the Commercial Court with jurisdiction.[49]

14.5.5 Appeals and Transfer of pending cases

a. Appeals: It is stipulated that wherein a party is aggrieved by the ruling of a Commercial Court or the Commercial Division, they may file an appeal with the Appellate Division within 60 days from the date of judgment.[50] It is stipulated that such appeals need to be adjudicated in an expeditious manner, specifically within 6 months from date of its filing.[51]

b. Transfer of pending cases: Incorporating the important suggestions brought for in the 188th (2003) and 253rd (2015) Law Commission Reports, the need to transfer the pending litigation from civil courts to the commercial side has been realized.[52]

14.5.6 Procedural Changes

a. Timelines[53]: In the 2015 Act, to ensure that the motive of speedy resolutions are effected, necessary changes were required to be added and adapted specifically in the Civil Procedure.

The prima facie issue was the delay caused by the extra-long filing timelines that was allowed to parties and therefore it was necessary to incorporate shorter timelines to enable speedy to disposal of the matter and therefore limit the scope of courts to condone delays. Other aspects, which outline the move to ensure expeditious disposal were: recording of evidence on a day-to-day basis; 6-month period for disposal of appeals and denial of adjournments on ground of advocate not being present.

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[46] The appeals and applications have been referred with the disposal manner specified in the Arbitration and Conciliation Act, 1996.
[47] The Commercial Courts Act, 2015, §10(1).
[48] *Id.*, §10(2).
[49] The Commercial Courts Act, 2015, §10(3).
[50] *Id.*, §13(1).
[51] *Id.*, §14.
[52] *Id.*, §15 (provided that they meet the specified value and commercial dispute definition requirements).
[53] *Id.*, ch. VI.

TABLE 1: Timelines under the Commercial Courts Act	
Proceeding	**Deadline**
Written Statement/Counter Claim	To be filed within 30 to 120 days from the date of service of summons.[54]
Inspection/Filing of Documents	Inspection to be completed within 30 days from filing of written statement. An additional 30 days may be granted if sufficient grounds are present.[55]
Admission/denial of Documents	To be completed within 15 days from when inspection is completed.[56]
Case Management Hearing	Hold first hearing within 4 weeks of Affidavit of admission/denial being filed by parties.[57]
Framing of issues and conclusion of oral arguments	To be closed within 6 months from the first case management meeting.[58]
Written Arguments	To be submitted 4 weeks prior to oral hearings.[59]
Judgment	Commercial Court, Commercial Division or Commercial Appellate Division shall render judgement within 90 days from conclusion of arguments.[60]

b. Costs: A lot of talk had happened about how the litigants unethically tried to subvert the proceedings and delay it for their own *malafide* benefit by filing frivolous applications, false counterclaims and meritless appeals. The 2015 Act, specified that costs would follow such vexatious applications and schemes[61] and even if they denied reasonable settlement offers without appropriate justification.

c. Streamlined procedures: The 2015 Act stipulates clear and detailed procedure by affecting relevant changes in the Civil Procedure Code with a view to ensure effectiveness in the process and thereby in the adjudication of the case.

It is important for parties to abide by the procedures with care and caution because if they miss out they may be barred from relying upon it. This is a slightly arduous task in practice.

d. Case Management Hearings: One of the key elements to ensure a speedy trial was based on summarily discussing with both parties and the Court, timelines precisely for various proceedings and filings that are so required under that particular trial. Foreign courts where Case Management is an essential and integral part of the legal system quite predominantly follow this system.

The Supreme Court had opined that upon filing of suit, the trial court ought to set timelines for filings and pleadings and parties should abide by these dates.[62]

The 2015 Act mandated that the court hold a meeting with the parties and determine a timeline for proceedings like, recording of evidence, filing of written arguments, commencement and conclusion of oral arguments.[63]

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[54] CODE CIV. PROC., Proviso to Order 5 Rule 1.
[55] *Id.*, Order 9, Rule (3)(1).
[56] *Id.*, Order 11, (4)(1).
[57] *Id.*, Order 25-A.
[58] *Id.*, Order 25-A.
[59] *Id.*, Order 28.
[60] CODE CIV. PROC., Order 20.
[61] The Commercial Courts Act, 2015, sched., § 2.
[62] Rameshwari Devi v Nirmala Devi, (2011) 8 SCC 249, at para 52.
[63] The Commercial Courts Act, 2015, sched., § 7.

e. Summary Judgment: The concept of summary judgment is similar in nature to summary suits as specified under Order 37 of the Civil Procedure Code. It is more often than not seen in cases without any substance, which linger in courts for long periods. This is due to the tedious processes that must be adhered to before a judgment can be rendered. These hamper effectiveness and create an additional burden. Therefore the 2015 Act specifies that either party in the interest of expeditious trial may seek a summary judgment and the Act further lays down the instances and procedures wherein parties may seek summary judgment.[64] Discretion has been granted upon the court but it has the duty to strike a balance between providing equal opportunity, protection to each litigant and ensuring that the principles of natural justice are upheld.

It can be seen that the changes effected from the existing set of statutes and legislations were deemed necessary for the purpose of ensuring faster resolution and thereby increasing confidence in the justice system.

14.6 DRAWBACKS OF THE COMMERCIAL COURTS ACT, 2015

The provisions and the overall object of the Act are well intentioned. With speedy resolutions at the forefront, the Act has come up with various aspects to ensure that this is met, whilst bringing in techniques to strike the required balance between following due procedure and ensuring that frivolous delays and *malafide* cases are curtailed.

Nonetheless, as it is with the case of statutes, the practical downsides and its implementation issues are always brought forth once it is enacted, likewise with the 2015 Act, there were pertinent issues with implementation faced by courts.

14.6.1 Definition of 'Commercial Disputes'

Despite attempts to give the definition the widest scope possible, it was criticised for listing out the transactions and thereby limiting the scope indivertibly. The definition of commercial dispute as it stands, gives potential for debates and issues to arise as to whether a dispute is a commercial dispute at all.

When examining the transactions listed, one can notice that whilst most are clear but some cause unnecessary limitations and conflicts. For example, clause (xiii)[65] refers to disputes over subscription and investment agreement and then limits it to the service industry only, whilst in all likelihood the chance of a dispute arising in manufacturing or trading sector is also quite possible, thereby creating confusion as to whether or not commercial courts will have jurisdiction over the matter.

To give it a wide ambit the legislators could have merely defined it to include all commercial disputes arising out of or in relation to commercial transactions,[66] thereby limiting its scope to include only those disputes as commercial disputes, which are similar to or are explicitly listed in the 2015 Act.

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[64] CODE CIV. PROC., Order 13A.
[65] The Commercial Courts Act, 2015, §2(1)(c).
[66] Qatar Airways v. Airports Authority of India & *Anr*, (2017) Del 8088.

Intellectual property is of paramount importance to business houses and the clause dealing with it could be said to not fully cover the requisite aspects pertaining to protection of IP, for example, when dealing with confidentiality.

The grey areas in the definition have opened up scope for exploitation by lawyers who can question the jurisdiction of the court and thereby prolong the trial, defeating one of the key purposes of the 2015 Act.

14.6.2 Specific Value, definition & calculation

Whilst the intent is good to ensure that high value transactions are brought into the ambit of Commercial Courts and it also provide a method of determination of specified value, the pertinent issue that arises which will invariably become a subject of debate is with regard to the valuation of evidence and court fees. For example, in a shareholders' dispute relating to shares, even though the court fee legislation of a state may not provide for an ad-valorem court fee, the valuation of shares can become a contentious issue in such suits involving evidence as to share valuation for deciding whether it would come within the pecuniary jurisdiction of a Commercial Court.

14.6.3 Other issues

a. Discovery: This is one of the most cumbersome administrative tasks of litigation, wherein the parties have to submit all relevant documents in relation to the dispute before the court. Whilst this provision is well taken but being able to submit all necessary documents within a strict timeline and without any recourse after the time limit may *prima facie* seem unfair.

b. Appointment of judges: The procedure and details regarding the requisite qualifications and appointment is left unanswered. Merely stating the judges should have knowledge of commercial disputes is vague and leaves room for multiple interpretations.

c. Costs: Whilst there are specifications on this, there is much that is left to the discretion of the judge and one cannot expect a dramatic change in the extent of cost that would be imposed by the courts.

d. Timelines: While the provisions for Case Management Hearings and for closing trials within 6 months are noble in thought, there are apprehensions that these would meet the same fate of several other legislations, which have tried to fix specific timelines for conduct and disposal of judicial and quasi-judicial proceedings.

e. Appeals: There is a lot of debate regarding interpretation of Section 13; whether or not it includes all orders as well. If a wide interpretation is given, then it again exposes the commercial courts to a litany of cases, which was not the intent. Therefore, more clear provisions with regard to appeals are needed.

f. Summary Judgement: While, it has been simplified in comparison to CPC, but there is need for greater detail to increase the efficacy of the Act. Even in cases attracting summary procedure, courts in India have been liberal in granting leave to defend

and that too without putting conditions and if the same approach is continued, the object of having such procedure for summary judgement may not be achieved.

g. E-Facilities: The suggestions of e-filing, video conferencing of witness for evidence, and use of the latest technology will go a long way in bringing these courts at par with the systems being followed in some countries. It is relevant to note that change is already underway but the rate of adoption and adaptation to change and technology is too slow in a fast-changing world.

Finally, unless Commercial Courts are set up in all the districts by all States within a short span of time, sufficient number of judges are appointed to the Courts, appropriate infrastructure is provided, talented judges are appointed, trained and competent persons are selected, based on merit, to head these courts, and there is a change in the very mindset and attitude of both the judges and the lawyers functioning in the Courts, the object of the Act may not be achieved at all.

Overall, it can be noted that there is a gap between the intent of the envisaged provisions and the practical scenario, it will be crucial for it to be monitored and changes brought in to ensure that the sluggish regime changes.

14.6.4 Reforms Required

- Most importantly, the Act should be revised specifically with regard to the definition given to commercial disputes. Understandably, it has to strike the right balance between ensuring that it is wide enough to encompass all commercial disputes but limited so as not to bring within its ambit a litany of matters and defeating the intent of the Act.
- Another notable suggestion was with regard to the valuation of suit being kept at Rs. 1 Crore could be deemed to be kept at an exorbitantly high pecuniary level, whereby intending to disregard less valued matters but which may be of importance.[67]
- Stipulating qualification of judges, was a necessary addition, however it is further essential to ensure that proper guidelines are laid down to prescribe other aspects such as experience and expertise that have been left ambiguous.
- Much like foreign jurisdictions there is need for the introduction of Alternative Dispute Resolution mechanism. But the same should be made mandatory to help in the amicable settlement of disputes and in an attempt to reduce the burdens of courts.
- All in all, there is need to expand or further explain the provisions which are open ended and can be the cause of additional burden. This can be achieved by doing a proper compatibility check with the provisions of the Act as well as the impact on the judicial system and case disposal timelines.[68]

[67] AMEEN JAUHAR & VAIDEHI MISRA, *supra* note 9.
[68] The Commercial Courts Act, 2015, §17.

14. 7 COMMERCIAL COURTS (AMENDMENT) ACT, 2018

By December 2017, nearly 247 commercial courts were established in various districts across the country by the state governments to improve the effectiveness of the Act. An ordinance was promulgated[69] which later got assent and became an amendment to the 2015 Act, through The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (hereinafter the 2018 Amendment).[70]

14.7.1 Key Changes

S. No.	Changes Made in	2015 Act	2018 Amendment
1.	Name of the Act	Commercial Courts, Commercial Division & Commercial Appellate Division of High Courts Act, 2015	Changed to, Commercial Courts Act, 2015[71]
2.	Pecuniary Jurisdiction	It was stipulated at matters valued at INR 1,00,00,000/- or above.	Decreased the limit to INR 3,00,000/-.[72]
3.	Hierarchy of Courts	State governments may set up commercial courts at the district level, in areas where high Courts do not have original jurisdiction. No provision with regard to appellate divisions at the district level.	Introduces Commercial Courts even in jurisdictions where the concerned High Courts have Ordinary Original Civil Jurisdiction; Introduces Commercial Appellate Courts; and Splits Commercial Courts in two types.
4.	Appointment of Judges	The 2015 Act, specified the need for the appointment of judges by State Governments with the concurrence of the Chief Justice of the High Court	Alters the provision to "*may*", instead of "*will*".
5.	Pre-institution Mediation[73]	No provision	Mandates that pre-institutional mediation should happen and an amicable settlement attempted to be reached. Mandatory where there is no requirement for an urgent relief. For this purpose, bodies under the Legal Services Authorities Act, 1987 will be brought in. They shall be required to complete the process within 3 months.
6.	Counter-claims	Section 9 allowed for transfer of such counter-claims from a civil court to a commercial court.	Section 9 omitted by 2018 Amendment.

i. Name of the Act: Initially the elongated name, created confusion as to whether these courts were merely a separate division of the High Courts or new courts. If they were merely separate divisions of the High Courts, then the Act did not bring about any significant change given that the High Courts were already functioning with commercial benches. The name change helps straighten things up and Commercial

[69] Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018.
[70] Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 [hereinafter Commercial Courts (Amendment) Act, 2018].
[71] Commercial Courts (Amendment) Act, 2018, §2 (Amendment to long title).
[72] *Id.*, § 4 (amendment to section 2).
[73] *Id.*, §11 (inserting Section 12A into the Act).

Division of High Court under the Act refers to newly constituted courts to specifically deal with commercial disputes within the valuation.

ii. Pecuniary Jurisdiction: A lot of criticism had been levelled against the Act with respect to its applicability to high valued commercial disputes only and thereby ignoring the less valued ones. With regard to that specifically, the reduction in the pecuniary jurisdiction to INR 3 Lakhs is a good welcome move.

The cases considered for the Ease of Business Report are the ones with claim value worth 200% of income per capita or $5,000 whichever is greater.[74] This led to data regarding the city civil court being considered for gauging the efficiency of enforcement of contracts in India as opposed to the commercial courts and divisions, which were constituted under the Act.

However, the rationale behind having this high pecuniary jurisdiction has been completely ignored. To reduce the burden of the courts and bring in only high value commercial matters, the changing of the specified value to a lower valuation will attract within its ambit significant amount of litigation and thereby increase the burden of the courts.

It will be important to see how the expediated timelines, mandatory mediation and CPC amendments help quick disposal of commercial disputes. Again, implementation becomes key and needs to be observed over time.

iii. Hierarchy & Structure of Courts[75]: The hierarchy and the structure of the Commercial Courts setup was changed to establish Commercial Appellate Courts and Appellate Divisions were established.

Commercial Courts in Jurisdictions where High Courts have Ordinary Original Jurisdiction – The 2018 Amendment provides that for places where the High Court has Ordinary Original Jurisdiction, a commercial court at the district level shall be established. The state government may specify the pecuniary jurisdiction of such Commercial Courts; however, it cannot be less than INR 3 Lakhs or more than the pecuniary jurisdiction of the District Courts in the said areas.

Thus, Commercial Divisions would also have jurisdiction over disputes, which fall within the pecuniary thresholds of the Commercial Courts. This derogates from the actual intent, as this change makes it more likely than not for the High Court to be dealing with low-value matters hence increasing the burden significantly.

Commercial Court below the level of District Judge in jurisdictions where High Courts have no ordinary original jurisdiction - The 2018 Amendment now provides for two types of commercial courts in jurisdictions wherein the high court does not exercise ordinary original civil jurisdiction. The Courts are: 1. Commercial Court at District Judge level; and 2. Commercial Court below District Judge level.

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[74] Ashish Kabra & Mohammad Kamran, *Amendments to the Commercial Courts Act*, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/180516_A_Amendments-to-the-Commercial-Courts-Act.pdf. (Last visited 18 May 2020).

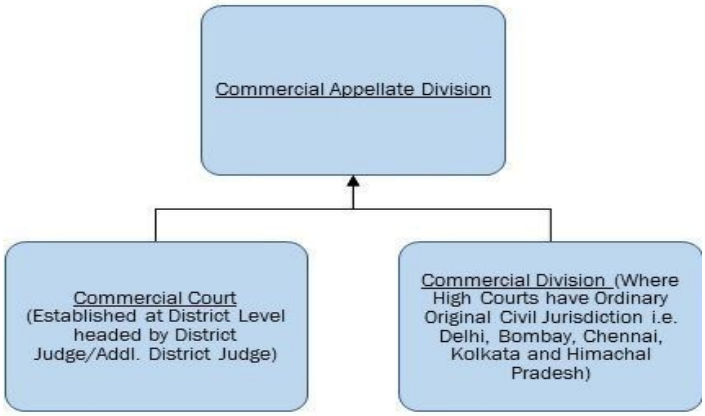
[75] *Id.*

The intent of providing such courts would be to ease the burden on commercial courts and also on Commercial Divisions of High Courts. This hierarchy also allow for mechanisms, which may in future regulate and curtail frivolous appeals.

Despite not being clearly put out, it may be interpreted that this bifurcation allows for higher valued matters to go to the District Judge level Commercial Courts and the lower valued ones to the Commercial Courts below District Judge level.

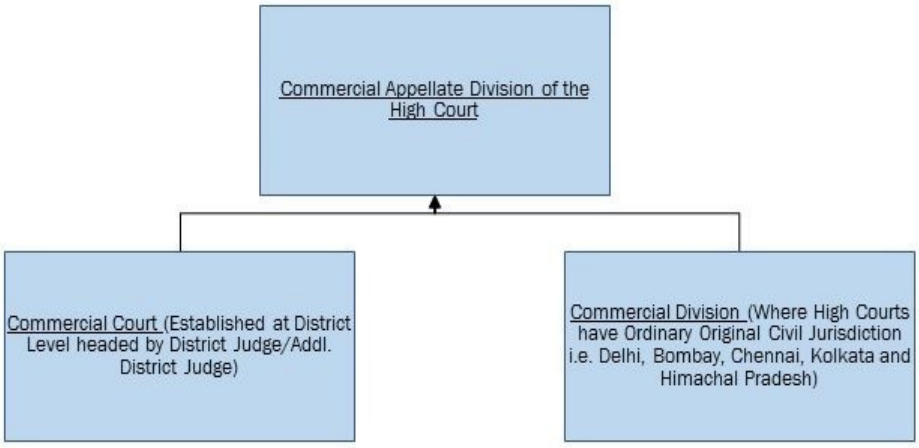
Commercial Appellate Court - The Ordinance further envisages the establishment of Commercial Appellate Courts in jurisdictions where the High Court does not exercise OOC jurisdiction. Appeals from Commercial Courts below the level of District Judge shall lie before the Commercial Appellate Court.

Pre-Amendment Structure:[76]



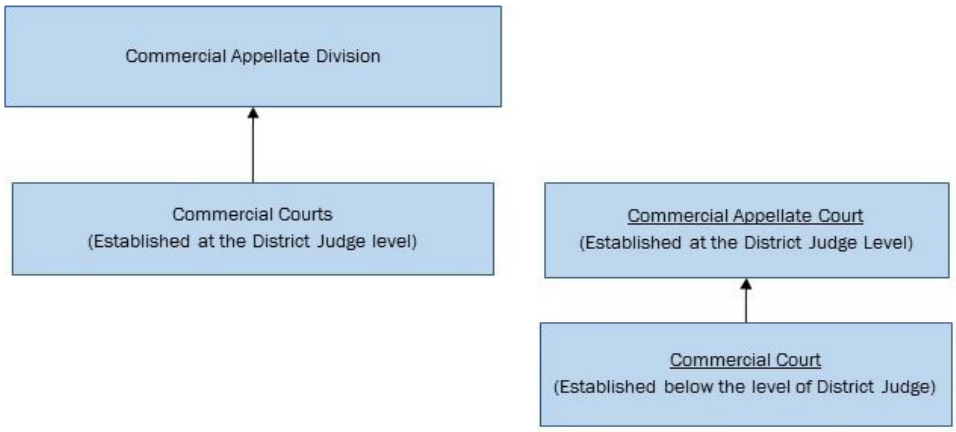
Post Amendment:

(Where High Courts exercise Ordinary Original Jurisdiction)



[76] *Id.*

(where High Courts don't exercise Ordinary Original Jurisdiction)



iv. Appointment of Judges: This has been one of the most critically questioned changes, wherein now the state governments have been allowed to appoint judges to the courts without receiving consensus from the judiciary. This at the face of it, may seem to be a violation of judicial independence and may be subjected to constitutional challenges, as the amendment allows interference of the executive in judicial matters and is a threat to its independence.

It will be important to see how things pan out. Furthermore, an issue still persists with regard to the process of appointment; the requisite qualifications and other critical details need to be clearly ironed out by the legislature further.

Furthermore, with regard to this particular point there are multiple other issues that need to be conclusively addressed, other issues about the requisite knowledge (qualification of the Commercial Court Judge) needs to be clarified further to ensure there is no vagueness and furthermore, for the executive there is a need to ensure and curtail the number of vacancies ,. In recent times it has become apparent that the causation for delay and unnecessary burden is the dearth in the number of judges and capacity not being maintained to the fullest.

v. Pre-Institutional Mediation: An important addition was the mandatory pre-mediation procedure for commercial disputes. Seeing from foreign jurisdictions it is seemingly possible that many disputes may easily be resolved amicably rather than being dragged through cumbersome litigation.

The issue however is the definition of an "*urgent matter*" has not been provided and left to interpretation. When the basis of going ahead for litigation or mediation has been rested upon the urgency of the matter, it was important for the legislature to provide or attempt to outline the situations wherein the matter can easily be adjudged whether or not it is urgent.

Furthermore, there has been no specification or guidelines on setting up the infrastructure to accommodate mediation and allocation of resources to sustain this. All in all, the Amendment is a good effort to attempt to resolve issues and reduce the burden on courts.

vi. Counter-claims: The provision for allowing of transfer of existing counter-claims suits from civil to commercial courts was a process which allowed for reducing the burden of commercial courts. The intent was more or less being defeated.

It appears that this change has been made considering the reduction of the specified value to three hundred thousand. It may also be noted that pursuant to Order VIII Rule 6A, a counterclaim can only be made up to the pecuniary limit of the jurisdiction of the court.

In a nutshell, the 2018 Amendment is a mixed bag; whereas the reduction of the pecuniary jurisdiction and addition of mandatory mediation are positive steps. On the other hand, there is a need to provide further clarity with regard to appropriate determination of the jurisdiction of commercial courts and the procedure of appointment of judges by the executive.

14.8 INTERPRETATION OF "COMMERCIAL DISPUTE" & APPLICABLE RULES

The Commercial Courts Act defines a "commercial dispute" broadly to mean any dispute arising out of a commercial transaction. They include, *inter alia*, export or import of merchandise or services; trade, financial services, insurances, investments, intellectual property rights, or such other commercial disputes notified by the Central Government etc. Moreover, a dispute does not cease to be a commercial dispute if it involves action for recovery of immovable property or other incidental reliefs or the other contracting party is a State or a private body carrying out public functions.[77] However, the objectives of the Act limit this broad definition of the enumerated forms of commercial disputes to those having a specified value of the subject matter.[78]

Further, in order to streamline the trial procedure and expedite adjudication in commercial disputes, the Act amended the Civil Procedure Code, 1908 ("CPC") as applicable to commercial disputes. Some of the important amendments include restricted timeline for filing written statements, submission of written statements in the prescribed format, application for summary judgment of a claim or a part thereof. Strict timelines prescribed for disclosures, discovery and inspection of documents, and other trial procedures including pronouncement of judgment within ninety days of conclusion of arguments.[79] The Act provides for the amended CPC to prevail in case of conflict with any provisions of any rule of jurisdictional High Court or any state amendment to the CPC.[80] The Indian judiciary, in tandem with the object and intent of the Act, in numerous cases applied the literal interpretation of the Act, and forbade to condone delay in filling belated written statements.[81] Further, the Bombay High Court has clarified that, "Amendments introduced

[77] The Commercial Courts Act, 2015, §2(1)(c).
[78] *Id.*, §2(1(i) r.w. §12.
[79] *Id.*, §16 r.w. sched.; *See also* Bharat Bhogilal Patel v. Leitz Tooling Systems India (P) Ltd., 2019 SCC OnLine Bom 890.
[80] The Commercial Courts Act, 2015, §16.
[81] M/S SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd., 2019 SCC OnLine SC 226; Axis Bank Ltd. v. Mira Gehani 2019, SCC OnLine Bom 358.

to CPC by the Commercial Courts Act are only applicable to Commercial Disputes of a Specified Value and not Commercial Disputes not of a Specified Value."[82]

To further expedite commercial dispute resolution and monitor the progress, the Commercial Courts (Statistical Data) Rules, 2018 was published. Now, every Commercial Court, Commercial Appellate Court, Commercial Division and Commercial Appellate Division of all High Courts in India is required to publish statistical data by the tenth day of every month on the concerned High Court's website.[83]

Additionally, in pursuance of the object and intent of the Commercial Courts Act, the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 has been published prescribing the procedure for mandatory Pre-Institution Mediation conducted by the Legal Services Institutions.[84] Further, the Act has empowered the courts to conduct Case Management Hearing[85] in pre-trial or during trial under certain circumstance. This judicial process provides effective, efficient and purposeful judicial management of a case so as to achieve a timely and qualitative resolution of a dispute.[86]

Considering all the measures taken for speedy disposal of cases, the Act, has failed to demarcate the jurisdictions of the Commercial Courts and commercial Division of the High Court as both their pecuniary jurisdictions are at rupees three lakhs.[87] Further, the purpose of the Act to expedite the commercial proceedings has been dampened by the recent Amendment of 2018 which drastically reduced the pecuniary jurisdiction of the courts from above one crore rupees to three lakh rupees thereby opening the flood gates for numerous commercial dispute litigations. However, in their legislative wisdom, the mandatory pre-institution mediation prescribed aids to curb these commercial disputes reaching the courts.

14.8.1 Comparative Framework: USA & UK

In United Kingdom ("UK"), Commercial Courts were established in 1895 and in 1970 were recognized as a Queen's Bench division of the High Court. Civil Procedure Rules ("CPR") and Practice Directions govern the proceedings in the Commercial Court. Arbitration applications are dealt under Part 62 of CPR. A "commercial claim"[88] is described as *any claim* arising out of the transaction of trade and commerce and includes *inter alia* any claim relating to a business document or contract; the export or import of goods; etc. Whilst the Commercial Court remains an entirely appropriate forum for resolving most of the disputes, parties are encouraged to consider the use of Alternate Dispute Resolution as an alternative

[82] Bharat Bhogilal Patel v. Leitz Tooling Systems India (P) Ltd., 2019 SCC OnLine Bom 890.
[83] The Commercial Courts Act, 2015, §17 r.w. Commercial Courts (Statistical Data) Rules, 2018, Rule 3.
[84] The Commercial Courts Act, 2015, §12A r.w. Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018.
[85] CODE CIV. PROC., Order XV-A (inserted by the Commercial Courts Act, 2015).
[86] LAW COMMISSION OF INDIA, REP. NO. 230, REFORMS IN THE JUDICIARY- SOME SUGGESTION (Aug. 2009), http://lawcommissionofindia.nic.in/reports/report230.pdf.
[87] The Commercial Courts Act, 2015 §§ 6,7 r.w. § 2(1)(i).
[88] Civil Procedure Rules, 1998 Rule 58.1(2) (UK).

means of resolving disputes or particular issues.[89] Additionally, the Courts encourage the early neutral evaluation.[90] The purpose of ENE is to help the parties settle the case at an early stage.[91] To avoid delay and cost, the courts are given an over-riding objective to deal with cases justly.[92]

In United States of America ("US"), 'commerce' is concurrent to State and federal jurisdiction. To aid in commercial dispute resolution, Business Courts and commercial dockets are established at various States including Delaware, Maryland, New Hampshire, New York etc..[93] Large commercial disputes are usually adjudicated in the adversarial US civil court system. The basic framework for litigation is consistent throughout the US.[94] Federal courts have limited jurisdiction and hear a civil claim where there is a federal question,[95] diversity of citizenship (corporation deemed citizen), amount in costs etc..[96] State civil court systems generally hear claims for monetary and equitable relief. For example, New York's Commercial Division of the Supreme Court (the trial court) addresses disputes concerning breach of contract or fiduciary duty, fraud, misrepresentation, and business torts. In certain circumstances, Federal courts can refer cases to arbitration, with the consent of the parties[97] or offer some form of ADR under the Alternate Dispute Resolution Act such as early neutral evaluation and minitrial.[98] However, courts do not generally compel parties to a large commercial dispute to use ADR. The Federal court refuse to refer to arbitration even when there is consenting parties if the issue involves constitutional violations or amount in controversy is greater than US$150,000.[99]

Drawing from the fruits of the successful UK and US legal regime, Indian law encompasses a wider definition and includes disputes arising out of transactions relating to aircraft and incidental matters etc.[100] This effectively brings a large number of disputes within the ambit of commercial disputes. However, unlike UK, the commercial claim in India is subjected to pecuniary jurisdiction. The concepts of minitrial and early neutral evaluation have been absorbed into as case management and mandatory pre-institution mediation. India's mandatory pre-institution mediation is in contrast to the optional remedy of ADR under the US federal law.

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[89] HM COURTS & TRIBUNAL SERVICE, THE COMMERCIAL COURT GUIDE, (10 ed, 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672422/The_Commercial_Court_Guide_new_10th_Edition_07.09.17.pdf.
[90] *Id.*
[91] Civil Procedure Rules, 1998 Rule 3.1(2)(m) (UK).
[92] *Id.*, Part 1, Rule 1.1.
[93] American Bar Association, *Recent Developments in Business Commercial Courts in the United States and Abroad,* (May 22, 2014), https://www.americanbar.org/groups/business_law/publications/blt/2014/05/01_renck/.
[94] Tai-Heng Cheng and Christopher Cook, Quinn Emanuel Urquhart & Sullivan LLP, *Litigation and enforcement in the United States: overview,* Thomson Reuters practical Law, (Feb. 1, 2017), https://uk.practicallaw.thomsonreuters.com/6-502-1160?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.
[95] 28 UNITED STATES CODE, §1331.
[96] *Id.*, §1332.
[97] *Id.*, §654.
[98] *Id.*, §651.
[99] *Id.*, §654.
[100] The Commercial Courts Act, 2015, §2(1)(c).

14.9 MANDATORY PRE-INSTITUTION MEDIATION

The Commercial Courts Act amended in 2018, in conjunction with the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (hereinafter referred as the "Pre-institution Mediation Rules") mandates the exhaustion of pre-institution mediation by the plaintiff in prescribed manner as a measure to curb unnecessary litigations.[101]

Section 12 A of the Commercial Courts Act, 2015, provides that when a suit under this Act does not contemplate any urgent interim relief, then it should be preceded by a pre-institution mediation[102] governed by the Pre-institution Mediation Rules. For the purpose of the mandatory mediation, Authorities constituted under the Legal Services Authorities Act, 1987 are authorized to conduct mediation.[103] The Authorities are mandated to complete the mediation process within a period of three months from the date of application made by the plaintiff.[104] An extension of the period of mediation by two months is permitted upon the consent of the parties.[105] The Act also excludes the period during which the parties remained occupied with the pre-institution mediation, from computation of limitation under the Limitation Act, 1963.[106] Settlement arrived during the mediation process has to be reduced into writing and signed by the parties to the dispute and the mediator.[107] Moreover, the settlement is given the same status and effect as if it is an arbitral award on agreed terms under Sub-section (4) of Section 30 of the Arbitration and Conciliation Act, 1996.[108]

The Pre-institution Mediation Rules prescribe in length the following procedure to be followed when initiating, conducting and settling the mediation process:

i. ***Application and Notice***: The mediation can be initiated with the Authority by a party only upon an application in the prescribed form and manner with a fee of one thousand rupees.[109] Upon receiving the application, the Authority issues a notice[110] in the prescribed form based on the nature of commercial dispute, territorial and pecuniary jurisdiction. The notice is sent through both post and electronic means to the opposite party to appear and give consent to participate in the mediation process to be held on the specified date which will be within a period of ten days from the date of issue of the notice. A final notice is sent in the same manner in the absence of a response to the previous notice.[111] The mediation process is treated as a non-starter and a report in the prescribed form is made and endorsed to both parties, if the final notice issued remains unacknowledged or the opposite party refuses to

[101] The Commercial Courts Act, 2015, §12A.
[102] *Id.*, §12A(1).
[103] *Id.*, §12A(2).
[104] *Id.*, §12A (3).
[105] *Id.*, §12A(3) proviso.
[106] *Id.*
[107] *Id.*, §12A(4).
[108] *Id.*, §12A (5).
[109] Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, Rule 3.
[110] *Id.*, Rule 3(2).
[111] Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 Rule 3(3).

participate in the mediation process.[112] An extension of maximum ten days will be granted upon a request seeking time for appearance made by opposite party.[113]

ii. ***Appearance***: If the opposite party fails to appear on the fixed date, the Authority treats the mediation process as a non-starter with a report in the prescribed form submitted and endorsed to both parties.[114] When both the parties appear and consent to mediation process, the Authority will assign a mediator and a fix a date for appearance before the mediator.[115] Thereafter, the Authority ensures that the mediation process is completed within a period of three months or with a further extension of two months with consent of both parties.[116]

iii. ***Venue and general principles***: The mediation process is to be conducted within the Authority premises.[117] Before commencement of mediation, both parties are to pay a mediation fee shared equally calculated in the prescribed manner based on the quantum of the claim.[118] The mediator should facilitate the voluntary resolution of the dispute and assist in reaching a settlement.[119] Further, the parties can appear before the mediator either personally or through a duly assigned representative or counsel.[120] The rules mandate that, the parties must participate in good faith with an intention to settle the dispute.[121] Strict confidentiality is to be maintained during the mediation process by all the concerned parties, their representatives and mediator. For this purpose, the mediator bans all stenographic or audio or video recordings of the mediation process.[122]

iv. ***Procedure of Mediation process***[123]: At the commencement of mediation, the mediator explains mediation process and fixes the date and time of each mediation sitting after consultation with the parties. The mediator is given the discretion to hold the proceedings with the parties jointly or separately during the course of the mediation process. During separate sittings, the parties can share with the mediator their settlement proposal and specify the portion which may be shared with each. Further, the mediator maintains the confidentiality of such separate sittings and shares only the permitted facts with the other party. The parties can exchange with each other their settlement proposals during the mediation sitting either orally or in writing.

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[112] *Id.*, Rule 3(4).
[113] *Id.*, Rule 3(5).
[114] *Id.*, Rule 3(6).
[115] *Id.*, Rule 3(7).
[116] *Id.*, Rule 3(8).
[117] *Id.*, Rule 4.
[118] *Id.*, Rule 11.
[119] *Id.*, Rule 5.
[120] *Id.*, Rule 6.
[121] *Id.*, Rule 8.
[122] *Id.*, Rule 9.
[123] *Id.*, Rule 7.

v. ***Settlement***[124]: When a mutually agreed settlement is reached, the mediator reduces it in writing in prescribed form and the parties and mediator affix their signature. Thereafter, an original copy of the settlement agreement will be provided to both parties and signed copy forwarded to the Authority. If a settlement is failed to be reached, or the mediator is of the opinion that the settlement is not possible, then a report in the prescribed form containing the reasons in writing will be submitted to the Authority by the mediator. After the mediation process is complete, except for the mediation application, notice and settlement agreement or failure report, no hard or soft copies of any documents including notes, communications between the parties etc. are to be retained beyond a period of six months either by the Authority or Mediator. The District Legal Services Authority then forwards the detailed data of the mediation to the State Legal Services Authority where it is maintained and published in the prescribed form and manner.

The Rules further prescribes the ethics to be followed by the mediator, inter alia, to uphold the integrity and fairness of the mediation process, ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the mediation process, disclose any financial interest or other interest in the subject-matter of the commercial disputes.

This mandatory pre-institution mediation clause is laudable as it facilitates to filter out frivolous commercial disputes and enables the parties to be brought to the negotiation table with a threat of a future stringent and time-bound litigation upon failure. This proves especially beneficial to patent disputes which are commercial disputes under the Act, to prevent infringement and avoiding years spent in cumbersome litigation. The flexibility that the Act provides in case of interim relief over mediation and the bar on civil revision of the application or petition form Commercial Courts is a buffer to long drawn out litigation. However, overshadowing its usefulness, the Act and the Rules, have failed to establish the nature of "urgent relief" for not initiating the pre-institution mediation, and this itself casts an obstacle in speedy disposal of case. Further, no sanction is prescribed for the non-appearance of parties thereby undermining the whole vision of pre-institution mediation for speedy disposal of the case. Lastly, in appointing the Legal Services Authority as the Authority for mediation, a crucial point of its already over-burdened status has been overlooked.

Constitutional Validity of such requirements: The Commercial Courts Amendment Act, 2018 introduced Section 12A to the Act, which provides that in cases where the suit does not contemplate any urgent relief, the parties will need to undergo mediation prior to the institution of the suit.[125] This requirement is similar to the mandate under Section 89 of the CPC.

The constitutional validity of Section 89 was challenged in the *Salem Advocate Bar Association case*. The Supreme Court rejected the constitutional challenge and held that, "*we do not find*

[124] Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018, Rule 7.
[125] The Commercial Courts Act, 2015, §12A.

that the said provisions are in any way ultra vires the Constitution. Neither Mr. Vaidyanathan nor any other learned counsel made any submissions to the effect that any of the amendments made were without legislative competence or violative of any of the provisions of the Constitution. We have also gone through the provisions by which amendments have been made and do not find any constitutional infirmity in the same." [126]

The Court did not record any arguments made by the petitioner against the constitutional validity of the amendments. Entry 95, List 1[127] of the Constitution of India allows the Central Government to enact any law on the jurisdiction and powers of all courts, except the Supreme Court of India, and Entry 77 of List 1[128] allows the Central Government to make any law on the jurisdiction and powers of the Supreme Court of India, thus these two entries, read with Article 246[129] seem to give the Central Government the authorization to impose the requirement of mandatory mediation.

In what cases can the pre-institution mediation be exempted: Section 12A provides, "*A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation.*"[130] Thus mediation is a mandatory requirement for the institution of every suit which does not contemplate any *urgent interim relief*. It is important to note that the legislature in its wisdom chose to insert the word "urgent" in the statute and thus every prayer for interim relief would not be sufficient to waive the requirement of mediation.

The Hon'ble Minister for Law and Justice made the following statement for describing Section 12A in the Parliament, "*Sir, one thing I would like to share with this House is that this is the most important commercial law initiative perhaps in the entire world where pre-mediation initiative has been given a very important focus. Suppose one partner has run away with all the profits. Then we need interim protection from the court. Therefore, the law says, 'except in the case of urgent interim relief, every commercial dispute must go to the mediation first'. Three months' period has been prescribed. First, you should use it. If you are not able to resolve, then come to the court. Therefore, pre-mediation litigation resolution is an important milestone.*"[131] Thus he elaborated the importance of mandatory mediation, and the need for courts to be satisfied with the urgency of the interim relief before they waive such a requirement.

It becomes necessary for us to examine which cases would satisfy the "urgent interim relief" requirement to be exempt from the mandate of Section 12A and two High Courts have passed judgments which provide us with an understanding of the same. The Telangana High Court in *M/s. M K Food Products v. M/s. H Food Products*,[132] held that Section 12A does not require the commercial court to determine whether the plaintiff is entitled to any urgent interim relief, the mandate of Section 12A is limited to the court in applying its mind to determine whether a particular suit contemplates any urgent relief. In this case, the plaintiff

[126] Salem Advocate Bar Association v. Union of India, (2003) 1 SCC 49.
[127] India Const. sched. 7, list 1, entry 95.
[128] India Const. sch. 7, list 1, entry 77.
[129] India Const. art. 246.
[130] The Commercial Courts Act, 2015, §12A.
[131] Rushab Aggarwal, *Mediation and Misinterpretation of Section 12A of Commercial Courts Act,* Bar and Bench (Jan. 8, 2019), https://www.barandbench.com/news/mediation-section-12a-commercial-courts-act.
[132] M/s. M K Food Products v. M/s. H Food Products, Civil Revision Petition No.3690 of 2018.

had filed a suit seeking an injunction restraining the defendant from infringing his copyright. The commercial court had returned the plaint on the ground that the plaintiff had failed to exhaust the mandatory requirement of mediation. In appeal the High Court held that, "*the very nature of a suit for injunction against infringement of a copyright, is such that urgent reliefs will invariably be contemplated.*" Thus, other similar cases of IPR infringement would also be exempt from the mandate of Section 12A, as they would also necessarily contemplate urgent reliefs.

The Madras High Court, in *Sathyam Wood Industries v. Adoniss (P) Ltd. and Ors.,*[133] was faced with the case of a timber merchant who had purchased goods from the respondent company. The goods were transported from Brazil by ship, and it was the plaintiff's case that he was not being allowed to collect the goods despite having made the full payment to the respondent, as a result of this the goods were damaged and he was continuing to suffer financial losses. The commercial court had rejected his suit under Section 12A for failing to resort to mediation, but the High Court reversed this finding. It held that the goods had been lying at the port for a considerable amount of time and further delay would cause irreparable loss to the plaintiff. It thus held that a case of urgency had been made, and the Commercial court was directed to consider the matter on merits.

Thus, from these two cases we can understand the meaning of "urgent interim relief" and if any suit does not meet these requirements then it can be rejected by the court under Order VII Rule 11(d) of the CPC[134] for failing to satisfy the conditions of Section 12A.

14.9.1 Comparative Jurisdictions

In UK, the preferred disposal system for commercial disputes is the Commercial Courts, but parties are encouraged by the courts to consider the use of alternate disposals including arbitration, mediation. The CPR through part 62 governs any arbitration applications to the Court. Additionally, for speedy disposal and eliminating frivolous cases the Courts encourage the parties to do Early neutral evaluation to settle the case at an early stage.[135] A party can apply for alternative form of disposal at any stage before the Case management conference. During the case management conference, the Judge, if he/she deems fit can recommend resolution through alternate settlement. If the parties are unable to agree upon a mediator, the Case Management Conference is mandatorily restored to enable the Court to facilitate agreement on a mediator. To avoid the cost of a restored Case Management Hearing, the parties can send to the Court their respective lists of available neutrals, so as to enable the Judge to suggest a name from those lists.[136] Further, to avoid delay and cost and ensuring cases are dealt expeditiously and fairly, the Courts are given an over-riding objective to deal with cases justly.[137]

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[133] Sathyam Wood Industries vs Adoniss (P) Ltd. and Ors., Civil Revision Petition (Madurai) No. 804 of 2019.
[134] CODE CIV. PROC., Order VII, Rule 11(d).
[135] Civil Procedure Rules, 1998, Rule 3.1(2)(m) (UK).
[136] HM COURTS & TRIBUNAL SERVICE, THE COMMERCIAL COURT GUIDE, (10th ed., 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672422/The_Commercial_Court_Guide_new_10th_Edition_07.09.17.pdf.
[137] Civil Procedure Rules, 1998, Part 1, Rule 1.1 (UK).

In US, generally, the federal courts adjudicate commercial disputes, however they refer cases to arbitration with the consent of the parties[138] or offer other forms of alternate dispute resolution under the Alternate Dispute Resolution Act which include the early neutral evaluation and minitrial.[139] It is to be noted that, the courts do not compel the parties to avail the benefits of alternate dispute resolution. Moreover, whenever the issue involves constitutional violations or amount in controversy is greater than US$150,000,[140] the federal courts refuse to refer to arbitration even if the parties consent to arbitration. Notably, the State of New York, as a step towards reducing the backlog of pending cases, had introduced in 2014 a pilot mandatory mediation program through the Commercial Division in New York County Supreme Court. It assigns every fifth case in a week for mandatory mediation. The project was concluded in 2016. Further, in 2017, by Administrative Order, a pilot project ("the Non-Division Pilot Project") was established in New York State where certain commercial cases not assigned to Commercial Division Justices are automatically referred to mandatory mediation in the ADR Program in accordance with the Rules and Procedures thereof.[141] Subsequently, by an Administrative Order in 2019, cases eligible for the pilot project were expanded to include those designated as "Business Entity," "Insurance," "UCC" and "Other Commercial" matters on the RJI.[142]

Turkey, like India, has made pre-institution mediation compulsory for commercial disputes. In 2019, amendments were made to Law no. 7155 entitled "Law on Commencement of the Proceedings Relating to Pecuniary Claims Originating from Subscription Contract". Article 20 of the Law regulated and amended Article 5/A of the Turkish Commercial Code as mediation to become a pre-condition for the claimant when initiating litigation.[143] The mediation is available only for the enumerated commercial disputes under the law including, all disputes arising from commercial relations between legal entities and/or natural persons, anti-trust suits and such like.

India, when compared to the major developed countries like UK and USA has taken a commendable step in making pre-institution mediation mandatory. This over the long run will ease the burden on the legal system and improve the commerce sector by saving precious time wasted in long drawn litigation.

14.10 IMPORTANT JUDGEMENTS

It is necessary to assess the impact of the Commercial Courts with regard to the nature of the commercial transactions that are brought forth for adjudication. Comparatively, Delhi High Court had lesser number of pending cases with a high disposal rate as compared to

[138] 28 UNITED STATES CODE, §654.
[139] *Id.*, §651.
[140] *Id.*, §654.
[141] *See* http://ww2.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml (last visited July 13, 2020).
[142] *Id.*
[143] Guden Law firm, *Mediation as a Pre-Condition for Commercial Disputes in Turkey, British Chamber of Commerce,* (2019), https://www.bcct.org.tr/news/mediation-as-a-pre-condition-for-commercial-disputes-in-turkey/67531.

the Bombay High Court (both cities are being evaluated for ease of doing business in India).[144]

One of the landmark decisions with regard to IPR was given in the case of *Guiness World Records v. Sababbi Mangal*[145], wherein the Delhi High Court observed that the Commercial Divisions have jurisdiction to hear matters that are pending regardless of whether it meets the pecuniary jurisdiction. This was done for particular enactments and specifically for Commercial Divisions.

In another Delhi High Court decision, it applied summary judgement in cases pertaining to passing off, the power granted to it under Commercial Courts Act. Summary judgement was particularly important for expediting the judicial process specifically in cases wherein the defendant cannot possibly present any reasonable case.[146]

A lot of debate had ensued with regard to the ambiguity that is presented in the sections pertaining to jurisdiction, especially in light of the changes brought forth. With regard to that, the Bombay High Court had opined that the amendments to CPC apply to Commercial disputes of a specified value only and that is the letter of the law as per Sections 4, 7 and 16.[147]

While analysing data from the cases decided by the Delhi and Bombay High Courts, it is apparent that nearly 50% or more of such cases are being resolved by mediation or are withdrawn before going ahead with trial. However, there was a significantly high pendency rate amongst those cases that were sent for trial.[148]

However, one can never say that the situation has completely improved with many cases still pending and unnecessary delays still occurring with vacancies of judges and other pertinent issues. There are cases that are still pending for over two years in the Bombay High Court wherein no hearing has taken place.[149]

It has been found that in nearly 450 cases of the Bombay & Delhi High Courts, no Case Management Hearing has taken place, which was stipulated to be mandatory and to be held within a specified period.[150] This moves to show that there is a serious gap with the provisions, the intent of the law and the implementation by the court.

14.11 COMMERCIAL COURTS IN KARNATAKA: A GROUND REPORT

Not going into the details of prior and subsequent history of the establishment of Commercial Courts in the state of Karnataka, when we commenced our empirical research in the month of June-July 2019 there were only three Commercial Courts for the entire State of Karnataka. Two of these courts were situated in Bengaluru and one was in Ballari.

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[144] AMEEN JAUHAR & VAIDEHI MISRA, *supra* note 9.
[145] Guiness World Records v. Sababbi Mangal CS (OS) No.1180/2011.
[146] SanDisk LLC v. Memory World, 2018 Del 11243*;* Ahuja Radios v A Karim, CS (OS) 447/2013
[147] Axis Bank Ltd. v. Mira Gehani, 2019 Bom 358; Bharat Bhogilal Patel v. Leitz Tooling Systems India (P) Ltd., 2019 Bom 890
[148] AMEEN JAUHAR & VAIDEHI MISRA, *supra* note 9.
[149] *Id*.
[150] *Id.*

Our purpose of doing the empirical study was to obtain first-hand experience of the functioning of these courts through data collection, interviews with the Judges and observation of the day to day court proceedings. To carry out the empirical study we not only prepared a data collection tool in the form of an excel sheet, but also obtained the necessary permissions from the appropriate authorities. The Registrar of the Court and the Judges were kind enough to grant us the permission to visit the court premises and observe court proceedings but were also generous enough to grant us access to the case files. The data was collected for a sample size of 45 Cases (10 more than the required number 35 which we were mandated under the project). The Data from the Cases was collected based on the following:

1. Court
2. Case Details:
    a. Case Name
    b. Case Number
    c. Section/Act
    d. Relief Sought (legal and monetary)
    e. Court Fee
3. Judicial Process:
    a. Date of Filing
    b. Date of Transfer
    c. Date of first hearing in the Commercial Court
    d. Time taken to hold first hearing
    e. Summons issued on
    f. No. of times summons Re-issued
    g. No. of hearings spent on Summons
    h. Time taken in Summons
    i. Appearance of Defendant on
    j. Written Statement filing Date
    k. Extension sought in filing written statement (if any)
    l. Time taken to file Written Statement
    m. Extension if any
    n. Date of framing of Issues
    o. Time taken for Evidence
    p. Time taken in Arguments
    q. Number of times Plaintiff Absent
    r. No. of times Court officials on leave
    s. Interim Applications (if any)
    t. Total number of IAs
    u. Time taken to pass orders
    v. Total number of Hearings
4. ADR:
    a. Pre-Institution Mediation (yes/no)
    b. Mediation (yes/no)

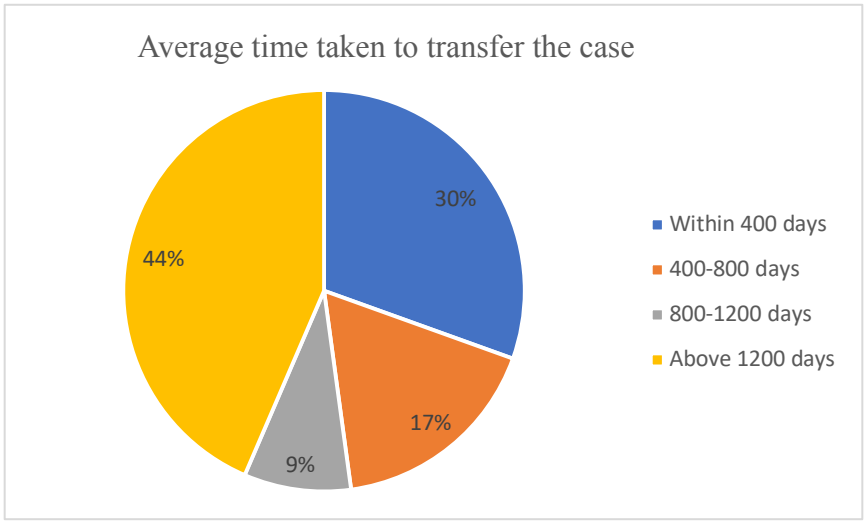
   c. Arbitration (yes/no)
   d. Lok Adalts/Conciliation (yes/no)
   e. Time taken in ADR
   f. Outcome (successful/unsuccessful)
5. Judgement:
   a. Time interval between last date of argument and till the posting of matter for judgement
   b. Date of judgement
   c. Total time taken to Deliver judgement
   d. Relief granted
   e. Brief Reasons
   f. Major Reasons for Delay
6. Miscellaneous

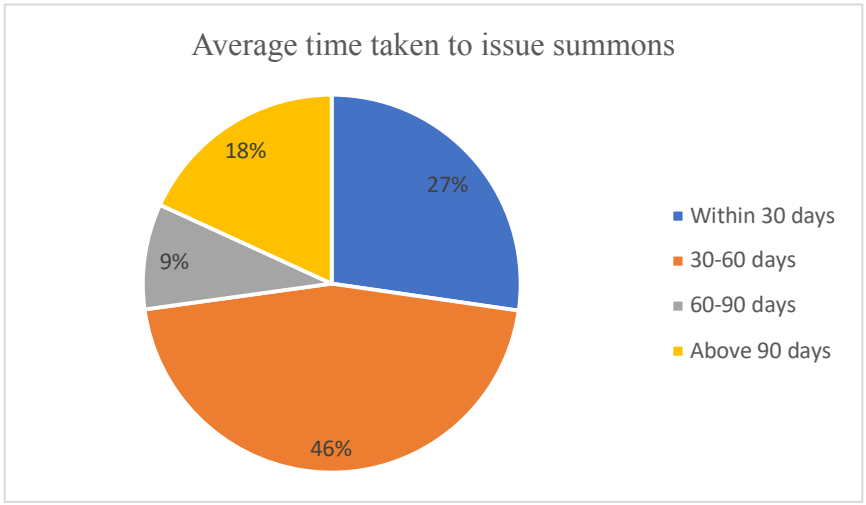
14.11.1 Analysis of Data Collected:

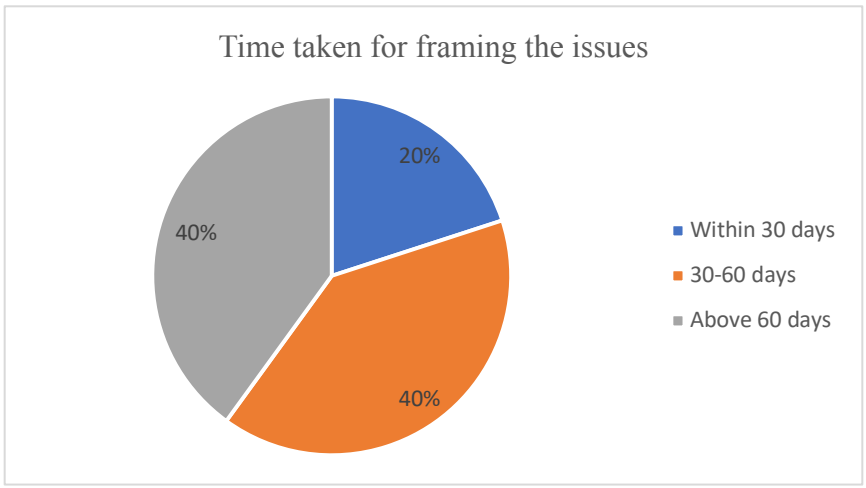
1. The Average Value of the Suit (excluding claim of interest) was 6,22,94,133.56 (6 Crores 22 Lakhs 94 thousand and 133.56). This value justifies the existence of specialised commercial courts for expeditious disposal of high value commercial disputes. However, post the 2018 amendment, the average value of the suits may decrease as the 2018 Amendment to the Commercial Courts Act has decreased the threshold of specific value to 3 lakh rupees.
2. Most of the cases were money suits claiming a fixed amount of money along with interest ranging from 1% to 24%. This demonstrates that there is no fixed standard for claiming interest. As most of these suits were pending before the commercial courts and the few in which decree was passed were ex-parte decrees, the average standard of interest granted by the courts was not fixed. However, in spite of this fact, it can be stated that there is a need to establish a fixed standard of granting interest in commercial matters.
3. Out of the 45 cases, injunctions (temporary or permanent) were claimed in only 4 suits and they were pending before the commercial courts as several interim applications were filed in these suits thus leading to delay in the disposal of case.
4. As majority of the cases that were studied had been transferred from other courts to the present commercial courts most of the cases were still pending at the stage of issuance of summons. In 44% of the cases the average time taken to transfer was more than 1200 days. This huge consumption of time in the cases resulted from the Government of Karnataka's trial and hit approach in establishment of commercial courts in the State of Karnataka. Designating, re-designating and again designating courts as commercial courts first in each district then commercial centres and then again designating more courts as commercial courts leads to expenditure of huge amount of time in transfers thus leading to delay in the final disposal of commercial disputes.
5. In 46% of the cases summons were issued within the time period of 30-60 days. While in 9% of the cases the court took more than 90 days to issue summons. The major reason for delayed issuing of summons was absence of parties in courts and

transfer of case from the place where the suit was originally filed to commercial court in Bengaluru.

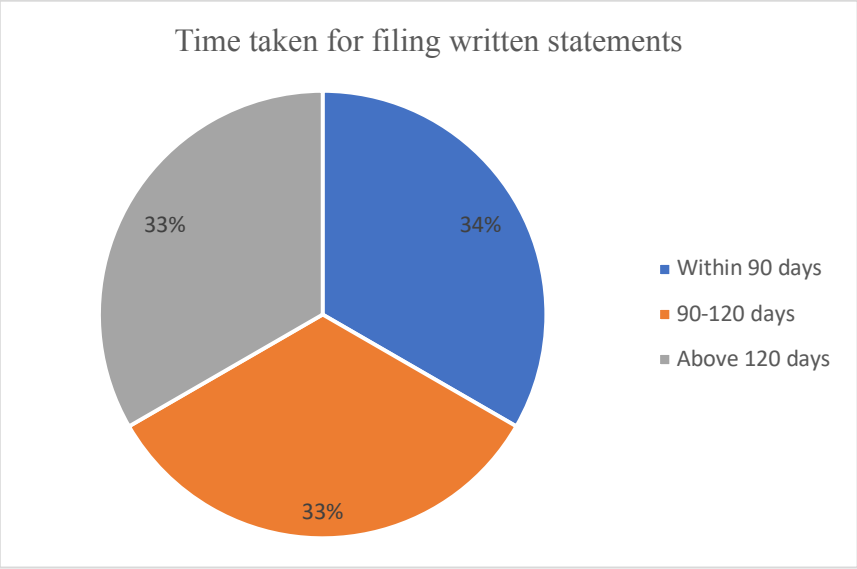
6. As far as filing of written statements is concerned the data is equally split to draw any tangible conclusion. The time taken by parties to file written statement is equally split between within 90-days, 90-120 days and more than 120 days. As with our earlier observation the major reason for delay in filing of written statement by the defendant was due to transfer of cases from outside Bengaluru to commercial courts in Bengaluru.







7. In 40% of the cases the Commercial Courts have taken between 30-60 days to frame issues, while in another 40% cases the court have taken above 60 days time to frame issued. Thus, as can be seen in 80% of the cases the courts have taken more than 30 days to frame issues. This lengthy time for framing of issues is highly undesirable on the part of the commercial court. If more than a month time is spent in just framing of issues then it will surely cause delays in the final adjudication of the dispute.
8. Out of the random sample of 45 cases only 6 cases were referred to the Pre-Institution Mediation. The reason for this low number of the cases referred for PIM are (i) The 2018 Amendment does not affect the suits that were instituted before the amendment. (ii) Parties using interim reliefs and other tactics to by-pass the PIM mechanism.



9. Out of these, 6 cases which were referred to Pre-Institution mediation 4 were unsuccessful simply because the defendant did not appear before the mediator to take part in the mediation. The mediation process simply dragged on for 3 months without a single appearance of the defendant and after the completion of 3 months the Report was submitted by the authority and again the normal litigation process started with the issuance of summons. This wastage of 3 months' time of the plaintiff on the account of the defendant's non-appearance needs to rectified. If the defendant does not show any interest in appearing before the mediator the provisions of Pre-Institution Mediation are likely to become an obstacle for the plaintiff to obtain justice.
10. In not a single case out of the sample of 45 find the provision of Case Management Hearing being utilised. The Court follows its normal procedure like any other court. The provisions of CMH should be strictly adhered to curb delays in dispute resolution and adjudication. Rules and guidelines in this regard must be framed.

14.11.2 Recommendations and suggestions

As we have stated earlier, the analysis of this chapter should be read in conjunction with Chapter 12 of this Report on steps to be taken for speedy resolution of commercial disputes. The recommendations and suggestions of that chapter are drawn on the basis of the

empirical study conducted in this chapter and thus they are not repeated for the sake of brevity. Apart from those, few other aspects that should be looked into are the following:

1. In order to improve the ease of doing business, the enforcement of contracts must be made effective. This can be achieved by strengthening the law governing the powers and functions of the commercial courts.
2. In strengthening the framework of commercial courts, focus should be placed on vesting exclusive jurisdiction on the commercial courts with respect to commercial matters.
3. The weakness in the functioning of commercial courts currently despite the amendment to the commercial courts act can also be attributed to the fact that the Arbitration and Conciliation Act was not amended on an equal footing. Hence, Amendments should be carried out in the Arbitration and Conciliation Act as well to make commercial courts the exclusive forum for arbitration matters.
4. Furthermore, with respect to Section 12A of the Commercial Courts Act, the process of Pre-Institution lacks effectiveness due to the lack of quality and specialisation of the mediators. The process of Pre-Institution Mediators can be improved taking into consideration the following points:
    a. Mediators should be specialised persons having knowledge and expertise in the area of the particular dispute before them especially with respect to the nature and merit of the dispute.
    b. Mediators should undergo training in specialised matters.
    c. Mediators should be able to frame issues.
    d. Mediators should be capable of formulating a resolution which can subsequently be placed before the Commercial Court for adjudication of a dispute.

14.12 CONCLUSION

With criticism levelled against the judiciary and the judicial system in India, a reform was necessary especially in light of *Forum Non Conveniens* being cited by many foreign courts to exercise jurisdiction over cases, as well as the country being accused of breaching its obligations under Conventions.

The enactment of the Act was a positive step for India, not only in terms of improving its ranking but it also made a move towards improving the latency of the judicial system and ensuring that unnecessary delays are done away with to and expedite the justice delivery process.

However, the Act sought to improve the system with stricter deadlines and timelines, focusing on Case Management Hearing and disposal helps parties and the judiciary to be involved and proactive. Even though implementation had been difficult it is better to have a system under the law, which makes it definitive and mandatory. Furthermore, it is advisable that rather than imposing timelines it should be ensured that the parties themselves set it and if they are indecisive the court can step in and provide for suitable dates. Being able to balance the need for quick resolution and allowing due process is a difficult process but an important one to achieve.

There are many instances where there have been deviations from the case management timelines set. if we look at foreign court's (such as UK or US) deviation is only allowed if extra-ordinary circumstances arise, therefore there is a need to make this aspect party centric and hold them strictly to it ensure adherence to the timelines. Further, there is need to have more clarity regarding the deadlines for the summons process and ensure that penal costs are awarded in the event a party has tried to abuse the justice delivery process through frivolous suits or seeking adjournments.

The world has seen a huge shift from tiresome litigation process to ADR. This has helped to not only reduce the burden of courts but ADR process also being more party centric, has ensured faster and more amicable ways of sorting out differences. The mediation made mandatory is a positive step in the right direction, ensuring that if any avenue or possibility to resolve disputes is there it must be explored. With this paradigm shift taking place the world over it is important that India has added this option and has also made an attempt to set up the mechanism and infrastructure to sustain and fully adopt ADR processes.

The aspect of appointing judges with requisite knowledge or expertise of the commercial disputes is a valiant step, thereby allows for resolution to happen in a better manner as the judge has at the very least a fundamental understanding of the dispute. However, the issue is that there is still an immense need for clarity in terms of appointment of judges and the qualifications. Also, the new amendment allowing the State Government authority to appoint is constitutionally questionable and can raise questions about the encroachment into a judicial function and the absolute need for autonomy of the judges.

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CHAPTER 15: EASE OF DOING BUSINESS AND ENFORCEMENT OF CONTRACTS

15.1 INTRODUCTION

The advent of globalisation and liberalisation has created avenues for numerous commercial transactions. Being able to portray a country as a convenient destination for doing business is one of the key factors that contribute towards achieving higher economic growth rate. For an economy looking for growth of trans-national businesses and cross-border investments, the key factor is whether or not that country is feasible for business.[1] Similarly, from the investor's perspective the feasibility of the destination for business is a key factor. Thus, there arises a need for developing a standard which can serve as a 'market place' for the both the country and the investor. The Ease of Doing Business Rankings (herein after EoDB) developed by the World Bank and updated annually serves this purpose.

The genesis of the EoDB rankings lies in the seminal research carried out by Simeon Djankov, Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer.[2] In their research they have presented and analysed data on the regulation of entry of start-up firms in 85 Countries. They have covered a plethora of procedures, official timelines and official costs that must be incurred by start-ups before they can start their operation legally. Through their analysis and data evidence they have discredited the Public Interest Theory of

[1] AMEEN JAUHAR & VAIDEHI MISRA, COMMERCIAL COURTS ACT, 2015: AN EMPIRICAL IMPACT EVALUATION, (2019), https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf.

[2] Simeon Djankov et al, *The Regulation of Entry*, 127 QUARTERLY JOURNAL OF ECONOMICS (2002).

Regulation[3] and corroborated the perspective of Public Choice Theory[4] and the '*tollbooth*'[5] view (a second strand of Public Choice Theory).

Another inspiration for the Ease of Doing Business Rankings came from the seminal research work of Prof. Oliver Hart and Prof. Andrei Shlifer in 2008.[6] Their Report made an analysis of debt enforcement of an identical insolvent firm 'Mirage' in 88 countries. Mirage is a limited liability, domestically owned hotel business located in the most populous city. The analysis went on to discuss different procedures available as part of the insolvency proceedings, such as foreclosure, liquidation and reorganization. It suggested that keeping the business afloat as a going concern is a better and more efficient alternative as opposed to a piecemeal sale of its assets. Towards the end, the authors concluded that debt enforcement across the world was highly inefficient (even in the simple case of Mirage that they dealt with). It was found that this inefficiency came from high administrative costs and long delays, but also due to excessive piecemeal sales of still viable business entities.[7] Further, the authors noticed that developing nations often follow and emulate laws introducing elaborate bankruptcy procedures, in their efforts to save insolvent entities. Although time consuming and costly, it works well in developed nations who are able to save such firms as a going concern. In contrast, these procedures nearly always fail in their developing counterparts. In fact, the Debt Enforcement Report states that nearly 80% insolvent businesses end up being sold piecemeal.[8]

Though the foundation for the EoDB Rankings can be said to have been influenced by the struggle between the communist and socialist regulatory approach to economic activity, and the liberal free market economy approach, with a certain bias toward the latter, nonetheless, the rankings over the years have gained a prestigious international reputation with countries pushing reforms after reforms to improve their position in the rankings. This is particularly true in case of India, where in the recent past several key reforms have been initiated to improve the Indian position in the EoDB rankings.

TABLE 1: India and the Ease of Doing Business Rankings

Year	2015	2016	2017	2018	2019	2020
Ranking	142	130	130	100	77	63

[3] *See* ARTHUR PIGOU, THE ECONOMICS OF WELFARE (4th ed., 1938) as cited in Simeon Djankov, *supra* note 2 (the primary stand of this theory is that regulation of market is better than unregulated markets because unregulated markets are prone to frequent failures such as monopoly and externalities. They view government regulation as an instrument to attain social efficiency and protection of public).

[4] *See* Gordon Tullock, *The Welfare Cost of Tariffs, Monopoly, and Theft*, 5 Western Economic Journal 224-232 (1967); George Stigler, *The Theory of Economic Regulation*, Bell Journal of Economics and Management Science, 3-21 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 Journal of Law and Economics 211-240 (1976) (as cited in Simeon Djankov, *supra* note 2)(this theory views government as less benevolent than viewed by Public Interest Theory; and views regulations as 'socially inefficient' & ultimately unbeneficial to consumers).

[5] Simeon Djankov, *supra* note 2 (holds that regulations are pursued for their own selfish interest by those in power).

[6] Simeon Djankov et al., *Debt Enforcement Around the World*, 2008, https://www.doingbusiness.org/content/dam/doingBusiness/media/Methodology/Supporting-Papers/DB-Methodology-Debt-Enforcement-around-the-World.pdf (last visited May 24, 2020).

[7] *Id.*

[8] *Id.*

The methodology and parameters used to calculate the ease of doing business score and rank the country has undergone changes since World Banks' first Report in 2003[9]. The latest parameters (10 in number) on the basis of which countries are ranked are – starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency.[10] Apart from the above, there are other two parameters as well namely – employing workers and contracting with the government (which will be added sooner probably in the next edition of the Ease of Doing Business Report 2021). These 12 parameters are broadly classified under 5 categories – Opening a business, getting a location, accessing finance, dealing with day-to-day operations, operating in a secure business environment.[11]

Ease of Doing Business Parameters (Note: The employing workers and contracting with government indicators sets are not included in the ease of doing business rankings.) Image sourced from: World Bank, Doing Business 2020 Report.[12]

Based on the above parameters/indicators, the Ease of Doing Business Report ("EoDB Report") is a yearly report released by the World Bank that comprehensively reviews, analyses and ranks countries in the world on the basis of national laws governing businesses in those countries. The Report evaluates its findings on the basis of several uniform parameters common for all nations. In essence, it is a measure of an economy's stance to best regulatory practices.[13] Although the World Bank started publishing the 'Doing Business' Report from 2003, rankings of economies started only in 2006. Ever since, this study has emerged to be one of the flagship reports released by the World Bank in this field, and is often said to have nudged various regulatory reforms introduced by developing economies.

In this chapter, we look at the Enforcement of Contract indicator of the EoDB rankings in detail and its parameters. We also take a closer look at India's performance on the enforcement of contract parameter. The chapter then discusses the Rule of Law Index and

[9] WORLD BANK GROUP, DOING BUSINESS IN 2004: UNDERSTANDING REGULATIONS (Sept. 2003), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB04-FullReport.pdf (the original parameters were five in number namely- starting a business, hiring & firing workers, enforcing contracts, getting credit, and closing a business).

[10] *Doing Business Rankings,* https://www.doingbusiness.org/en/rankings (last visited May 14, 2020).

[11] WORLD BANK GROUP, DOING BUSINESS 2020 (Oct. 2019), https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf.

[12] *Id.*, at 3.

[13] World Bank Group, *Doing Business – About Us*, available at https://www.doingbusiness.org/en/about-us (last visited May 26, 2020).

its link with Enforcement of Contracts before concluding with recommendations that can improve the enforcement of contracts in India.

15.2 ENFORCEMENT OF CONTRACTS

The Enforcement of Contract indicator is one of the original indicators in the ease of doing business rankings[14] and it remains till date one of the key indictors used to calculate the ease of doing business score and ranking.[15] As stated in Ease of Doing Business Report 2004, **the main reason for the enforcement of contract indicator is to measure the efficiency of courts** which is the main institution for enforcing contracts.[16] With regard to stimulating economy and business, the courts have four important functions to play namely:

1. Encouragement to new business relationship: as new partners do not fear being cheated.
2. Confidence in complex transactions – as they clarify threat points in the contract and enforcing such threats in the event of default.
3. Enable rendering of more sophisticated goods and services – by encouraging asset-specific investments in their production.
4. Limiting injustice and securing social peace – without courts, commercial disputes will end up in feuds, to the detriment of everyone involved.[17]

Weakness of the legal system, inefficiency of courts and delays in justice are neither recent phenomenon nor particularly Indian specialties (though Indian courts are notorious for delays). Weakness of legal system and inefficiency of judicial setup span across countries and even centuries as demonstrated by the following quote from Shakespeare's *Hamlet*[18] (who counts Law's delay among the calamites of life):

> "To be, or not to be, that is the question: … That makes calamity of long life: For who would bear the whips and scorns of times, the oppressor's wrong, the proud man's contumely, the pangs of despised love, *the law's delay*". [emphasis added]

The reason for efficiency in courts and judicial set up is further illustrated by the hypothetical illustration as stated in the Ease of Doing Business Report 2004:

> "Imagine that a new client comes to a textile company and orders shirts. The client and the company manager sign a contract for payment on delivery. But at delivery, the client refuses to pay in full. What happens next? In New Zealand, the company manger will show the client the contract and ask for payment. The client is likely to pay. In Poland, the company manager will show the contract to the client and ask for payment. The client is likely to refuse to pay. In Cote d'Ivoire, the company manager would probably not deal with the new client unless the client could provide references from other textile companies of from companies that operated in the same region. In Vietnam, the client might not bother going to the company without having at least half of the money available for an advance payment. Why the difference? The answer lies in the efficiency of courts."[19]

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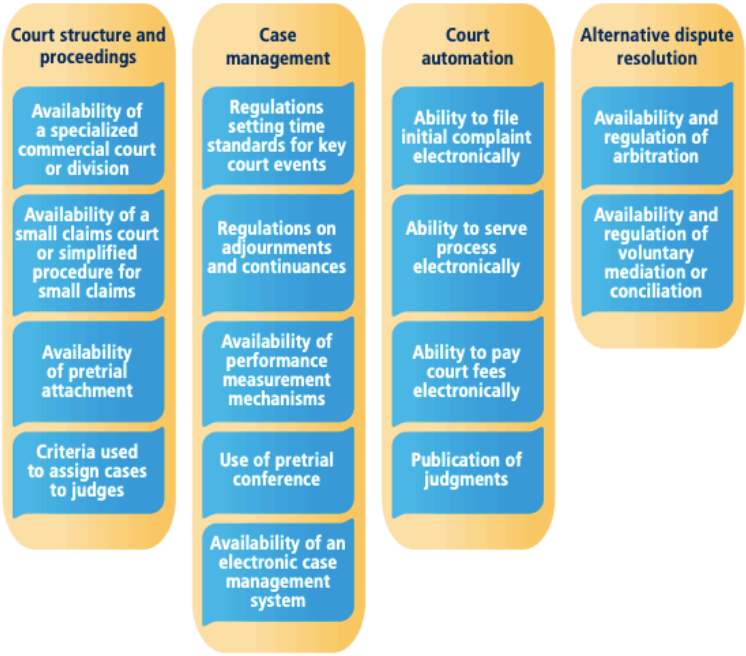
[14] WORLD BANK GROUP, DOING BUSINESS IN 2004, *supra* note 9.
[15] WORLD BANK GROUP, DOING BUSINESS 2020, *supra* note 11.
[16] WORLD BANK GROUP, DOING BUSINESS IN 2004, *supra* note 9.
[17] *Id.*, at 41.
[18] SHAKESPEARE, HAMLET: PRINCE OF DENMARK, act III, scene 1.
[19] WORLD BANK GROUP, DOING BUSINESS IN 2004, *supra* note 9.

The reason for determining courts' efficiency by measuring enforcement of contracts is also stated in the following terms on the World Bank's, Doing Business website:

> "Efficient contract enforcement is essential to economic development and sustained growth.[citation omitted] Economic and social progress cannot be achieved without respect for the rule of law and effective protection of rights, both of which require a well-functioning judiciary that resolves cases in a reasonable time and is predictable and accessible to the public.[citation omitted] Economies with a more efficient judiciary, in which courts can effectively enforce contractual obligations, have more developed credit markets and a higher level of development overall. [citation omitted] A stronger judiciary is also associated with more rapid growth of small firms. [citation omitted] Overall, enhancing the efficiency of the judicial system can improve the business climate, foster innovation, attract foreign direct investment and secure tax revenues. [citation omitted] … Effective courts reduce the risk faced by firms and increase their willingness to invest. [citation omitted]"[20]

The Enforcement of contract indicator as originally constructed in the 2004 Report evaluated countries on the basis of three parameters namely:

> "1. The number of procedures – as mandated by law or court rules, that demand interaction between the parties to the dispute or between them and the judge or court officers.
> 2. The cost – as a share of income per capita, incurred during dispute resolution- comprising court fees, attorney fees, and payments to other professionals.
> 3. The estimated time to resolve a dispute – measured as the number of days from the moment the plaintiff files the lawsuit until the moment of settlement or actual payment."[21]



Areas Covered by the Quality of Judicial Process Index. Image Sourced from Doing Business 2016 Report. (*See* footnote 26)

Over the years, the parameters used for measuring the enforcement of contracts have evolved. Time, as counted in number of days, has remained constant in the enforcement of contracts. However, the cost factor and the procedural factors have seen modification with the latter being totally replaced. The cost factor which was originally measured in 2004 Report as share of income per capita[22] has been replaced first by percentage of debt

[20] *Enforcing contracts- Why it Matters,* https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts/why-matters (last visited June 30, 2020).
[21] WORLD BANK GROUP, DOING BUSINESS IN 2004, *supra* note 9.
[22] *Id.*

amount in 2005,[23] then by percentage of overdue debt in 2006 Report,[24] and then it was starting to be measured as percentage of claim value since 2007 Report.[25] The number of procedures as originally construed remained till 2015 (with some minor modifications) but was completely replaced by Quality of Judicial Process Index in the Doing Business Report 2016.[26] This new parameter tested the adoption of good practices that promote quality and efficiency in the commercial court system with the aim of capturing new and more actionable aspects of judicial system and providing a picture of judicial efficiency that goes beyond the time and cost associated with resolving a dispute.[27]

Thus, presently (with Doing Business 2020 Report) contract enforcement rank is calculated on the basis of three criteria namely – **time taken** by the court of first instance to dispose of the case (counted from the moment the plaintiff decides to file the lawsuit in court until payment and includes both the days when actions take place and the waiting periods in between. It is calculated in number of days), **Cost** incurred in the dispute (calculated as percentage of the claim value and based on court fees, attorney fees and enforcement fees), and the **quality of judicial process index** (which varies from 0 – 18, higher number indicating better quality of judicial process and is based on parameter of court structure and proceedings, case management, court automation and alternative dispute resolution).[28]

15.2.1 Time Taken

The Time Taken parameter of Enforcement of Contract indicator is documented in 'number of calendar days' starting from the moment the hypothetical seller decided to file the lawsuit in a count till the time of payment. This period is inclusive of the days which see action and also the period of waiting in between actions. The time is recorded for mainly three different stages of case:

1. Filing and service;
2. Trial and judgement;
3. Enforcement.

This time is recorded in practice (regardless of whatever time limits are set by law) if such time limits are not respected in the majority of cases.[29]

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[23] WORLD BANK GROUP, DOING BUSINESS IN 2005: REMOVING OBSTACLES TO GROWTH (Sept. 2004), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB05-FullReport.pdf.

[24] WORLD BANK GROUP, DOING BUSINESS IN 2006: CREATING JOBS (Sept. 2005), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB06-FullReport.pdf.

[25] WORLD BANK GROUP, DOING BUSINESS IN 2007: HOW TO REFORM (Sept. 2006), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB07-FullReport.pdf.

[26] WORLD BANK GROUP, DOING BUSINESS 2016, MEASURING REGULATORY QUALITY AND EFFICIENCY (Oct 2015), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf.

[27] *Id.*, at 92.

[28] World Bank Group, *Doing Business: Enforcing Contracts Methodology*, http://www.doingbusiness.org/en/methodology/enforcing-contracts. (last visited May 1, 2020).

[29] Doing Business, *Enforcing Contracts Methodology,* https://www.doingbusiness.org/en/methodology/enforcing-contracts. (last visited May 30, 2020).

TABLE 2: Time Taken[30]		
Filing and Service Phase	**Trial and Judgement Phase**	**Enforcement Phase**
The Time for seller to try and obtain payment of court through a non-litigious demand letter, including the time to prepare the letter and the deadline that would be provided to Buyer to comply. The time necessary for a lawyer to write the initial complaint and gather all supporting documents needed for filing including authenticating or notarizing them, if required. The time necessary to file the complaint at the court. The time necessary for Buyer to be served (including processing time at the court and the waiting periods between unsuccessful attempts).	Time between the moment the case is served on Buyer and the moment a pre-trial conference is held, if such pre-trial conference is part of the case management techniques used by the competent court. Time between pre-trial conference and first hearing. If pre-trial conferences are not there then the time between the moment the case is served and the moment the first hearing is held. The time to conduct all trial activities, including exchanges of briefs and evidence, multiple hearings, waiting times in between hearings and obtaining an expert opinion. The time necessary for the judges to issue a written final judgement once the evidence period has closed. The time limit for appeal.	Time taken to obtain an enforceable copy of the judgement and contact the relevant enforcement office. The time taken to locate, identify, seize and transport the losing party's movable assets (including the time necessary to obtain an order from the court to attach and seize the assets, if applicable). The time it takes to advertise, organize and hold the auction. If more than one auction would usually be required to fully recover the value of claim in a case comparable to the standardized case study, then the time between multiple auction attempts is recorded. The time it takes for the winning party to fully recover the value of the claim once the auction is successfully completed.

15.2.2 Cost

The Cost indicator is documented as a percentage of **claim value** which is assumed to be equivalent to 200% of income per capita or Five Thousand Dollars, whichever is greater. Three types of costs are recorded: average attorney fees, court costs and enforcement costs. (bribes paid if any are not included).[31]

TABLE 3: Cost[32]		
Average Attorney Fees	**Court Costs**	**Enforcement Costs**
Fees that plaintiff must advance to a local attorney to represent him in the standardized case, regardless of final reimbursement.	Costs that plaintiff must advance to the court, regardless of final cost borne. It includes the fees that parties must pay to obtain an expert opinion, regardless of whether they are paid to the court or to the expert directly.	Costs that plaintiff must advance to enforce the judgement through a public sale of Buyer's movable assets, regardless of the final cost borne by Seller.

15.2.3 Quality of Judicial Process Index

As stated earlier this indicator introduced by the 2016 Ease of Doing Business Report is used to measure the adoption of best practices in its court system by an economy in mainly four factors namely: Courts structure and proceedings, case management, court automation and ADR.[33] Each of these factors is further divided into sub-factors with scores assigned them (if a best practice exist (yes) then a certain score is given, if it does not exist (no) then a score

[30] *Id.*
[31] Doing Business, *Enforcing Contracts Methodology,* https://www.doingbusiness.org/en/methodology/enforcing-contracts. (last visited May 30, 2020).
[32] *Id.*
[33] *Id.*

of zero and even negative is given. The maximum a country can score in quality of judicial of process Index is 18. The distribution of the score (with additional column stating Indian position, to be analyzed later in the chapter) is as follows:

TABLE 4: Quality of Judicial Process Index

Quality of Judicial Process Index (0-18)	**Yes (Score)**	**No (Score)**	**India (Delhi) (score- 10.5)**
Court Structure and Proceedings (-1 – 5)			**4.5**
1. Is there a court or division of a court dedicated solely to hear commercial disputes?	1.5	0	Yes (1.5)
2. Small Claims Court			1.5
2.a Is there a small claims court/fast track procedure for small claims?	1	0	Yes (1)
2.b If yes, is self-representation allowed?	0.5	0	Yes (0.5)
3. Is pretrial attachment available?	1	0	Yes (1.0)
4. Are new cases assigned randomly to judges? (manual 0.5)	1/0.5	0	**Yes (manual) 0.5**
5. Does a woman's testimony carry the same weight in court as a man's?	0	-1	Yes (0)
Case Management (0-6)			**1.5**
1. Time Standards			0.5
1.a Are there laws setting overall time for key events in a civil case?	Yes	0	Yes
1.b If yes, are the time standards set for at least three court events?	Yes	0	Yes
1.c Are these time standards respected in more than 50% cases?)	1/0.5	0	**No (0.5)**
2. Adjournments (if 3 are met 1, if two are met 0.5, if one is met 0)			0
2.a Does the law regulate max. no. of adjournments that can be granted?	Yes	0	Yes
2.b Are adjournments limited to unforeseen and exceptional circumstances?	Yes	0	**No**
2.c if rules on adjournments exist, are they respected in more than 50% of cases?	Yes (1)	0	**No (0)**
3. Can two of the following four be generated about the competent courts: Time to disposition report, clearance rate report, age of pending cases report, single case progress report?	1	0	Yes (1.0)
4. Is a pre-trial conference among the case management techniques used?	1	0	**No (0)**
5. Are there any electronic case management tools in place within the courts for use by judges?	1	0	**No (0)**
6. Are there any electronic case management tools in place within the competent court for use by lawyers?	1	0	**No (0)**
Court Automation (0-4)			**2.0**
1. Can the initial complaint be filed electronically through a dedicated platform within the competent court?	1	0	**No (0)**
2. Is it possible to carry out service of process electronically for claims filed before the competent court?	1	0	**No (0)**
3. Can Court fees be paid electronically within the competent court?	1	0	Yes (1)
4. Publication of judgements			Yes (1)
4.a Are judgments rendered in commercial cases at all levels made available to the general public through publication in official gazettes, in newspapers or on the internet or court website?	1	0	Yes

4.b Are judgments rendered in commercial cases at the appellate and supreme court level made available to the general public through publication in official gazettes, in newspapers or on the internet or court website?	If 4.a is no but 4.b is yes (0.5)	0	Yes
ADR (0-3)			**2.5**
1. Arbitration			**1.0 (should be 1.5) (error in EoDB Report)[34]**
1.a Is domestic commercial arbitration governed by a consolidated law or consolidated chapter or section of the applicable code of civil procedure encompassing substantially all its aspects?	0.5	0	Yes (0.5)
1.b Are there any commercial disputes—aside from those that deal with public order or public policy— that cannot be submitted to arbitration?	0.5	0	Yes (0.5)
1.c Are valid arbitration clauses or agreements usually enforced by the courts?	0.5	0	Yes (0.5)
2. Mediation/Conciliation			1.5
2.a Is voluntary mediation or conciliation available?	0.5	0	Yes (0.5)
2.b Are mediation, conciliation or both governed by a consolidated law or consolidated chapter or section of the applicable code of civil procedure encompassing substantially all their aspects?	0.5	0	Yes (0.5)
2.c Are there financial incentives for parties to attempt mediation or conciliation (i.e., if mediation or conciliation is successful, a refund of court filing fees, income tax credits or the like)?	0.5	0	Yes (0.5)

15.3 ENFORCEMENT OF CONTRACTS IN INDIA

India had a very rough journey so far as the Ease of Doing Business & especially Enforcement of Contract parameter is concerned. The 2003 Report brought to the world's notice that it takes more than 10 years to resolve a bankruptcy proceeding in India and with regard to contractual enforcement it mentioned that it takes about 365 days, involves 22 different procedures and costs about 95% of income per captia to enforce a contract in India.[35] It also gave India a Procedural-Complexity index of 50 (a very high number) in relation to contractual enforcement which indicates how heavily dispute resolution is regulated and measures substantive and procedural statutory intervention in civil cases in the courts. A high procedural-complexity index is associated with greater corruption and indicates delay.[36]

[34] There seems to be an error in the Ease of Doing Business Report 2020 with regard to India as per the Report it shows all the sub-parameters of ADR are marked yes but the score is given as 1 instead of 1.5 (with overall score should be 3 not 2.5), *See* Doing Business 2020, *Economy Profile India* at page 104, https://www.doingbusiness.org/content/dam/doingBusiness/country/i/india/IND.pdf. (Hyperlink kept for emphasis).

[35] WORLD BANK GROUP, DOING BUSINESS IN 2004: UNDERSTANDING REGULATIONS (Sept. 2003), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB04-FullReport.pdf.

[36] *Id.*

The successive EoDB reports portrayed an even grimmer picture of contractual enforcement scenario in India. In 2015 India ranked 142nd among 189 countries and its contract enforcement rank was 186.[37] According to the 2015 Report, contractual enforcement in India involved 46 different procedures, took 1420 days and cost of 39.6% of the claim value.[38] Since then, India has jumped 65 places to reach 77th position in the 2019 rankings.[39] However, this substantial improvement in the overall ranking was not supplemented by a good performance on the contract enforcement front. From standing 186th among 189 countries in 2015 India was only able to jump to 163rd position among 190 countries in 2019 rankings.[40] India's improvement on ease of doing business index continued in 2020 Report as well with India jumping 14 places to reach 63rd position among 190 countries.[41] However, the scenario with respect to contractual enforcement remained unchanged for India as it remained at 163rd position.[42]

TABLE 5: India's Ranking in the Ease of Doing Business Report

Year	Rank	Enforcement of Contracts
2014	134	186
2015	142	186
2016	131	178
2017	130	172
2018	100	164
2019	77	163
2020	63	163

TABLE 6: Enforcement of Contract Rank of India as compared to Other Jurisdictions

Country	Singapore	United States	United Kingdom	India
Time Taken	164	370	437	1445
Filing and service	6	30	30	45
Trial and judgment	118	240	345	1095
Enforcement of judgement	40	100	62	305
Cost (% of Claim value)	25.8	22.9	45.7	31.1
Quality of Judicial Process Index (0-18)	15.5	15	15	10.5
Enforcement of Contract Rank	1	17	34	163

[37] WORLD BANK GROUP, DOING BUSINESS 2015: GOING BEYOND EFFICIENCY (Oct. 2014), http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf.
[38] *Id*.
[39] WORLD BANK GROUP, DOING BUSINESS 2019: TRAINING FOR REFORM (Oct. 2018), http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf.
[40] *Id*.
[41] WORLD BANK GROUP, DOING BUSINESS 2020, *supra* note 2.
[42] *Id*.

15.4 RULE OF LAW INDEX

The Rule of Law Index ("**RL Index**") is released by the World Justice Project every year. It measures the strength of the concept of rule of law in different countries based on experiences and opinions of the general public in addition to those of country and foreign experts. Needless to say, strengthening the Rule of Law is of paramount importance to most nations, as a robust system leads to cascading positive effects for the country in terms of economic growth, political independence and societal progress. The Index was first released in 2008.

Strengthening this concept of rule of law has been a major goal for citizens, governments, business entities and civil society organizations across national borders.[43] To be effective and efficient, the development of rule of law requires clarity about the fundamental features that define and shape rule of law, as well as an adequate basis for its evaluation and measurement.[44]

The scores and rankings in the RL Index 2020 were derived from more than 130,000 household surveys and 4000 legal practitioners and expert surveys held worldwide. In essence, this Index was conceptualized and intended for several stakeholders including policy makers, academics, citizens, civil society organizations etc.

In India, rule of law has been held to be a basic structure of the Constitution by the Supreme Court in various pronouncements over the years.[45] Dr. B.R. Ambedkar also noted the Constituent Assembly's resolve "to ensure that 'rule of law as a basic tenet of constituent democracy' must be preserved at all costs."[46]

In 2020, India was ranked 69 out of 119 nations covered on the RL Index, with a total score of 0.51. Out of several factors that this Index considers, from the perspective of contractual enforcement, some factors are Constraints on Government Powers, Absence of Corruption and Civil Justice.

The RL Index was developed by the World Justice Project (WJP) to serve as a quantitative tool for measuring rule of law in its practicalities. The methodology and comprehensive definition are but a product of intensive consultation and vetting by stakeholders from more than 100 countries and 17 disciplines.

The scores and rankings of all factors and sub-factors of the RL Index draw from two sources of data collected by the WJP:

1.1.1. A General Population Poll (GPP) conducted by local polling companies, while using a representative sample of 1000 respondents in each subject country;

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[43] WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2020, (2020), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf (last visited May 23, 2020).
[44] *Id.*
[45] Indira Nehru Gandhi v Raj Narain, AIR 1975 SC 2295; S.P Gupta v. Union of India, AIR 1982 SC 149.
[46] CONSTITUENT ASSEMBLY DEBATES, Vol. VIII, 122-4 (quoting M.K. Gandhi, My Experiments with Truth, 224 (1993)).

1.1.2. Qualified Respondents' Questionnaire (QRQs) that consist of closed-ended questions filled by in-country legal practitioners, experts etc. with expertise in civil and commercial law; constitutional law, civil liberties and criminal law; labour law and public health.

When considered concurrently, the two data sources provide original and updated information that are reflective of the experiences and perceptions of the general public and experts.

The RL Index measures the adherence to the concept of rule of law by scrutinizing policy outcomes, including whether the people have access to courts in their countries or whether crime is effectively controlled by those responsible. This, of course, is in stark contrast to the theoretical focus on writing laws, or the institutional means through which the society aims to achieve these outcomes.

There are several indices that measure and cover discrete aspects of rule of law. These aspects include absence of corruption or human rights. While important and highly relevant, they do not often render a complete picture of the conditions of rule of law. In this light, it may be said that the RL Index is the only comprehensive global Index that looks at the concept in a more comprehensive manner.[47] As a people-centric Index, the RL Index mentions that it puts the people at its core. "It looks at a country's adherence to the rule of law from the perspective of ordinary individuals and their experiences with the rule of law in their societies."[48]

15.4.1 Universal Principles

The Rule of Law Index defines the Rule of Law as a durable system of laws, institutions norms and community commitment that deliver:

1. **Accountability:** The government as well as private actors are accountable under the law.
2. **Just Laws:** The laws are clear, publicized and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property and human rights.
3. **Open Government:** The processes by which the laws are enacted, administered, and enforced are accessible, fair and efficient.
4. **Accessible and Impartial Dispute Resolution:** Justice is delivered timely by competent, ethical and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

15.4.2 Rule of Law Index Parameters[49]

In addition to the Universal Principles, the conceptual framework of this Index is comprised of eight (8) factors that further contain 44 sub-factors. The eight factors include:

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[47] World Justice Project, supra note 43 at 5.
[48] *Id.*, at 8.
[49] The World Justice Project, https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019/factors-rule-law (last visited May 23, 2020).

Constraints on Government Powers: There can be many institutions that have the effect of producing limitations on government power, differing in kind and potency in different countries. Some of these institutions include the legislatures (at all levels of State), judiciary, civil society organizations, independent media, political parties etc. Another important aspect is the existence of an independent auditing and review. These include comptrollers or auditors, along with human rights agencies. This ensures effective checks on and oversight of the government and mitigates chances of misuse. Government officials must also be sanctioned and punished for proved misconduct (including officials in all branches of the State). Further, government officials are elected or appointed in accordance with the provisions of the Constitution, and the sanctity of the election process is maintained.

Absence of Corruption: Absence of corruption is a fundamental end that countries seek to achieve. Government officials in the executive must not use their public offices for private gain. The same principle is extended to all officials of the judiciary, legislature and military. Prevalence of bribes, informal payments and like inducements are measured under this head. It is also seen if government contracts are awarded through open and competitive bidding procedures. Further, measures whether judges or military officials or members of legislative bodies accept bribes for facilitating illicit deals or transactions through their official powers.

Open Government: The factor measures whether laws and information on rights and duties are publicly available, presented in a way that's easy for the common man to understand, and should be disseminated in all relevant languages. It also measures the quality and accessibility of information published by the government (printed or online) and whether administrative rules, bills pending in legislative bodies and judgments of the courts are made accessible to the public timely.

Further, the factor measures the right to information available to, and in the knowledge of citizens; whether requests for pertinent and complete information in possession of government departments are granted within a reasonable period of time. This information must be provided at a reasonable cost, without the necessity of paying bribes. The effectiveness of public participation mechanisms (including freedom of speech, assembly and association and right to petition the government) is also measured under this factor. It also studies whether the people are able to lodge specific complaints to the government regarding provision of services of a public nature and performance of its officers in carrying out their legal duties in practice, including how the government (and its officials) responds to such complaints.

Fundamental Rights: Perhaps one of the cornerstones of the rule of law, this factor ascertains the existence of equal treatment and absence of discrimination in state action. Individuals must be free from any kind of discrimination, irrespective of its basis on socio-economic status, gender, ethnicity, religion, national origin, sexual orientation or gender identity in terms of public services, employment, court proceedings etc. The factor measures the importance awarded to the right to life and security of persons, and whether the police does not inflict physical harm on suspects and detainees, and whether the media or political dissidents are subject to unreasonable searches, seizures, arrests and detentions, threats,

abusive treatment, violence among others. It also goes on to measure whether due process of the law is followed vis-à-vis rights of accused and convicts in the judicial system.

All persons accused of a crime must be treated as innocent until proven guilty, persons must be free from arbitrary arrests and unreasonable detentions; also measures whether suspects are able to access and rebut evidence being used against them in trial, and whether they are provided with basic rights even after conviction. Further, freedom of speech and expression must be effectively guaranteed, along with freedom of conscience and religion. Privacy of all persons must be respected, and there should be no searches without warrants based on probable cause and judicial authorization. It also measures the freedom of assembly and association, in addition to fundamental rights of labor must be secured.

Order and Security: This factor measures whether crime is effectively controlled in society, and the prevalence of common crimes, including murder, theft, armed robbery and extortion among others, as well as the general perception of the people insofar safety in their communities is concerned. It also measures whether people are safe from armed conflicts and terrorism, and whether people resort to intimidation or violence to address and resolve civil dispute amongst themselves or seek redress and intervention of the government.

Regulatory Enforcement: A yardstick to measure compliance of government orders and judicial proceedings, it measures whether government regulations are effectively applied and enforced and subject to bribery or 'improper influence'[50] by private parties. It furthers ascertains whether due process is followed in administrative proceedings and are conducted without unreasonable delays. Additionally, it also measures whether government respects property rights of people, refrains from illegal seizure of private property and provides adequate compensation when a property is expropriated.

Civil Justice: Civil Justice is an important factor from the lens of contractual enforcement. It measures accessibility and affordability to civil justice for the people, including whether people are aware of available remedies; they must also be able to afford representation, and must not be subject to unreasonable fees, encounter unreasonable procedural hurdles, or experience geographical and linguistic barriers to justice. The system must be free of discrimination, and no one should be discriminated against on the basis of socio-economic status, gender, religion, ethnicity, sexual orientation etc.

Further, the system must be free of corruption and improper and illicit government or political interference. The delays caused in the process of civil justice are also measured. The decisions of civil courts must be effectively and timely enforced, and ADR mechanisms must be affordable, efficient, enforceable and corruption-free.

Criminal Justice: The eighth and last factor in the RL Index, it measures if the criminal investigations are effective, perpetrators of crimes are caught and charged, whether the police and prosecutors are honest and have adequate resources and perform their duties in a competent manner. The criminal adjudication system is impartial, timely, effective and

[50] World Justice Project, *supra* note 43, at 14.

free of corruption, the correctional system of the country is effective in reducing criminal behavior and whether due process of law and rights of accused and convicts are respected.

From the perspective of enforcement of contracts, the relevant factors include:

1. Constraints on Government Powers;
2. Absence of Corruption;
3. Civil Justice;
4. Criminal Justice.

15.4.3 India's Ranking in Rule of Law Index

In 2020, India was ranked 69 out of a total of 119 nations surveyed by the WJP.[51] This marked a marginal dip in India's ranking from 68 in 2019 (with the total score of 0.51 out of a maximum of 1.0 remaining constant).[52] India's ranking for the last 5 years has been mentioned in Table below:

TABLE 7: India's Ranking in Rule of Law Index

Year	Score	Ranking
2015	0.51	59
2016	0.51	66
2017-18	0.52	62
2019	0.51	68
2020	0.51	69

A bare perusal of the above table makes it clear that while India's score on the RL Index has remained more or less consistent since 2015, its rank has gone down (from a high of 59 in 2015 to 69 in 2020). This could, perhaps, be ascribed to a better performance on this index by other countries, pushing their scores (and subsequently rankings) above India's. Be that as it may, it is plain that India needs to do better in order to improve its ranking in the Index.

Ranking in different factors: The RL Index considers 8 factors while computing the final scores and rankings. India has fared well in some, while performing abysmally in others. India's global rankings vis-à-vis these factors have been given in Table below:

TABLE 8: India's Ranking in Rule of Law Index (Factors)

Factor	Score	Ranking (out of 128)
Constraints on Government Powers	0.61	41
Absence of Corruption	0.42	85
Open Government	0.61	32
Fundamental Rights	0.51	84
Order and Security	0.59	114
Regulatory Environment	0.49	74
Civil Justice	0.45	98
Criminal Justice	0.40	78
Source: World Justice Project Rule of Law Index 2020		

[51] World Justice Project, supra note 43, at 16.

[52] World Justice Project, Rule of Law Index 2019, 2019, available at https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf (last visited May 23, 2020).

From the above table, it is clear that India has performed well only in two factors viz., constraints on government powers and open government, getting a global rank of 41 and 32 respectively. In all other factors, India fared worse than half other nations.

15.5 LINK BETWEEN RULE OF LAW INDEX AND ENFORCEMENT OF CONTRACTS

> "[W]ith us no man is above the law [and] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[53]

The phrase "the Rule of Law" has to be differentiated from "a rule of law". The latter may be used to refer to some particular legal rule, for instance, a provision for filing tax returns by a certain date, or a law laying down succession of property amongst all legal heirs. In contrast, the 'Rule of Law' is an ideal of political and legal morality and refers to the paramount character as such and of the institutions in a legal system.[54]

It can very well be said that rule of law and contractual enforcement is intricately and extensively connected. One cannot possibly exist without the other. A general and pervasive feeling and effect of rule of law creates a favorable perception in terms of certainty, stability and predictability in the minds of current and prospective investors. This gives confidence to investors and have that serves as kind of security to their investments in any economy. In particular, these include the quality of contractual enforcement, respect for property rights, the process of adjudication of legal disputes as well as clear and relatively stable laws governing their assets in the country. All laws must be publicly promulgated, equally enforced and independently adjudicated.[55] By extension, laws should be prospective, intelligible, consistent and practical.

In addition, a robust system of rule of law mandates a politically independent and impartial system of judicial forums (including courts), a working system of separation of powers and the right to a fair trial.[56]

15.6 RECOMMENDATIONS TO IMPROVE ENFORCEMENT OF CONTRACT

On the basis of analysis and research conducted under this project and highlighted in this report through chapters 2 to 16 it can be concluded that:

1. Radical changes in both the substantive law as well as procedural laws are required to strengthen the Indian Contract Enforcement Regime to make it responsive to the needs of present times.

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[53] A.V. DICEY, INTRODUCTION TO THE CONSTITUTION (*first published in* 1885, 2013).
[54] *Stanford Encyclopedia of Philosophy*, June 22, 2016, https://plato.stanford.edu/entries/rule-of-law/#Dice (last visited May 26, 2020).
[55] *What is the Rule of Law?*, United Nations and the Rule of Law, 2004, https://www.un.org/ruleoflaw/what-is-the-rule-of-law-archived/.
[56] Dr. Pim Albers, *How to Measure the Rule of Law: A Comparison of Three Studies*, 2007, https://rm.coe.int/how-to-measure-the-rule-of-law-a-comparison-of-three-studies-dr-pim-al/16807907b2.

2. The Substantive law and Procedural law reforms identified in the various chapters of this Report, if successfully implemented, will not only strengthen the overall legal framework with regard to enforcement of contracts in India by providing a robust time-bound legal regime, but will also aid in improving the enforcement of contract parameter under the Ease of Doing business Rankings by helping in reducing the time taken to enforce a contract in India.
    a. The substantive reforms will help in reducing the time taken in contract enforcement by reducing the discretion of courts which will provide for a stable and clear law that will enable parties to anticipate the outcomes of their dispute. These reforms are in line with the recent radical reforms that have been carried out in India such as the Specific Relief (Amendment) Act, 2018 and includes: allowing enforcement of punitive damages and penalty and liquidated damages clauses (chapter 3 and 4), allowing for recovery of combined claims of reliance and expectation loss (chapter 6), substantive law portion of the Commercial Courts Act, 2015 (chapter 12 and 14) including the definition of commercial disputes etc.
    b. Procedural law reforms also help in reducing the time taken to resolve a dispute as a stricter procedure will ensure that the procedure is not prone to abuse by removing discretion, tendency to by-pass, disinterest in court and ADR proceedings, and disregard for timelines. Areas which have been marked for procedural reforms in this Report includes: The development of a standard formula for damages (along the factors identified in chapter 5), reforms in the Arbitration procedure (such as reducing number of adjournments to 3, penalty based adjournments and delays, reporting mechanism on conduct of parties etc. as identified in chapter 7), operationalization of order XLI of the Code of Civil Procedure code (as suggested in chapter 9), further strengthening of the ADR mechanisms and making the procedure similar on the line of UK and USA (based on the comparative study conducted in chapter 10), evolving parameters to monitor the efficiency of commercial dispute resolution and regular monitoring of the same (as suggested in chapter 11), the procedural aspects of Commercial Courts Act, 2015 including pre-institution mediation (higher interest rate can be granted in damages to a party if the other party does not show up for mediation and imposing other such monetary incentives and disincentives), issue of summons, transfer of cases, framing guideline for Case Management Hearings etc. (based on the empirical study conducted and reforms suggested in chapter 12 and 14).
3. Apart from the substantive and procedural laws as highlighted above, the management of contractual relationships is also a key factor when it comes to a speedy and efficacious dispute resolution. Effective management can make the disputes less cumbersome and problematic. This will be like stating the common phrase "solving a problem even before it arises". Most of the infrastructure and PPP projects are prone to lengthier resolution because of inefficient contract management. The analysis made and conclusion drawn in chapter 13 will be a guide in ensuring efficient management of contracts.

4. There is a clear relationship between the **'Quality of Judicial Process Index'** and **'time taken'** in resolving a commercial dispute as has been highlighted in the Doing Business Report 2016. Strengthening the Quality of Judicial process index will result in the reduction of time taken in resolving commercial disputes.
5. Presently India's Quality of Judicial Process Index stands at 10.5 which can be improved by carrying out the following reforms:
   a. Cases can be assigned randomly through electronic case management systems as done in Bosnia and Herzegovina (as compared to manual assignment done in India). Developing an automated electronic case management system will help India in securing a perfect 5 points (as compared to 4.5 it holds presently due to manual assignment of cases) on the Court Structure and Proceedings sub-parameter of Quality of Judicial Process Index.
   b. Stricter time lines should be provided for the followings:
      i. service of summons
      ii. first hearing;
      iii. filing of written statement;
      iv. completion of the evidence period;
      v. filing of testimony by expert; and
      vi. submission of the final judgement;

      If not feasible in all of the above, then at least in three of these key court events monetary incentives and penalties (by way of awarding a higher interest in damages or by way of other means as suggested in 2.b) will help in ensuring that time standards are respected in more than 50% of the cases which will help India in registering 0.5 in Time standards factor of Case management parameter under Quality of Judicial Process Index.

   c. Limiting the number of adjournments in commercial cases to unforeseen and exceptional circumstance will help India in registering an improvement of 1 point in the adjournment factor of Case Management parameter under Quality of Judicial Process Index. Additionally, imposing monetary disincentives for asking casual adjournments to ensure that court process is not taken as a free ride in the prevailing legal culture in India and that the procedure is followed in at least 50% of the cases.

      Pre-trial conferences should be introduced as a general law and should not be restricted to Commercial Courts Act (under which it has been a failure as demonstrated by our empirical research). An option should also be given to participate in the pre-trial conference electronically through case management techniques. In the pre-trial conference the following issues should be discussed: (i) time schedule of filing of documents etc.; (ii) an estimation of case complexity and projected length of trial; (iii) possibility of settlement or ADR; (iv) exchange of witness lists; (v) evidence; (vi) jurisdiction and other procedural issues and (vii) narrowing down of contentious issues. Furthermore, **the discussion and passing of order on these issues should be mandatory** on the court in the pre-trial conference as compared to discretionary under the present

Commercial Courts Act. Doing so will help India in registering 1 point under the Pre-Trial factor of Case Management parameter under Quality of Judicial Process Index.

d. Judges and the court staff should be trained to use and access electronic case management system to all of the following:[57]
   i. To access laws regulations and case law
   ii. To **automatically generate a hearing schedule** for all cases on their docket;
   iii. To **send notifications to lawyers**;
   iv. Track the status of case on their docket;
   v. To view and mange case documents (briefs, motions);
   vi. To assist in writing judgements;
   vii. To semi automatically generate court orders;
   viii. To view court orders and judgements in a particular case;

   Doing so will help India register an improvement of 1 point under the case management parameter of Quality of Judicial Process Index.

e. Similarly, lawyer should also be trained during their legal education and training in the use of case management system for the following:
   i. To access laws regulations and case law
   ii. To **access forms to be submitted to the court**
   iii. To **receive notifications**;
   iv. Track the status of case;
   v. To view and mange case documents (briefs, motions);
   vi. To file and submit documents to court;
   vii. To view court orders and judgements in a particular case;

   Doing so will help India register an improvement of 1 point under the case management parameter of Quality of Judicial Process Index.

f. The suggestions made in points (b) to (e) suggesting stricter time standards, adjournments framework and complete electronic management will help India in registering an improvement of +4.5 points over its present standing at 1.5 ratings and reach the maximum of 6 in the case management parameter of Quality of Judicial Process Index. Suggestion in this regard can be taken from Australia which has registered the highest score of 5.5 in this parameter by providing a complete electronic system. (On a trial basis these reforms can be implemented and made mandatory in the cities of Delhi, Mumbai, Chennai, Calcutta and Bengaluru which are possibly eyed for ease of doing business ranking data collection by the World Bank and are the prime commercial centers in the country).

g. Further, the initial plaint and lawsuit should be filed electronically through a dedicated platform by development of e-filing system like done by Estonia. Also,

[57] During the time of Covid-19 outbreak the courts are reinventing themselves through technological developments. Supreme Court of India has also issued guidelines in this regard permitting filing of e-summons and e-notices.

this initial plaint and complaint should be made serviceable on the defendant electronically by e-mail, fax or SMS. Both these systems will help India in registering a +2 point improvement on its present 2 points out of 4 under the Court Automation parameter of Quality of Judicial Process Index.

If carried out successfully, all these reforms will help in improving the quality of Judicial Process Index which in turn will result in decrease of the time taken in resolving commercial disputes in India and thus improving India's Ease of Doing Business Ranking substantially.

15.7 CONCLUSION

The ease of doing business index is a methodology of ranking countries created jointly by *Simeon Djankov* and *Gerhard Pohl*, two leading economists at the Central and Eastern Europe sector of the World Bank Group.[58] India has improved its ranking considerably under the Ease of Doing Business, but this is because of changes in corporate law, insolvency law as well as employment law. Contract Law and Indian judicial system is yet to make its contribution improving ease of doing business in India. Following the changes brought about by the specific Relief (Amendment) Act, 2018, Commercial Courts Act and its Amendment, as well as the Arbitration and Conciliation Act, the reforms of this study will surely prove helpful in not only strengthening the general contract law in India but also improving the ease of doing business in India.

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[58] Doing Business, *Ease of Doing Business Score*, http://www.doingbusiness.org/en/data/doing-business-score (last visited May 19, 2020).

CHAPTER 16: THIRD PARTY FUNDING IN DISPUTE RESOLUTION

16.1 INTRODUCTION

Third party funding ("**TPF**") is an agreement that enables a person or entity who is not a party to the dispute to provide funds or any other type of material support to a party to the dispute which is used to finance the costs of the litigation or proceedings. Depending on the outcome of the proceedings, the entity providing such funds would be entitled to remuneration or reimbursement.[1] The nature of TPF would require the application of the Doctrines of Champerty and Maintenance.[2] Maintenance is the funding of legal proceedings by a third party and champerty is when the third party gets a share in the proceeds.[3]

TPF is a solution for the impecunious who do not have the resources to pursue litigation or arbitral proceedings due to non-availability of funds. However, TPF is not restricted to just the impecunious people. It is also available to companies who are hesitant to pursue meritorious claims so as to preserve the cash flow required in order to run the business and manage the risks. Due to increase in costs in arbitration[4] and the curbs placed on the legal budgets of the companies, there is a rapid growth in the TPF industry with the entrance of a wide array of new funders into the market of global litigation financing.

Usually, TPF is sought by claimants. The law firms may also avail TPF in some jurisdictions. And despite the fact that there is challenge regarding the reimbursement of funders in case of successful defence of the respondents, third-party funding for the respondents is also evolving.[5] The rejection rate of TPF is higher than 80% because there are several factors that are to be considered by the party funding in order to approve the same.[6] First, there should be indication of a solid claim along with a well recoverable margin between the budget for the expenses and costs and the damages to be recovered.[7] TPF has many shortcomings and raises concerns like conflict of interest, confidentiality breach, unnecessary interference of funders in proceedings and many more.. But it is the way forward, especially in international arbitration and would require stringent regulation in order to ensure proper practice of the same in India.

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[1] Rishi Kumar Dugar, *Arbitration Cost's Going the Litigation Way - Is Third Party Funding of Arbitrations the Way Forward in India to Curtail Huge Arbitration Costs*, 2018 SCC OnLine Blog OpEd 9.
[2] LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 1 (2d ed. 2017).
[3] UK, Law Commission, Proposals for Reform of the Law Relating to Maintenance and Champerty (London: Her Majesty's Stationery Office, 1966) at para 9.
[4] INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION, QUEEN MARY UNIVERSITY OF LONDON, 14, (2015)
[5] Matthew Denney, *Portfolio Finance May Minimize Litigation Funding Risks*, CHANCERY FINANCE (Feb. 20, 2018).
[6] Hiroo Advani & Chaiti Desai, *Third Party Funding*, 2021 SCC OnLine Blog Exp 45.
[7] Tobey Butcher, *Is Arbitration Portfolio Financing Going to Grow in 2018?*, KLUWER ARB. BLOG (Feb. 2, 2018).

16.2 ENFORCEABILITY OF THIRD PARTY FUNDING IN INDIA

Champertous agreements used to be tortious and criminal.[8] However, these doctrines are not strictly applicable under the Indian jurisdiction but would only apply to transactions which are extortionate, inequitable or unconscionable in nature and not done with a bona fide object.[9] A constitutional bench of Supreme Court has held that with the exception of advocates,[10] champerty contracts involving third party (non-legal persons) are not illegal per se as such transactions were not against the public policy and public morals.[11] The Supreme Court has again clarified, in the case of *Bar Council of India v. A. K. Balaji*, that TPF is legally permissible as long as it is a non-lawyer funding the litigation and getting repaid.[12] Therefore, a TPF agreement containing an object or consideration which is extortionate or unconscionable, then it would be unenforceable under the Contract Act.[13]

The concept of TPF is not unexplored in India. In the EPC sector, Hindustan Construction Company Limited considered monetisation of litigation claims with a consortium of investors led by BlackRock Inc. Similarly, Patel Engineering has also been successful in monetising its claims through third party investors.[14]

Many States like Maharashtra, Uttar Pradesh, Tamil Nadu, Gujarat, Odisha, Andhra Pradesh and Madhya Pradesh have expressly recognised TPF in civil suits and have amended the CPC. The amendment gives power to the Court to ask the funding entity to become a party and deposit the costs of the litigation proceedings in the court.[15] This is to ensure that the funder cannot back out of paying the amount promised in the middle of the legal proceedings for any reason including apprehension of the results of the proceedings.

In the case of *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.*,[16] Section 45 of the Arbitration and Conciliation Act of 1996[17] was interpreted by the Supreme Court. It was held that when the performance of the principle agreement is dependent on the performance or execution or aid of an ancillary agreement and collectively have a bearing on the dispute, the transaction should be of composite nature to serve the ends of justice. This can bring TPF under the purview of the Arbitration and Conciliation Act.

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[8] Christopher Hodges et al., *Litigation Funding : Status and Issues* 12 (Ctr. for Socio-Legal Stud., Oxford and Lincoln L. Sch., U. Lincoln 2012).
[9] Ram Coomar Coondoo v. Chunder Canto Mookerjee, 1876 SCC OnLine PC 19.
[10] Bar Council of India's Standards of Professional Conduct and Etiquette, R. 20 and 21, Ch. II, Part VI, Bar Council of India Rules, 1975 [read with S. 49(1)(c) of the Advocates Act, 1961 read with the proviso thereto].
[11] *In Re* 'G' A Senior Advocate of the Supreme Court, AIR 1954 SC 557.
[12] (2018) 5 SCC 379.
[13] The Indian Contract Act, 1872, §23.
[14] Amita Katragadda, Shrey Srivastava & Priyal Modi, *Third Party Funding* (2020).
[15] CODE CIV. PROC., Order XXV, Rule 1.
[16] Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc., Civil Appeal No. 7134 of 2012.
[17] The Arbitration and Conciliation Act, 1996, §45.

In case of arbitration, there is no law that expressly bars TPF and the statute governing arbitration is also silent on the same.[18] However, even extant provisions of law[19] and decisions[20] only deal with whether or not such agreements are enforceable and not the regulation thereof.[21] TPF has also received favourable reference in the report of the High Level Committee to review the Institutionalisation of Arbitration Mechanism in India.[22]

India does not yet have a regulatory framework to address third-party funding. So, there is no clarity on who can provide TPF. However, there have been a few cases which laid down that TPF is legal in India as long as it does not go against the public policy of India. In *BCI v. A.K. Balaji* (2015), the Court held that TPF is legally permissible and there appears to be no restriction on non-lawyers to fund a litigation and get repaid after the outcome.[23]

The uncertainty and upheaval in the market resulting from the global economic slowdown in 2008 allowed for several hedge funds and banks, which are not affected by erratic changes in the financial markets to rely on dispute financing,[24] leading to the dawn of arbitration as an investment or an asset class, by creating a secondary market in the claims.[25] Recently, the institutional framework of third party funders, which has grown in response to the burgeoning of TPF as a 'corporate finance', has led to entities with abundant cash reserves to finance dispute resolution.[26]

16.3 THIRD PARTY FUNDING AND PUBLIC POLICY

Public policy refer to statements that regulate the actions of the citizens as well as reflect the government actions aimed to counter problems in order to ensure maximum good of majority of people affected by it.[27] First, the government makes policy choices, then those policy choices are put in action and finally, we see the impacts of the policy on the citizens. Law is the instrument through which the Government can affect the lives of the citizens.[28]

The concept of public policy is varying and uncertain and has often been described as an "untrustworthy guide" or an "unruly horse" and is capable of expansion and modification. Whatever obstructs justice, violates a statute, restrains liberty and natural or legal rights or is against good morals can be considered to be against public policy.[29] In light of The

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[18] The Arbitration and Conciliation Act, 1996.
[19] *In Re* 'G' A Senior Advocate of the Supreme Court, AIR 1954 SC 557 ("the amendments by High Courts of Bombay, Gujarat, Madhya Pradesh and Allahabad in Order 25 of the Code of Civil Procedure, 1908 whereby courts are empowered in those States to compel third-party financiers to furnish security for costs").
[20] S.V.R. Mudaliar v. Rajabu F. Buhari, (1995) 4 SCC 15.
[21] Arunadhri Iyer & Ashwin Mathew, *Third-Party Funding of Litigation - A Damocles Sword or a Welcome Step*, 2021 SCC OnLine Blog OpEd 62.
[22] Report of High-Level Committee to review the Institutionalization of Arbitration Mechanism in India (2017).
[23] Bar Council of India v. A.K. Balaji, Civil Appeal Nos.7875-7879 of 2015 (SC).
[24] NIEUWVELD & SAHANI, *supra* note 2, at 11.
[25] Charlie Lightfoot et al., *England and Wales*, GLOBAL ARB. REV. (2018).
[26] NORTON ROSE FULBRIGHT, INTERNATIONAL ARBITRATION REPORT 3-4 (2016).
[27] Ranjita Chakraborty, *Managing Public Morality: The Politics of Public Policy in India*, 70 THE INDIAN JOURNAL OF POLITICAL SCIENCE (2009).
[28] Manas Chakrabarty & Aleya Mousami Sultana, *Public Policy Making in India and the Scheduled Castes*, 69 THE INDIAN JOURNAL OF POLITICAL SCIENCE, Jan. - Mar., 2008, 191-202.
[29] P. Rathinam v. Union of India, AIR 1994SC 1844.

Contract Act, 1872, any agreement that tends to injure public welfare can be said to be against public policy.[30]

The Arbitration and Conciliation (Amendment) Act, 2015 clarified the circumstances when the arbitral award would be said to be in conflict with public policy of India.[31] Public policy includes fundamental principles of law and justice in both substantive and procedural respects.[32] There are three grounds - *first*, it should not be affected by corruption or fraud; *second*, it is in contravention with the fundamental policy of Indian law; *third*, it is in conflict with the most basic notions of morality or justice.[33] Thus, if a foreign award is found to be in conflict with the public policy of India and cannot be enforced.

In India, an agreement is considered to be champertous only if it is opposed to public policy or the provisions of the agreement are immoral or unjust or shocking to the conscience of law[34] and it has reiterated in several arbitration decisions that TPF agreements are different from Maintenance and Champerty. Besides, ensuring that no individual is denied access to justice due to financial shortage is also considered to be a part of the public policy of India.[35]

In the case *In re 'G', A Senior Advocate of Supreme Court*,[36] the constitutional bench of the apex court differentiated between litigations involving a champerty contract with lawyers and with non-lawyers and held that if only non-legal persons are involved, there is nothing against public policy in such a transaction.[37] The privy council, in *Ram Lal v. Nil Kanth*,[38] held that " agreements to share the subject of litigation, if recovered in consideration of supplying funds to carry it on, are not in themselves opposed to public policy".

In Singapore, the Civil Law (Amendment) Act was enacted in 2017 which provided for the abolishment of maintenance and champerty except for contracts which are against public policy.[39] It also provided that TPF contracts are not against public policy and, therefore, valid.[40] Similarly, in Hong Kong, maintenance and champerty are considered to be against public policy and, therefore, prohibited with certain exceptions. However, the doctrine of champerty is not applicable in arbitration matters[41] and the Hong Kong Law Reform Commission proposed allowance of TPF in arbitration.[42]

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[30] The Indian Contract Act, 1872 § 23 (applicable to contract to commit a crime, a tort or a fraud on a third party, contract that is sexually immoral, contract to the prejudice of the public safety, contract prejudicial to the administration of justice, contract that tends to corruption in public life, contract to defraud the revenue).
[31] The Arbitration and Conciliation (Amendment) Act, 2015 § 34(2)(A).
[32] Vyapak Desai et al., *Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India*, Enforcing Arbitral Awards in India 201, 2016 (Nakul Dewan ed., 2017).
[33] Pierre Tercier and Dilber Devitre, *Public Policy Exception - A Comparison of the Indian and Swiss Perspectives*, 5 IJAL (2016).
[34] Dr. V. A. Babu Legal vs State of Kerala, CRP. No. 933 of 2002 (E).
[35] *Id.* at 63.
[36] *In Re* 'G' A Senior Advocate of the Supreme Court, AIR 1954 SC 557.
[37] Bar Council of India's Standards of Professional Conduct and Etiquette, R. 20 and 21, Ch. II, Part VI, Bar Council of India Rules, 1975 [read with S. 49(1)(c) of the Advocates Act, 1961 read with the proviso thereto].
[38] Ram Lal v. Nil Kanth, 1893 SCC OnLine PC 7.
[39] The Civil Law (Amendment) Act, 2017, §5A (Singapore).
[40] *Id.*, §5B.
[41] Cannonway Consultants Limited v. Kenworth Engineering Ltd., (1995) 1 HKC 179 (High Court of Hong Kong).
[42] HONG KONG LAW REFORM COMM'N, REPORT ON THIRD PARTY FUNDING FOR ARBITRATION (2016).

Under the English Law, champertous agreements which are opposed to public policy are prohibited. In Australia, conditions were laid down for the court to test the TPF agreements on grounds of abuse of process and public policy. The first question to be answered was whether the litigation is adversely affected by the TPF agreement. The second question is if there has been fair exercise of bargaining powers.[43] The third and the final question to be considered by the courts was whether there was any instance of exercise of excessive control by the financier.[44] There is no definitive test as such and the questions are to be determined on a case-to-case basis. Thus, it is important to regulate TPF in India and reconcile it with the doctrine of public policy in order to ensure the object of protection of vulnerable parties is maintained and followed.[45]

16.4 REGULATION OF THIRD PARTY FUNDING

Despite the numerous benefits of TPF enumerated before, there are also a few risks and concerns associated with it. For instance, there is a possibility of existence of some connection between the financier and the arbitrator[46] which might lead to the respondent blocking the arbitration at the outset or challenging it to be against the public policy of India.[47] There is also a risk of unnecessary inference in the proceedings and dilution of the claimant's autonomy or breach of confidentiality. Therefore, it is very important to regulate TPFs. While doing so, its main objective should be kept in mind.

TPF agreements should be made with a bona fide objective of assisting a claim. The pivotal justification for third-party funding is that exorbitant costs of litigation or arbitral proceeding does not become a hurdle for parties with insufficient financial resources to have access to justice.[48] To ensure transparency and avoid conflict of interests of the parties, the existence of any TPF agreement should be revealed including the identity of the funder as is seen in Singapore.[49] Also, lawyers and law firms should not have any material interest in the TPF agreement.[50]

From the perspective of the funders, the TPF agreement could be gauged as an investment which would require an analysis of the merits of the claim, the damages that are likely to arise and the prospects of enforcing the award.[51] There is a likelihood of abuse of financial power leading to unwarranted interference in the proceeding and "unfair bargains".[52] In order to protect the interests of the opposing party, there should be a restriction in the agreement regarding the extent to which the financier can interfere in the proceedings.

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[43] *Campbells*, (2006) 229 CLR. 386, ¶ 92 (Australia).
[44] *Id* at ¶ 90.
[45] Arthad Kurlekar & Gauri Pillai, *To be or not to be : the oscillating support of Indian courts to arbitration awards challenged under the public policy exception*, 32 (1) ARB. INT'L 179-198 (2016).
[46] The Arbitration and Conciliation Act, 1996, §12 r.w. sched. 5.
[47] *Id.*, §34(2)(b)(ii).
[48] Tara Santosuosso & Randall Scarlett, *Third-Party Funding in Investment Arbitration : Misappropriation of Access to Justice Rhetoric by Global Speculative Finance*, 60 (9) B.C. L. Rev (2019).
[49] Legal Profession (Professional Conduct) Rules, 2015, Rule 49A.
[50] *Id.* Rule 49B.
[51] Joe Tirado et al., *The Costs and Funding of International Arbitration, in Defining Issues in International Arbitration* 289 (Julio César Betancourt ed, 2016).
[52] Frank Garcia, *Third Party Funding as Exploitation of the Investment Treaty System*, 59 (8) B.C. L. REV. 7 (2018).

The TPF agreement should not be against the public policy of India.[53] An award or an agreement is said to be against public policy if it is contrary to the fundamental policy, justice or morality, interests of India or is patently illegal.[54] Such funding, in essence, is a furtherance of morality, justice and ultimately, public policy as it promotes access to justice. It must be ensured that such TPF is not unreasonable to the opposing party and the motive behind the funding is not malicious which may include gambling in litigation, oppression of other parties, encouraging unrighteous suits and so on. So long as the terms of the agreements are no unjust or shocking to the conscience of law, they are not opposed to public policy.[55]

As already mentioned, the TPF agreement should be just and with an aim of achieving a bona fide object and not extortionate or unconscionable. In furtherance of the same, there should be no connection between the third-party funder and the arbitrator presiding over the proceedings which can be ensured by prior disclosure of existence of TPF agreement along with the identity of the funders.[56] This would ensure independence and impartiality on the part of the arbitrator.[57]

The Tribunal and the parties have to maintain confidentiality regarding all the arbitral proceedings under the Arbitration and Conciliation (Amendment) Act, 2019.[58] There is a possibility that there can be a breach of confidentiality on account of third-party agreements and therefore, necessary steps have to be taken to ensure that such breach does not occur.[59]

There should be a framework to address capitalization of the funders. Section 4(1)(b) of the Civil Law (Third-Party Funding) Regulations of Singapore[60] provides for minimum paid-up share capital to be eligible to provide third-party funding. The Code of Conduct of the Association of Litigation Funders of England and Wales[61] also requires its members to maintain capital adequate enough to cover the funding liabilities for at least thirty-six months and have access to a minimum amount of money. This would prevent the entry of less trustworthy elements from entering the market.[62]

TPF has been in demand recently in international arbitration and due to lack of regulations, there is no way to mitigate the risks associated with TPF like transparency and confidentiality of the proceedings and protection of interests of the opposing party.[63] Therefore, before it is

[53] Kurlekar & Pillai, *supra* note 45.
[54] ONGC v. Western Geco International Limited, (2003) 5 SCC 705.
[55] Ridhima Sharma, *Third Party Funding in International Commercial Arbitration*, 12 NUALS L.J. 61 (2018).
[56] ICCA AND QMUL TASK FORCE ON THIRD-PARTY FUNDING, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2018).
[57] Alastair Henderson et al., *Update : Singapore Passes Law to Legalize 'Third-Party Funding' Of International Arbitration and Related Proceedings*, HERBERT SMITH FREEHILLS ARB. NOTES (Jan. 11, 2017).
[58] The Arbitration and Conciliation (Amendment) Act, 2019, §43A.
[59] Antje Baumann and Michael M. Singh, *New Forms of Third-Party Funding in International Arbitration: Investing in Case Portfolios and Financing Law Firms*, 7 IJAL 29 (2019).
[60] The Civil Law (Third-Party Funding) Regulations, 2017, § 4(1)(b) (Singapore).
[61] The Code of Conduct of the Association for Litigation Funders, 2011, §9.4 (UK).
[62] The Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe (CCBE), rule 3.6.
[63] Pranav V. Kamnani & Aastha Kaushal, *Indian Journal of Arbitration Law Regulation of Third Party Funding of Arbitration in India : The Road Not Taken*, 8 IJAL 151 (2020).

too late, there should be regulating framework for third party funding. India should have a framework of TPF and strict rules regarding: (a) the financier's right to interfere; (b) penalties for duress and threat; (c) the right to terminate the funding agreement; and (d) rules regarding confidentiality and disclosures.[64]

Therefore, third party funding should be in furtherance of a bona fide object, in line with the public policy of India, the Arbitration and Conciliation Act and any other law in force at the time and ensure adherence to fairness, justice and morality. With stringent regulation of third-party funding, it would be possible for India to expand the market for TPF enabling better access to justice. It would encourage persons who are hesitant to pursue litigation or arbitration for want of funds and resources would not have to give up on meritorious claims.

16.5 STATUTORY RECOGNITION OF THIRD PARTY FUNDING IN OTHER COUNTRIES

The doctrines of champerty and maintenance were enforceable in Singapore till 2017 rendering TPF as a tort.[65] In Hong Kong, too, TPF was made an exception to the general bar on champerty and maintenance through the Arbitration and Mediation (Third Party Funding) (Amendment) Ordinance, 2017.[66] In civil law systems like France and Belgium, the position of TPF falls under a grey-are but it's practice is frowned upon.[67]

In countries like Australia, US, Germany and UK, the legal barriers regarding champerty and maintenance have eroded[68] and its demand has created a marketplace for funders in the US, UK and the Netherlands among others.[69] In Australia, there are many cases where it was held that third-party funding of proceedings is not against public policy. These cases include *Campbells Cash and Carry Pty. Ltd. v. Fostiff Pty. Ltd.*[70] and *Mobil Oil Australia Pty Ltd. v. Victoria.*[71] However, no standard was laid down for the determination of fairness of the agreement in either case even though that there might be concerns of illegality and public policy.

In 1908, the doctrines of champerty and maintenance were said to be obsolete and outdated in England.[72] In 1967, they were abolished as crime and torts.[73] However, in case of violation of public policy, the abolition of aforementioned doctrines will not affect the determination of the same.[74] The Criminal Law Act, 1967 has paved the way for TPF in

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[64] James Clanchy, *Navigating the Waters of Third Party Funding in Arbitration*, 82 (3) INT'L J. ARB, MEDIATION DISP. MGMT. 222 (2016).
[65] Nadia Darwazeh & Adrien Leleu, *Disclosure and Security for Costs or How To Address Imbalances Created By Third-Party Funding*, 33 (2) J. INT'L ARB. (2016).
[66] Arbitration and Mediation (Third-Party Funding) (Amendment) Ordinance, No. 6 (2017) (H.K.).
[67] NIEUWVELD & SAHANI, *supra* note 2.
[68] Alastair Henderson et al., Update : *Singapore Passes Law to Legalize 'Third-Party Funding' Of International Arbitration and Related Proceedings*, HERBERT SMITH FREEHILLS ARB. NOTES (Jan. 11, 2017).
[69] Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice : How Law Firms, Arbitrators and Financiers Are Fuelling An Investment Arbitration Boom*, CORP. EUR OBSERVATORY TRANAT'L INST. (Nov. 2012).
[70] Campbells Cash & Carry Pty Ltd. v. Fostif Pty Ltd., (2006) 229 CLR 386, ¶¶ 146-149 (Austl.).
[71] Mobil Oil Australia Pty. Ltd. v. Victoria, (2002) 211 CLR 1 (Austl.).
[72] British Cash and Parcel Conveyors v. Lamson Store Service Co., [1908] 1 K.B. 1006 (Eng.).
[73] The Criminal Law Act, 1967, §§13,14 (UK).
[74] *Id.*, §14(2).

England. There can be found statutory provisions for "security for costs" under the English law in the Civil Procedure Rules[75] and the London Court of International Arbitration Rules[76] that allows demand for security by the courts despite privity. The English Arbitration Act further allows the claim to be dismissed if a peremptory order for security for costs order is not complied with.[77] This ensures the both the right of the claimant to access to justice as well as the right of the respondent to financial protection of their costs are protected.[78]

Even though TPF has come to be accepted widely, there are a very few countries like UK, Singapore and Hong Kong that have laid down regulations for addressing and mitigating the risks associated with such funding agreements, like, conflict of interest, confidentiality and transparency of proceedings, public policy concerns among others.[79] The Singapore International Arbitration Centre ("**SIAC**") has given discretionary powers to the tribunal to order disclosure of TPF agreements, if any.[80] The Canada-European Union Trade Agreement ("**CETA**") mandates such disclosure.[81] In Hong Kong also, it is mandatory to disclose the existence of TPF agreements as well as the identity of the funder.[82] The Code of Practice for Third-Party Funding of Arbitration in Hong Kong is mandatory and binding and applicable on all funding agreements.[83] Having such a code helps maintain a check on the funders and prevents them from abusing the law.

In *Essar Oilfields Services Limited v. Norscot Rig Management Pvt. Ltd.*,[84] third-party funding was classified as a part "other costs" allocated to either parties depending on their conduct during the arbitration proceedings under Section 59(1)(c) of the Arbitration Act, 1996.[85] The UK Code of Conduct for Litigation Funders lays down certain duties and responsibilities of the funders[86] and along with the IBA Guidelines on Conflicts of Interest of 2014, places the onus on the funders to disclose any existing conflicts with the arbitrators.[87] In Singapore, the Civil Law (Amendment) Bill was passed in 2017 which permitted third-party funding for international arbitration and related proceedings in Singapore.[88]

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[75] The Civil Procedure Rules, 1999, rule. 25.12 (Eng.).
[76] London Court of International Arbitration Rules, 2014, rule. 25(2).
[77] The Arbitration Act, 1996, §41(6) (UK).
[78] William Kirtley & Koralie Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant is Relying upon Third-Party Funding?,* 30 J. INT'L ARB. 17, 19 (2013).
[79] *Id* Pranav V. Kamnani and Aastha Kaushal, *Indian Journal of Arbitration Law Regulation of Third Party Funding of Arbitration in India : The Road Not Taken*, 8 IJAL 151 (2020).
[80] Singapore International Arbitration Centre Investment Arbitration Rules, 2017, rule. 24.
[81] Comprehensive Economic and Trade Agreement, Can.-EU, art. 8.26, Jan. 14, 2017, O. J. L11/23.
[82] The Arbitration Ordinance, 2011, §98-u (H.K.).
[83] Code of Practice for Third-Party Funding of Arbitration, (2018) G.N. 9048, ¶ 1.2 (H.K.).
[84] Essar Oilfields Services Limited v. Norscot Rig Management Pvt. Ltd., (2016) EWHC 2361 (Comm) (Commercial Court, Queen's Bench Division).
[85] The Arbitration Act, 1996, §59(1)(c) (UK).
[86] Rachael Mulheron, *England's Unique Approach to the Self-Regulation of Third Party Funding : A Critical Analysis of Recent Developments*, 73 (3) Cambridge L. J. 570-97 (2014).
[87] IBA Guidelines on Conflicts of Interests in International Arbitration, Gen. Std. 7(d) (Oct. 23, 2014).
[88] The Civil Law (Amendment) Bill, 2017 (Singapore).

16.6 CONCLUSION

Arbitration is becoming increasingly prevalent worldwide. In cross-border disputes, international arbitration is the most common mechanism of dispute resolution sought after. India is also adopting a pro-arbitration stance by adopting a pro-institutional arbitration framework.[89] The Indian Courts have given decisions regarding remit of public policy,[90] fraud[91] and doctrine of severability[92] in enforcement of arbitral awards including foreign ones. In international arbitration proceedings, the costs are extortionate[93] and may, on instances, exceed millions of dollars[94] which compels the parties concerned to consider the means of funding before even going into the merits of the claim.[95] In order to avail justice, they have to, therefore, opt for TPF to pursue potentially legitimate claims because of lack of available funds.

India also has to adopt the practice of third-party funding which has become an indispensible part of international arbitration proceedings. Though TPF is still small and niche[96] in India, it is widely prevalent elsewhere.[97] With increase in demand for arbitration, the costs involved in the same have also increased.[98] And so does the need and demand for funding by external sources.[99] In India, TPF would be especially beneficial to small businesses that do not have the budget to allocate funds separately for legal expenses.[100]

However, as mentioned before, it is important to resolve the existing gaps in third-party funding which have been mention previously. TPF can be responsible for the creation of certain imbalances between the parties of a proceeding by way of information asymmetry as there is no obligation to divulge the existence or details of TPF, if any. There can also be an instance of arbitral hit and run[101] whereby the costs of arbitration become irretrievable because of the frivolous and inflated claims being engendered.[102] Because of this, and many

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[89] The Arbitration and Conciliation (Amendment) Act, 2019, Statement of Objects and Reasons.
[90] Shri Lal Mahal v. Progetto Grano Spa, Civil Appeal No. 5085 of 2013.
[91] WSG v. MSM Satellite, Civil Appeal No. 895 of 2014; *See also* Swiss Timing v. Organizing Committee, Arbitration Petition No. 34 of 2013.
[92] Mulheim Pipecoatings v. Welspun Fintrade, Arbitration Petition No.1070 of 2011.
[93] FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 686 (Emmanuel Gaillard & John Savage eds., 1999).
[94] Bernard Hanotiau, *The Parties' Costs of Arbitration*, *in* 4 EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION 213 (Yves Derains & Richard H. Kreindler eds., 2006).
[95] Philippe Cavalieros, *In-House Counsel Costs and other Internal Party Costs in International Commercial Arbitration*, 30 (1) ARB. INT'L 145 (2014).
[96] NIEUWVELD & SAHANI, *supra* note 2, at 11.
[97] P. Rathinam v. Union of India, AIR 1994SC 1844.
[98] Nick Rowles-Davies, *Third-Party Litigation Funding* 15 (2014).
[99] Duarte G. Henriques, *Arbitrating Disputes in Third-Party Funding*, 85(2) INT'L J. ARB. MEDIATION DISP. MGMT. 171 (2019).
[100] Jef De Mot et al., Third-*Party Funding and its Alternatives : An Economic Appraisal*, LEIDEN L. SCH. 3 (2016)
[101] RSM Prod., ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, ¶ 33 (Aug. 13, 2014).
[102] The Arbitration and Conciliation Act, 1996, §12 r.w. sched. 5.

other reasons, there is an immediate need for the regulation of TPF in India.[103] Such a step would also help India establish itself as a global arbitration hub.[104]

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[103] DEP'T OF LEGAL AFF., REPORT OF THE HIGH-LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALIZATION OF ARBITRATION MECHANISM IN INDIA 43 (2017).
[104] Ravi Shankar Prasad, *Changes in law needed to make India hub of arbitration*, Fin. Express, Jul. 18, 2019.

PART B

SEMINAR PAPERS

SPECIFIC PERFORMANCE OF CONTRACT: THE JOURNEY FROM BEING 'EXCEPTION' TO 'GENERAL RULE'

By: *Dr Ravindra Kumar Singh*[*]

Abstract

The nature and types of remedies permitted by the law influence both the manner in which parties bargain their contract and the performance of the contract. As a remedy, in the event of breach of contract, specific performance of contract means requiring the parties to the contract to perform their respective obligations as per the terms and stipulations of the contract. Before the enactment of the Specific Relief (Amendment) Act, 2018, specific performance of contract was awarded only in exceptional cases, and that the general remedy was award of damages. Damages were proved not to be the best remedy in all the situations. However, the said Amendment Act has changed this situation and now the grant of specific performance has been made the 'general rule'. After the passing of the Amendment Act (2018), specific performance is no longer dependent upon the discretion of the court, for this remedy can now be claimed as a matter of right. By lessening the interference by the court in the matter of contractual remedies, the Amendment Act has gone a step ahead by giving specific recognition to the autonomy of the parties while seeking remedies in the event of breach. All these will discourage parties from committing breach of contract, and encourage the good contract performance by the parties. From the standpoint of contract enforcement, shifting the specific performance of contract from 'exceptional or discretionary remedy' to 'general remedy', which the 2018 Amendment has brought forth, has to be much-appreciated.

The object of this paper is to critically appraise the Specific Relief (Amendment) Act, 2018 and its impact on the remedy of specific performance of contract. In this context, the paper also seeks to bring out the difference between the civil law system and the common law system. The paper discusses the judgments wherein, realising the growing jurisprudence in contract law, specific performance has been granted. Further, it analyses as to how the changes, brought about by the Amendment Act, are going to impact the approach and attitude of the parties to the contract vis-à-vis contract enforcement.

INTRODUCTION

The study of contract law can broadly be divided into three phases: formation of contract, discharge of contract, and remedies in the event of breach of contract. The object of contract management is to maximise the gain (the object which the parties intend to achieve by entering into the contract) and minimise the risk; and this object is accomplished in its entirety when all the broad phases are managed most efficiently. One can naturally expect that the parties to a contract would perform their contractual obligations, for they have voluntarily entered into that contract. So long as parties perform their obligations

* Dr. Ravindra Kumar Singh, Associate Professor of Law, Gujarat National Law University, India, rsingh@gnlu.ac.in and ravindrasinghshoorwar@yahoo.co.in [This paper is the revised and upgraded version of the paper which the author presented at the two-day National Seminar on 'Strengthening Legal provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial matters in India' held on 21-22 August 2019 at National Law School of India University, Bengaluru.]

satisfactorily, no issues arise. However, different consequences flow when a party fails to fulfil his contractual obligations. When a contract is breached, the aggrieved party has the following key remedies to claim: damages, specific performance of contract, injunction and termination of the contract. Specific performance of contract means obtaining performance *in natura*, i.e. the non-defaulting party can go to the court and obtain an order from the court by which the defaulting party is required to perform *in natura*. Aptness of remedies is quintessential to effective enforcement of contract, besides bolstering the confidence of people that in the event of breach, they will surely be provided with the most effective remedy by the law.

SPECIFIC PERFORMANCE OF CONTRACT BEFORE THE AMENDMENT ACT 2018

Of all the contractual remedies, before the enactment of the Specific Relief (Amendment) Act, 2018,[1] specific performance of contract could be awarded in extraordinary cases only, and it was monetary compensation (damages) which was commonly awarded. By granting specific performance of contract, the court necessitates the performance of the contractual obligations undertaken by the parties to the contract. Understandably, in many cases, damages could not provide the most satisfying remedy, for an award of damages is computed with reference to the date of breach and it does not take into consideration the events after the breach. More often than not, the non-defaulting party could not prove all the losses caused due to the breach, which would ultimately affect the quantum of damages. Damages would, in most of the cases, not be able to substitute the real object which the parties had in mind while entering into the contract. Delay in the award is also an ominous factor. The application of inadequacy test has not been very easy, as it has been applied on the basis of inferences rather than facts.[2] Prior to the Amendment Act of 2018, in India, specific performance of any contract could, in the discretion of the court, be enforced in the following situations: (a) where there existed no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or (b) where the act agreed to be done was such that compensation in money for its non-performance would not afford adequate relief.[3] Similarly, Section 11[4] provided that in the discretion of the court, specific performance could be granted if the act agreed to be done was in the performance wholly or partly of a trust. Section 14[5] enumerated certain contracts which could not be specifically enforced. Section 16[6] stipulated personal bars to the relief of specific performance in favor

[1] The Specific Relief (Amendment) Act, 2018 has come into force from 01 October 2018.
[2] *See* Nilima Bhadbhade, *Specific Performance of Contracts: The Test of Inadequacy and Effective Enforcement* (LexisNexis, 2014). Quoted by the Expert Committee on Specific Relief Act, 1963 that was constituted by the Government of India, Ministry of Law and Justice, Legislative Department.
[3] *See* the Specific Relief Act, 1963, §10 (as it stood prior to the Amendment Act 2018).
[4] As it stood prior to the Amendment Act (2018).
[5] As it stood prior to the Amendment Act (2018).
[6] As it stood prior to the Amendment Act (2018).

of a person in certain circumstances. Section 20[7] dealt with the discretion of the court as to decreeing specific performance.

SPECIFIC PERFORMANCE OF CONTRACT: CIVIL LAW SYSTEM VERSUS COMMON LAW SYSTEM

The approach of the civil law system differs from the common law system on the subject of specific performance of contract. In civil law jurisdictions, specific performance of contract can be claimed as a routine remedy, unless the performance has become impossible.[8] On the other hand, in the common law system, award of damages is the primary remedy.[9] At common law, the court has the discretionary power to grant specific performance in exceptional cases. It is considered as equitable remedy. Unlike damages, specific performance is not claimed as of right. The discretionary power of the court to grant specific performance is exercised on some well-established principles in the situations where the award of damages does not prove to be an adequate remedy. This judicial approach can be found in the UK, most of states of the USA[10] and other common law jurisdictions. Since this remedy is equitable in nature, therefore, before granting this relief, the court takes into consideration the conduct of the plaintiff. The plaintiff may be entitled to this remedy only if he comes to the court with clean hands, and also that there is no unreasonable delay on his part in seeking this remedy. The Specific Relief Act of India recognised and incorporated this principle. The great American jurist Oliver Wendell Holmes has put the position of the common law as: 'The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised act does not come to pass.'[11] This suggests that in the common law, a contract is not predominantly seen as a moral device, rather as an economic one.[12] Whereas, in the civil law system, a contract is considered as a moral device, i.e. in contract one must keep one's promise.

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[7] As it stood prior to the Amendment Act (2018). Section 20 is now substituted by the Amendment Act of 2018. The present Section 20 provides for 'substituted performance of contracts.

[8] For instance, in Germany, according to § 241(1) of the BGB (German Civil Code), a creditor is entitled to claim performance from the debtor. Similarly, as per Art. 1184 of the French Civil Code, in the event of non-performance on the part of the promisor, the other party has the option either to require the promisor to fulfil his contractual obligations where it is possible, or to terminate the contract and claim damages.

[9] As a remedy, generally, English law recognizes award of damages in case of breach of contract (along with termination in case of a fundamental breach). Under the English/common law, the remedy of specific performance is considered a secondary remedy and is granted in the discretion of the court in exceptional circumstances only, for instance, where the damages is proved to be inadequate. Whereas, under the civil law systems, specific performance of contract is regarded as the primary remedy aiming at reconstructing between the parties the situation as described in the contractual terms. See Giuditta Cordero Moss, *Lectures on Comparative Law of Contracts* (Institute of Private Law, University of Oslo, No 166, 2004) p 182.

[10] § 357(1) of the 'Restatement (Second) of Contracts' (American Law Institute) provides that subject to the rules stated in §§ 359-69, specific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty. Similarly, § 359(1) of the Restatement (Second) of Contracts states that specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.

[11] OLIVER WENDELL HOLMES, THE COMMON LAW 301 (Little Brown ed., 1881) as quoted in THOMAS KADNER GRAZIANO, COMPARATIVE CONTRACT LAW 221 (Palgrave Macmillan ed., 2009).

[12] JAN M SMITS, CONTRACT LAW: A COMPARATIVE INTRODUCTION 194(Edward Elgar 2014).

However, generally in all the legal systems of the world, contracts of personal services are not specifically enforced.[13]

SPECIFIC PERFORMANCE OF CONTRACT AFTER THE AMENDMENT ACT OF 2018

The Amendment Act of 2018 is principally based on the report submitted by the Expert Committee[14] on Specific Relief Act, 1963 ('Expert Committee') in the year 2016. The object of the Expert Committee was to review the provisions of the Specific Relief Act, 1963 with the aim of making the law relating to specific relief more effective and business friendly for ease of doing business, especially from the point of view of enforceability of contracts and other reliefs provided in the Specific Relief Act, 1963. It was indeed very much needed, as a lot of important developments have taken place since 1963. Today, many large value contracts are entered into for the purpose of developing infrastructure projects for public utility. The Amendment Act, accordingly, has been effected with an object of improving India's ranking in the 'ease of doing business index' released by the World Bank. As per the latest World Bank Report on 'Doing Business 2020' (17th Edition), India has ranked 63rd (out of 190 countries) in the ease of doing business ranking; however, the worrisome aspect is that it has not made any improvement on the 'enforcing contracts' indicator.[15] Nevertheless, a satisfying and encouraging aspect is that for the third consecutive year India is included in the top ten economies improving the most across three or more areas measured by Doing Business in 2018/19. As per the Report, the four areas in which India has made remarkable reforms making it easier to do business are: (a) starting a business, (b) dealing with construction permits, (c) trading across borders and (d) resolving insolvency. In the last year's World Bank Report on 'Doing Business 2019' (16th Edition), India ranked 77th (out of 190 countries); and it ranked 163rd (out of 190 countries) on the 'enforcing contracts' indicator.[16] The 'enforcing contracts' parameter measures the time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes

[13] *Id.* at 200.

[14] The Expert Committee was constituted by the Government of India, Ministry of Law and Justice, Legislative Department (Legislative III Section) [F.No. 11(2)/2015-Leg.III] vide Office Order dated 28 January 2016.

[15] India has made a significant jump upward, improving its ease of doing business ranking from 130 in Doing Business 2016 to 63 in Doing Business 2020. The Report says that India's 'Make in India' campaign, focused on attracting foreign investment, has especially boosted the private sector manufacturing and has improved the country's overall competitiveness. India has got an overall score of 71 out of 100. <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> (last visited Dec. 17, 2019) (The World Bank Report on 'Doing Business' states that Doing Business covers 12 areas of business regulation; ten of these areas—starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts, and resolving insolvency—are included in the ease of doing business score and ease of doing business ranking. It is to be noted that 'Doing Business' also measured regulation on employing workers and contracting with the government; but, these two are not included in the ease of doing business score and ranking. Contracting with the government indicator will, however, be included in Doing Business 2021).

[16] It got a score of 41.19 out of 100 on the 'enforcing contracts' parameter, https://www.worldbank.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf (last visited Aug. 20 2019).

index, appraising whether the country has adopted good practices that promote quality and efficiency in the judicial system.[17]

The important changes brought forth by the Amendment Act of 2018 are as follows:

(i) Making specific performance of contract a general remedy from discretionary or exceptional remedy.

(ii) Introduction of substituted performance of contract (right to cover).

(iii) Decreasing the types of contracts which cannot be specifically enforced.

(iv) Empowering the court to engage experts where it considers it necessary to get expert opinion to assist it on any specific issue involved in the suit.

(v) Special provisions for contracts relating to infrastructure projects.

(vi) Expeditious disposal of suits.

In so far as specific performance of contract is concerned, the Amendment Act has changed the position of law (which was based on the principles evolved by the English courts of equity); and accordingly, now specific performance will be granted as a 'general rule', rather than in 'exceptional' circumstances only. After the amendment, Section 10 now provides that specific performance of a contract has to be enforced by the court where the non-defaulting party claims it, and this power of the court is subject to the provisions contained in Section 11(2), Section 14 and Section 16.

Earlier, where an act was agreed to be done in the performance wholly or partly of a trust, specific performance of a contract could in the discretion of the court be enforced. But, now the specific performance of such a contract is not in the discretion of the court; it has to be specifically enforced, except as otherwise provided in the Specific Relief Act itself.[18]

So, post the Amendment Act 2018, specific performance is no longer dependent upon the discretion of the court, and now this remedy can be claimed as a matter of right. Section 20 of the Specific Relief Act has been amended for that reason. The discretionary nature of specific performance of contract actually created some uncertainties as to the grant of this remedy. However, the amendment has changed this situation, and now specific performance will be granted to those asking for this remedy. This much-needed change will reduce the interference by the court in the matter of contractual remedies. Party autonomy has been explicitly accepted by the law while looking for remedies in the event of contractual breach. This change is also in tune with the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts.[19] This is going to

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[17] https://doj.gov.in/sites/default/files/Brief%20Note%20on%20Doing%20Business%20Report-2018_2.pdf (last visited Aug. 20 2019).

[18] The Specific Relief Act, 1963, §11(1) (It was not specifically enforceable even prior to the 2018 Amendment).

[19] Report of the Expert Committee on Specific Relief Act, 1963 (submitted in May 2016) p 61. In support of this, the Report cited Article 9:102 of Principles of European Contract Law and Article 7.2.2 of the UNIDROIT Principles of International Commercial Contracts.
Article 9:102 of the Principles of European Contract Law, which provides for non-monetary obligations, reads as under:

discourage parties from breaking their contract; instead, it will inspire them to perform their contractual undertaking.

Specific performance is not granted in the following situations:[20]

(i) Where a contract made by a trustee in excess of his powers or in breach of trust.[21]

(ii) Where a party to the contract has obtained substituted performance of contract in accordance with the provisions of Section 20 of the Specific Relief Act.[22]

(iii) A contract, the performance of which involves the performance of a continuous duty which the court cannot supervise.[23]

(iv) A contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms.[24]

(v) A contract which is in its nature determinable.[25]

Except as otherwise provided in Section 12 of the Specific Relief Act, the court would not direct the specific performance of a part of a contract. Section 15 enumerates the persons who are entitled to obtain specific performance. Section 19 enlists the parties (and persons

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'(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.
(2) Specific performance cannot, however, be obtained where:
(a) performance would be unlawful or impossible; or
(b) performance would cause the obligor unreasonable effort or expense; or
(c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or
(d) the aggrieved party may reasonably obtain performance from another source.
(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.'

Article 7.2.2 of UNIDROIT Principles of International Commercial Contracts 2010, which deals with performance of non-monetary obligation, reads as under:

'Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless
(a) performance is impossible in law or in fact;
(b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;
(c) the party entitled to performance may reasonably obtain performance from another source;
(d) performance is of an exclusively personal character; or
(e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.'

[20] These situations have been provided under Sections 11 and 14.

[21] The Specific Relief Act, 1963, §11(2).

[22] The Specific Relief Act, 1963, §14(a) (The Amendment Act of 2018 has introduced the concept of '*substituted performance of contract*'. Accordingly, Section 20(1) provides that, 'where the contract is broken due to non-performance of promise by any party, the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency, and recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach'. However, before undertaking substituted performance of contract, the party who suffers such breach has to give a notice in writing, of at least thirty days, to the party in breach calling upon him to perform the contract within such time as stipulated in the notice, and on his refusal or failure to do so, he may get the same performed by a third party or by his own agency).

[23] The Specific Relief Act, 1963, §14(b) (It was not specifically enforceable even prior to the Amendment Act (2018)).

[24] *Id.*, §14(c) (It was not specifically enforceable even prior to the Amendment Act (2018)).

[25] *Id.*

claiming under them by subsequent title) against whom specific performance could be enforced. Section 18 states certain situations where a plaintiff seeks specific performance of a contract in writing, and to which the defendant sets up a variation, then, the plaintiff cannot obtain the performance sought, except with the variation so set up by the defendant.[26] In addition to the relief of specific performance, in a suit for specific performance of contract, the plaintiff may also claim compensation for its breach.[27] Prior to the amendment, compensation could be claimed 'either in addition to or in substitution of' specific performance. The wording of un-amended Section 21(1) was better than the amended Section 21(1), as it was wider and covered also a situation where if specific performance was not possible, the plaintiff could claim compensation 'in substitution of' such performance. The Expert Committee on Specific Relief also did not recommend for this amendment. In fact, the Expert Committee recommended for insertion of words 'or injunction in respect' after the words 'specific performance', so that compensation could be claimed either in addition to or in substitution of specific performance or injunction in respect of a contract.[28] The recommendations made by the Expert Committee for amending Sections 21, 23, 24 have not been accepted.

Section 16 provides for personal bars to specific performance. Accordingly, specific performance of a contract is not enforceable in favor of the following persons:

(i) A person who has obtained substituted performance of contract under Section 20.[29]

(ii) A person who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract.[30]

(iii) A person who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.[31] For the purpose of claiming specific performance of contract, he is no longer required to 'aver' that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him.

Section 17 states that a contract to sell or let any immovable property cannot be specifically enforced in favor of the following persons[32]:

(i) A vendor or a lessor who, knowing himself not to have any title to the property, has contracted to sell or let the property.

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[26] The Amendment Act has not made any change in Section 18.
[27] The Specific Relief Act, 1963, § 21(1).
[28] Report of the Expert Committee on Specific Relief Act, 1963 (submitted in May 2016) p 102.
[29] The Specific Relief Act, 1963, §16(a).
[30] *Id.*, §16(b).
[31] *Id.*, §16(c).
[32] The Amendment Act has not made any change in Section 17.

(ii) A vendor or a lessor who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

Where the performance of contract becomes impossible, specific performance is not granted in all the legal systems. There should have been an explicit provision in this regard. This is a lacuna in the Amendment Act. The various grounds on which specific performance can be refused should have been grouped together under one section/provision. This was recommended by the Expert Committee also.[33]

IMPACT OF THE AMENDMENT ACT OF 2018

All the significant changes brought forth by the Amendment Act are going to impact the contracting behaviour of the parties, besides ensuring effective enforcement of contracts and facilitating ease of doing business. With reference to the contract enforcement, elevating the remedy of specific performance of contract from 'exceptional or discretionary remedy' to 'general or statutory remedy', which the Amendment Act has brought forth, has to be applauded. The impact of the Specific Relief (Amendment) Act, 2018 on the remedy in the event of breach of contract is going to be multi-fold.

Attaining the expectations of the contracting parties: Besides deterring the parties from breaching the contract, the remedy of specific performance will also guarantee realising the expectations which the parties had in their mind while making the contract. The non-defaulting party will approach the court with much greater confidence of getting the adequate relief in terms of specific performance. Thus, the hitches in specifically enforcing the contract have been done away with. By according upper hand to the remedy of specific performance, the Amendment Act seeks to uphold the theory that one must keep one's promise. Parties do not enter into contract for just monetary benefit and, therefore, in the event of breach, monetary compensation may not all the time provide the real and full relief because the object of the parties was to achieve the purpose of the contract rather than getting the money equivalent to the loss suffered (which also many a time becomes difficult to prove). Specific performance of contract will protect the interest better by ensuring the parties of getting what was promised by the promisor. More so, the non-defaulting party must have the right to choose the kind of remedy that will give him better and greater satisfaction.

Change in the contracting behaviour of the parties: Making specific performance a general rule will change the overall contracting behaviour of the parties; they will also think of the remedies beforehand, and insert suitable clauses in their contract choosing remedies.[34] In a system where damages is the general remedy, promisors may have greater inducements to breach the promise if such a course of action is more beneficial to him than carrying it out. After

[33] Report of the Expert Committee on Specific Relief Act, 1963, pp 95-98.
[34] Report of the Expert Committee on Specific Relief Act, 1963, p 52.

the Amendment, parties will have extra reasons to perform their obligations and will be deterred to break their promises.

Certainty and consistency in terms of granting specific performance: Now, unless specific performance of contract, as a remedy, is barred on the limited grounds (as stipulated in the Specific Relief Act itself), it has to be granted to the party claiming it. As opposed to uncertainty and inconsistency, now there will be certainty and consistency in terms of granting specific performance of contract, as it is no longer dependent upon the discretion of the court.

Reducing the burden of the court: One of the positive impacts of making specific performance a general norm is that it will help reduce the burden of the court. Since parties will be under an obligation to perform the contract, therefore, indubitably less number of cases of breach of contract will reach the court.

Speedy disposal of cases under the Specific Relief Act: In order to ensure expeditious disposal of suits, a significant change brought about by the Amendment Act is that a suit filed under the provisions of the Specific Relief Act shall be disposed of by the court within a period of twelve months from the date of service of summons to the defendant. The period of twelve months may be extended for a further period not exceeding six months in aggregate after recording reasons in writing for such extension by the court.[35] Introduction of this time-bound adjudication will warrant speedy disposal of cases under the Specific Relief Act, and thereby, provide relief to the litigants.

Contracts of personal service: With reference to contracts of personal service, the general law is that such contracts cannot be specifically enforced. Declaring that no declaration to enforce a contract of personal service would normally be granted, the Supreme Court in *SR Tewari v. District Board Agra*,[36] formulated three exceptions in the following words:

'It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Art. 311 continues to remain in service, even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly, under the industrial law, jurisdiction of the labour and industrial tribunals to compel the employer to employ a worker, whom he does not desire to employ, is recognized. The Courts are also invested with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute, even if by making the declaration the body is compelled to do something which it does not desire to do.'

In *KK Saxena v International Commission of Irrigation and Drainage*,[37] the Supreme Court has recognised the following exceptions to the general rule that the contracts of personal service

[35] The Specific Relief Act, 1963, §20(c).
[36] SR Tewari v District Board Agra AIR 1964 SC 1680. These three exceptions have been reiterated by the Supreme Court in subsequent decisions, such as: Executive Committee of UP State Warehousing Corporation Ltd v Chandra Kiran Tyagi AIR 1970 SC 1244, Bank of Baroda Ltd v Jeewan Lal Mehrotra (1970) 3 SCC 677, Indian Airlines Corporation v Sukhdeo Rai AIR 1971 SC 1828, Executive Committee of Vaish Degree College Shamli v Lakshmi Narain AIR 1976 SC 888, and The Maharashtra State Cooperative Housing Finance Corporation Ltd v Prabhakar Sitaram Bhadange (2017) 5 SCC 623.
[37] KK Saxena v International Commission of Irrigation and Drainage (2015) 4 SCC 670.

are not specifically enforced: (i) where the employee is a public servant working under the Union of India or State; (ii) where such an employee is employed by an entity which is a State within the meaning of Article 12 of the Constitution; and (ii) where such an employee is a 'workman' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and raises a dispute regarding his termination by invoking the machinery under the said Act. The Court held that in the first two cases, the employment ceases to have private law character and 'status' to such an employment is attached; whereas, in the third category of cases, it is the Industrial Disputes Act which confers jurisdiction on the labour court/industrial tribunal to grant reinstatement in case termination is found to be illegal.[38]

The Amendment Act of 2018 is to be seen as the recognition of the growing jurisprudence in contract law. There are situations where specific performance would provide the most efficient remedy. It has to be, however, seen how the court is going to apply Section 14(c), which says that a contract cannot be specifically enforced where its performance is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms.

In sports and entertainment contracts, although performance requires personal skill and qualifications of the parties, but the court may still be justified in granting specific performance. In *Professional Football Club (Pty) Ltd v Igesund*,[39] the full bench of the Cape High Court (South Africa) took a bold stand and granted specific performance to the club against the head coach for the club's teams for the remainder of his fixed-term football coaching agreement. One can cull out the following four main considerations which influenced the Court in favour of granting specific performance:[40]

(i) The Court highlighted that the contract in question was not an ordinary contract of employment.

(ii) The Court stressed that specific performance is the primary remedy for breach of contract.

(iii) The main reason for the head coach's leaving was a commercial one and not a breakdown in the relationship between the parties.

(iv) The Court held that 'practical considerations' are irrelevant to the Court's equitable discretion to refuse specific performance, which should only be based on 'recognised hardship to the defaulting party'.

The above-stated judgment is a practical one and in tune with the modern-day reality. It is argued that if an employee is required to specifically perform the contract then he would exhibit lacklustre performance. But it has to be borne in mind that today in the sports and entertainment world, the competition is so high that even if the employee (actor/sportsperson) is not in good relation with the employer (producer/board/club), he

[38] *Id.*
[39] Professional Football Club (Pty) Ltd v. Igesund, 2003 (5) SA 73 (C).
[40] Tjakie Naudé, *'Specific Performance Against an Employee Santos Professional Football Club (Pty) Ltd v Igesund'*, THE SOUTH AFRICAN LAW JOURNAL 270.

would not afford to display lack-lustre performance. His reputation is at stake. He cannot disrupt his future, as his career mostly depends upon his on-field/on-screen performance. It is also to be noted that in these fields the actors/athletes develop so much competitive stints that they perform well on field/on screen, as they want to give their best every time, and furthermore, they are also accountable to the public. Quite often, these contracts are bargained on equality basis. More so, in such cases, it is the employer (club/board/producer) who is taking the risk, then, there is no reason to refuse specific performance. *Professional Football Club (Pty) Ltd v. Igesund* is a welcome decision because it discourages the coaches/athletes/actors from breaking their contractual obligations merely because they get better and lucrative offers from elsewhere. If a situation like the aforesaid case comes before the Indian courts, then it will be interesting to see the approach of the court, as in these types of cases the traditional grounds on which specific performance could be denied — cannot be applied blindly. More so, after the Amendment Act, the court should be encouraged to take bold approach recognising the growing jurisprudence in the field of specific performance of contract. The task of the court will become easier where the parties have in their contract itself explicitly or by implication provided for the remedy of specific performance in the event of breach or repudiation.

Again, in *Roberts v. Martin*,[41] the High Court of Cape of Good Hope ordered for the enforcement of a sponsorship agreement which was concluded between the applicant and the respondent, in terms of which the respondent undertook certain obligations in regard to the tennis playing future of the applicant.

The remedy of negative injunction may prove to be an effective relief where the coach/athlete/actor is desiring to join a rival board/club/production house; however, where the coach/athlete/actor is not seeking to join another board/club/production house or where he is pressurising the board/club/production house for renegotiation, then, the remedy of negative injunction would not prove to be adequate. In such a scenario, the remedy of affirmative injunction (specific performance) will provide the most adequate relief.[42] Furthermore, sports and entertainment contracts cannot be treated just as another set of contracts of personal service. Sports persons and actors possess unique skills and that they cannot be plainly replaced. These are other reasons why there is a greater scope for specific performance in sports and entertainment sector.[43]

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[41] Roberts v. Martin, (6448/04) [2005] ZAWCHC 12; 2005 (4) SA 163 (C).

[42] In his article titled, 'Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law' [16 *Marquette Sports Law Review* 261 (2006), available at: http://scholarship.law.marquette.edu/sportslaw/vol16/iss2/5, accessed: 17 December 2019], Geoffrey Christopher Rapp has advocated for specific performance effected by affirmative injunctions to eradicate the problem of holding out. He writes, 'Holding out induces negative externalities into communities hosting sports franchises; increases the costs of contract negotiations; and deprives fans of the players they have come to love and for whom they have paid increasingly outrageous prices to get to see.'

[43] *See* Kenneth Mould & Steve Cornelius, *The Case for Specific Performance as Remedy for Breach of Athletes' Contracts*, 8 IJPL (2017) (In this research paper, the authors have suggested to South African courts that specific performance is the most adequate remedy for breach of athletes' contracts. They have also referred to a few respectable scholars of US sports law who have advocated that US courts should consider granting affirmative injunctions against repudiating athletes which would have the effect of specific performance for breach of athletes' contracts).

CONCLUSION

The Amendment Act of 2018 is a very welcome move by Parliament of India. The changes brought about by this amendment, especially making specific performance a 'general rule' will undoubtedly impact the approach and attitude of the parties to the contract vis-à-vis contract enforcement, as it has strengthened and expanded the scope of remedies which the innocent party can claim in case of breach of contract. Since specific performance of contract has become a general or statutory remedy, therefore, the Amendment Act is definitely going to ensure contractual enforcement much better and more efficient, and thereby, improve India's ranking in the 'ease of doing business index', especially on the 'contract enforcement' parameter.

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STRENGTHENING CONTRACTUAL ENFORCEMENT IN COMMERCIAL ARBITRATION: A LEAP FORWARD

By: *Divyansh Nayar and Arth Singhal*[*]

Abstract

The ability to enter into, and more importantly, the ability to enforce contracts is fundamental to the proper functioning of the Commercial Markets. Disputes arising from these commercial dealings are pertinent to the 21st century and the resolution of such commercial disputes plays an important role in the effective enforcement of contracts. However, despite having an established legal system of Courts and Tribunals for more than half a century, India stands at 178 of the 189 countries in the ease of enforcement of contracts.

The reforms brought in the legal system, through the introduction of alternate dispute resolution mechanisms are themselves not bereft of ambiguities. Arbitration, both as a standalone technique or in combination with other mechanisms, remains the most preferred choice out of the Alternate Dispute Resolution Mechanisms to resolve commercial disputes. In consequence, it becomes relevant to deal with the ambiguities in the arbitration proceedings relating to the judicial interference in granting interim relief, timely completion of the proceedings, cost efficiency, among others.

This paper aims to analyze the choice between ad hoc arbitration and institution arbitration and determining the viability of each of the two options in light of the Arbitration and Conciliation (Amendment) Act, 2015, and the Arbitration and Conciliation (Amendment) Act, 2019. Further, relying on the Contractual theory as against the Status theory, the Paper suggests reforms in the relationship between the parties, arbitrators, and the institution (in case of institutional arbitration), to ensure effective enforcement of the contracts. It also discusses the 'Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India, 2018 chaired by Justice BN Sri Krishna' and intends to propose reforms in the arbitration regime in India.

INTRODUCTION

'Contractual Enforcement' is fundamental to the proper functioning of markets in India. We enter into multiple contracts daily, both consciously and unconsciously, like buying goods, taking a cab, merger of companies, etc. Proper enforcement of such contracts enhances the predictability in commercial relationships and reduces uncertainty regarding the implementation of rights flowing from the contract. It is also essential to ensure that the parties continue to repose faith in contractual relationships in the current times. When procedures for enforcing commercial transactions are bureaucratic and cumbersome, or when contractual disputes cannot be resolved in a timely and cost-effective manner, economies rely on less efficient commercial practices.[1]

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[*] Divyansh Nayar & Arth Singhal, students, B.A. LL.B., National Law University Odisha.

[1] *Contract Enforcement and Dispute Resolution*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (June, 2018),

From an economy-wide perspective, the issue in contractual enforcement is not whether a contract can be enforced but rather the cost of the various enforcement mechanisms and their efficacy in improving confidence between contracting parties. Consequently, the dispute resolution process holds an important position to effectively enforce the contracts. The inefficient dispute resolution process is both a hurdle in the successful enforcement of contracts and a burden in terms of the costs involved. The dispute resolution mechanism should be adept in its procedural functionality apart from being cost and time-efficient.

In the 21st century, the Alternate Dispute Resolution Mechanisms, constituent of arbitration, mediation, among other techniques, act as the only alternative and efficient mode of dispute resolution, as against litigation. Likewise, Justice Sundaresh Menon, the Chief Justice of the Supreme Court of Singapore also highlighted the importance of alternate dispute resolution by referring to it is an appropriate method of dispute resolution.

In this paper, we focus particularly on arbitration in India. The paper is divided into three chapters, each dealing with a different aspect of arbitration as it has evolved over the years. The procedural and substantive flaws in arbitration as practiced in the country have been attempted to be brought to the fore through this paper, as well as the subsequent ways for the reformation of each of those flaws.

Part I of the paper deals with the choice between ad-hoc and institutional arbitration and its viability. Part II stresses the need to revisit the relationship between the stakeholders involved in the arbitration process. Lastly, part III recommends the creation of an institutional arbitration-friendly regime.

CHOICE BETWEEN AD-HOC AND INSTITUTIONAL ARBITRATION AND ITS VIABILITY

In both theory and practice of arbitration, it is generally agreed that there are two basic forms of arbitration, ad hoc and institutional.[2] This truism is so self-understood that it has rarely been challenged, and few attempts have been made to identify precisely what makes an arbitration institutional or ad hoc.[3] Article IV (6) of the 1961 European Convention on International Commercial Arbitration is one of the few provisions in International Arbitration Law that expressly addresses the distinction between ad hoc and institutional arbitration and speaks of the "mode of arbitration".[4]

Depending on whether or not the arbitration proceeding is administered by an established organization, arbitration could be classified as either institutional, where "the proceedings are administered by an organization, usually by its own rules of arbitration,"[5] or ad hoc,

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https://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/contract enforcementanddisputeresolution.htm.

[2] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 169 (2d ed. Wolters Kluwer Law & Business, 2014).

[3] Ulrich G. Schroeter, *Ad hoc or Institutional Arbitration: A clear-cut distinction?*, 10(2) CONTEMP. ASIA ARB. J. 141.

[4] European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364.

[5] Gerald Aksen, *Ad Hoc Versus Institutional Arbitration*, ICC INT'L CT. ARB. BULL. 8 (1991).

meaning that "there is no formal administration by any established arbitral agency; instead, the parties create the rules for a given arbitration themselves.[6]

The global trend and practice of people's choice of arbitration, i.e. ad hoc or institutional, shows a lopsided inclination towards institutional arbitration with the majority of the arbitral awards being passed and administered by arbitral institutions.[7] Institutional arbitration offers a plenitude of advantages: availability of pre-established rules and procedures to ensure that the arbitration proceedings are conducted promptly;[8] administrative assistance; directory of qualified arbitrators to choose from; assistance in encouraging reluctant parties to proceed with arbitration; and defined format of proceedings with a proven record.[9]

However, according to a 2013 survey, the trend in India is contrary to global practice, which concludes that there is a strong preference for ad hoc arbitration amongst Indian companies, irrespective of their experience with arbitration or the quantum of the amount in dispute.[10] Ad hoc arbitration offers the advantages of giving the parties greater control over the arbitration process; allowing flexibility to the parties to decide on the procedure of arbitration and is cost-effective as there are no administration charges which are levied by any arbitral institution.[11] These advantages accruing from ad hoc arbitration are themselves conditional upon cooperation between the parties; the parties' understanding of the arbitration procedures; and the arbitration being conducted by a panel of experienced arbitrators. The difficulties posed in the dispute resolution process are dealt with in the next chapter.[12]

Difficulties in the Functioning of Ad-Hoc Arbitration in India

In the Indian context, more so often when there exists a commercial dispute, the disputant parties are less likely to cooperate, which frustrates the benefits accruing from the ad-hoc arbitration process in two ways: first, it leads to an increase in the costs arising from the arbitration process; and second, it leads to a delay in the arbitral proceedings.[13]

A properly structured ad-hoc arbitration is supposed to be cost-effective owing to the flexibility in the procedure of arbitration and the non-applicability of fees of the arbitration

[6] *Id*.
[7] *International Arbitration: Corporate attitudes and practices 2008*, QUEEN MARY UNIVERSITY OF LONDON AND PRICEWATERHOUSE COOPERS (2008), http://www.arbitration.qmul.ac.uk/docs/123294.pdf.
[8] SIAC Rules 2016, LCIA Arbitration Rules 2014, ICC Arbitration Rules 2017, ICADR Arbitration Rules 2014, CIETAC Arbitration Rules 2015 and HKIAC Rules 2018.
[9] William Hartnett and Michael Schafler, *Ad Hoc v. Institutional Arbitration – Advantages and Disadvantages* (September, 2017), http://adric.ca/wp-content/uploads/2017/09/Hartnett-and-Shafler.pdf.
[10] *Corporate Attitudes & Practices towards Arbitration in India*, PRICEWATERHOUSE COOPERS (2013), https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices- towards-arbitration-in-india.pdf.
[11] Sundra Rajoo, *Institutional and Ad hoc Arbitrations: Advantages and Disadvantages*, L. REV. (2010), http://sundrarajoo.com/wp-content/uploads/2016/01/Institutional-and-Ad-hoc- Arbitrations-Advantages-Disadvantages-by-Sundra-Rajoo.pdf.
[12] LAW COMM'N OF INDIA, 222 Report, http://lawcommissionofindia.nic.in/reports/report222.pdf.
[13] Edlira Aliaj, *Dispute resolution through ad hoc and institutional arbitration*, 2(2) ACAD. J. BUS., ADMIN., L. AND SOCIAL SCIENCES 247 (2016).

institution, both of which are necessarily incurred in case of an institutional set-up.[14] Further, this arbitration process is also deemed to be time-efficient due to the lack of bureaucracy, which is indispensable under institutional arbitration.[15]

However, in ad-hoc arbitration, the failure of the parties to consider every possible contingency that can arise while formulating the rules applicable to them gives rise to procedural difficulties.[16] In the resolution of any ambiguities, the only recourse available in case of an ad hoc arbitration is to approach the court.[17] This is due to the lack of a higher authority, like the institution itself in case of institutional arbitration, which can resolve the ambiguities and assist the arbitrator in deciding any particular issue in an expedited manner.[18] This causes the disputant parties to not only bear the costs of approaching the court for resolution of issues but also acts as an impediment to accelerated contract enforcement.[19]

India is ranked 164 in the ease of enforcing contracts in the World Bank's study and still takes 1,445 days to resolve a dispute. The cost of dispute resolution is 31% of the claim value. The quality of judicial process which includes "court structure and proceedings, case management, court automation, and alternative dispute resolution is also poor it is indexed at 10 out of 18."[20]

In conclusion, the existence of procedural difficulties, absence of a monitoring authority, the charge of exorbitant fees by the arbitrator and lastly, lack of negotiation power of the parties in an ad hoc set-up tends to protract and make the time and cost exorbitant in an ad-hoc set-up as against an institutional set-up.[21]

Inadequacy of Functioning f Institutional Arbitration in India

In contrast to the issues arising under ad-hoc arbitration, the arbitration institutions like SIAC and LCIA, by charging the administrative costs,[22] ensure pre-determination of the procedure of arbitration; minimal ambiguities in the procedure of adjudication;[23] minimal intervention by the courts;[24] and consequently, reduction in any unforeseen costs borne by the parties.[25] SIAC, LCIA, and similar other arbitral institutions have defined their own

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[14] Charles Russell Speechlys, *Ad Hoc v. International Arbitration*, https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/real-estate/2013/ad-hoc-v-international-arbitration/.
[15] *Id*.
[16] *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (2018), http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (last visited Sept. 14, 2019) [hereinafter, *BN Sri Krishna Report*].
[17] Bibek Debroy & Suparna Jain, *Strengthening Arbitration and its Enforcement in India – Resolve in India*, https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf (last visited Sept. 12, 2019).
[18] BN Sri Krishna Report, *supra* note 16, at 16.
[19] *Id*.
[20] World Bank Group, *Ease of Doing of Business*, http://www.doingbusiness.org/data/ex ploreeconomies/india. (last visited Sept. 12, 2019).
[21] Union of India v. Singh Builders Syndicate 2009 (4) SCALE 491.
[22] SIAC Arbitration Rules, 2016, sched. 1.
[23] *Id.*, rule 32.3.
[24] *Id.*, rule 40.1.
[25] *Id*., at 12.

Rules governing the disputes before them. Despite the presence of over 35 arbitration institutions in India and their popularity, the caseload on these institutions is insignificant compared to those of well-established international arbitral institutions, indicating a lopsided preference towards ad-hoc arbitration.

FAILURE OF AMENDMENTS BROUGHT TO REGULATE THE FUNCTIONING OF ARBITRATION IN INDIA

There have been numerous attempts to revamp the arbitration regime in India through the Arbitration and Conciliation (Amendment) Act, 2015[26] , and most recently, through the Arbitration and Conciliation (Amendment) Act, 2019.[27] However, it will further be seen how the amendments brought into the Arbitration and Conciliation Act, 1996 have not been able to resolve the problems arising from the ad hoc set up in India. The Arbitration and Conciliation (Amendment) Act 2015 brought about certain noteworthy modifications that would be critical in supporting international arbitration in the country, however, most of these amendments were restricted simply to the reformation of the ad hoc arbitration.[28] On the other hand, the Arbitration and Conciliation (Amendment) Act 2019 brings about modifications and additions which are majorly aimed at the institutionalization of arbitration.

The inadequacy or failure of these amendments is treated under three main heads as per the functions they were targeted to regulate: (A) Ad-hoc arbitration; (B) Institutional arbitration; (C) Both ad-hoc and institutional arbitration.

Ad-Hoc Arbitration

One of the major amendments brought in this area was the appointment of the arbitrators, which would be undertaken by the Supreme Court, High Court or any person/institution designated by these Courts, in case the parties fail to appoint one by mutual consent, as per the Amendment Act of 2015.[29] Even though there was a paradigm shift from the earlier position where the Chief Justices were given this power, the huge discretion with the Courts in the appointment procedure prevailed. The only metric that was set was to appoint an unbiased and impartial arbitrator.[30] The 2019 Amendment Act aims at dealing with this issue of appointment in two ways: One, by providing for the appointment of arbitrators by accredited institutions and not the courts;[31] and two, by providing for the basic qualifications to be accredited as an arbitrator under Schedule 8.[32] This amendment is a major step to curb the involvement of the courts in the appointment process, but this continues to be a relevant problem from the view of the formation of the Arbitration Council of India (dealt with in the next section).

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[26] Arbitration and Conciliation (Amendment) Act, 2015 [hereinafter, *Amendment Act, 2015*].
[27] Arbitration and Conciliation (Amendment) Act, 2019 [hereinafter, *Amendment Act, 2019*].
[28] *Id*., at 17.
[29] Arbitration and Conciliation Act, 1996, §11 [hereinafter, *Arbitration Act, 1996*].
[30] The Amendment Act, 2015, sched. 5, 7.
[31] The Amendment Act, 2019, §3.
[32] *Id.*, §14.

Coming to the next inadequacy, Section 29B provides for "fast track proceedings" under which parties can consent for resolving the dispute within six months with only written pleadings and without any oral hearing or technical formalities.[33] The Schedule of Fees has also been added to regulate the fees charged by the arbitrators through Schedule 4.[34] Further, Section 29B (8) provides for the fees of the arbitrator to be determined by the parties and the arbitrators themselves. Section 29B (8) renders the objective behind the introduction of Schedule 4 in the Arbitration Act redundant. It puts restraints on the negotiation power of the parties to decide the remuneration for the arbitrator as it has been left entirely upon the parties and the arbitrator to decide on the fees. Since no party would wish to upset the arbitrators who are the 'judges' in the case, particularly before the proceedings have even commenced, there is a disparity created in the position of the parties in the dispute.

Institutional Arbitration

There has been a major change in institutional arbitration by the formation of the Arbitration Council of India (ACI), an independent body corporate for grading and accreditation of arbitral institutions, and to promote and encourage arbitration and other Alternate Dispute Resolution mechanisms. It is also endowed with the responsibility of overlooking the appointment of arbitrators and the adjoining policy. This will enable the efficiency of time in cases where there is a halt in dispute resolution due to the appointment of the arbitrator. However, the reform brought in through the introduction of the ACI is temporary, with yields only in the short term.

The composition of the ACI is such that it consists of a chairperson who is a judge of the Supreme Court, Judge of a High Court or an eminent person having special knowledge, appointed by the Central Government in consultation with the Chief Justice of India. Further, an eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration nominated by the Central Government; an eminent academician having experience in research and teaching in the field of arbitration and Alternative Dispute Resolution laws appointed by the Central Government in consultation with the Chairperson; Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice and also the Department of Expenditure, Ministry of Finance; one representative of a recognized body of commerce and industry, chosen by the Central Government; and Chief Executive Officer.[35]

As has been made evident, there is a continued involvement of the Government and the judiciary in the constitution of the Arbitration Council and framing of policies regarding the appointment, accreditation, and functioning of the institutions which makes it highly bureaucratic and directly affects the dispute resolution process. This is because of a multitude of reasons: *firstly*, the fact that the Government itself is a prolific litigant in India becomes problematic as this would raise questions on the credibility of the arbitral proceedings;[36] *secondly*, the accreditation metric used by the government and judicial bodies

[33] The Arbitration Act, 1996, §29B.
[34] The Amendment Act, 2015, §25.
[35] The Arbitration Act, 1996, §43C.
[36] BN Sri Krishna Report, *supra* note 16, at 18.

is only bound by wide general principles and is completely dependent on the discretionary power of these institutions, which might even cause politicization due to the metric being favourable for the government and judicial functioning, and will be in sync with the practices of these bodies and not particularly arbitration.

Further, the New Delhi International Arbitration Centre Act, 2019 has been brought into force to create an independent and autonomous regime for institutionalized arbitration; as well as for the acquisition and transfer of the undertakings of the International Centre for Alternative Dispute Resolution and to vest such undertakings in the New Delhi International Arbitration Centre.[37] Even though the reform is *prima facie* brought forth to institutionalize arbitration in India, the same is problematic on two fronts: *first*, the composition of the New Delhi International Arbitration Centre, like the ACI, is highly bureaucratic and is causing politicization of the accreditation process. This is because the accreditation metric used is the one that shall be devised by the government and judicial bodies on their complete discretion. *Secondly*, it merely replaces the existing institutions, fails to diversify institutional arbitration in India, and is thus a dispensable act of the Legislature. It runs contrary to the overall objective of bringing in the 2019 Amendment and the New Delhi International Arbitration Centre Acts, i.e. to promote institutional arbitration in India. Many areas across India that have had a huge demand for getting their disputes resolved through institutional arbitration are not able to resort to the same due to the unavailability of such institutions nearby.

Both ad-hoc and Institutional arbitration

Section 29A was added by the 2015 Amendment, which sets a time limit for the completion of any arbitration including ad-hoc or institutional within 12 months. Interestingly, timely disposal within six months is incentivized by increasing the fee of the arbitral tribunal, and delay is penalized by up to 5% per month for each month of delay.[38] The 2019 Amendment Act has further set a limit of six months from the appointment of the arbitrators, for the completion of statements of claim and defense in an arbitration proceeding.[39] However, even though a restriction has been put in place on the time taken by the tribunal, there is no restriction on the number of extensions a court might grant, and the courts have been granted wide discretionary power over the same. This, in the opinion of the authors, runs contrary to the purpose for which the provision has been introduced, by not leading to speedier disposal of disputes.

Further, the 2019 Amendment Act exempts International Commercial Arbitrations from this timeline set by the 2015 Amendment Act. This amendment along with Section 23(4) which provides for completion of the pleadings within 6 months, rules out the possibility of questioning the accountability of the arbitrator in the institutional regime (International Commercial disputes are preferably taken before the arbitral Institutes) while adjudicating the disputes which are by nature complex and take longer to resolve. However, placing the

[37] The New Delhi International Arbitration Centre Act, 2019.
[38] The Arbitration Act, 1996, §29A.
[39] The Amendment Act, 2019, §5.

accountability of the arbitrator above the mandate to quick disposal of the dispute runs contrary to the idea of furthering institutional arbitration by attracting International disputants to resolve their disputes in India. This is because, the choice between a just and fair arbitration and quick disposal of the dispute, is not an attractive proposition for the disputant parties outside India.

Section 42B has been added through the 2019 Amendment Act, according to which, the arbitrator is protected from any legal proceedings for anything which is done or was intended to be done in good faith. Even though this amendment protects the arbitrators from the large number of frivolous complaints which are intentionally filed by parties to disrupt the arbitral proceedings, the legal effect of the same is rendered inefficient on two fronts: *firstly*, even though there is a bar on legal action against the arbitrator by the parties, other bodies or institutions like the Income Tax Department have regularly been proceeding against these arbitrators. *Secondly*, regarding any issue raised by the parties in dispute, due to the blanket protection offered to the arbitrators under the phrase 'good faith', there shall be serious concerns on the accountability of the arbitrator, especially where the Bill also tries to expedite the arbitration within 12 months. This shall negatively impact ad-hoc arbitration in India, due to the lack of other internal checks and balances on the functioning of the arbitrator, as in the case of arbitral institutions.[40]

Thus, the status of both ad-hoc and institutional arbitration remains problematic in India despite the reforms brought in to regulate their functioning. However, the former continues to be in a more dismal state as against the latter, and institutional arbitration, with the subsequent reforms, provides an adequate resolution of the problems arising out of ad hoc arbitration.

CONTRACTUAL RELATION BETWEEN THE PARTIES, ARBITRATORS AND THE INSTITUTION

Recent Indian legislations show that India is moving towards the "institutionalization" of arbitration. However, even in institutional arbitration, establishing a concrete relationship between all the stakeholders involved in the arbitration process is essential to achieve the larger goal of contractual enforcement.

Arbitration is usually considered to be a triangular setting wherein two opposing parties and an arbitrator is involved. However, there are instances where the arbitral institution is also involved in the process. The relationship between the arbitral institution and the parties is usually considered to be contractual. However, the relationship between the other stakeholders is not settled.

According to the traditional approach, the relationship between the stakeholders is considered to be contractual.[41] The "Contract theory" and the "Status theory" mainly govern the relationships under the arbitration process. Under the "Contract Theory", the

[40] SIAC Arbitration Rules, 2016, rule 40.

[41] MICHAEL MUSTILL & STEWART BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 221 (2 ed. Butterworths 1989).

parties enter into a private agreement for dispute resolution services provided by a private individual according to contractually agreed terms."[42] However, the contract between the parties, arbitrator, and the institution exists apart from the arbitration agreement.[43] However, according to the "Status theory", the arbitrator and the institution have a statutory relationship with the parties, wherein the arbitrator is given the status of a judge and the process of arbitration is viewed as a judicial substitute.

Because of the uncertainty in the approach concerning both the aforementioned theories, the ICC Commission on Arbitration established a working group to investigate the "Status of the Arbitrator" in 1992. The Working Group acknowledged that a contractual relation could exist between the following stakeholders[44]:

1. Between the parties and the institution.
2. Between the parties and the arbitrator.
3. Between the arbitrator and the institution.

The relation between the parties and the arbitrator

The "Contract theory" and the "Status theory" largely govern the relationship between the parties and the arbitrators. According to the Contract theory, the parties should enter into a private agreement with the arbitrator for the resolution of the dispute, as services are provided by the arbitrator according to the contractually agreed terms.[45] On the other hand, the Status theory states that an arbitrator should be viewed as a judicial substitute. This theory tries to establish a statutory relationship between the parties and the arbitrator which lifts the arbitrator above the parties.[46]

Further, in the case of *Jivraj v. Hashwani*,[47] the English Supreme Court considered the issue of whether the relationship between the arbitrators and the parties was a contractual one. Mustill and Boyd's view was considered to understand this relationship. They decided that the relationship between the arbitrator and the parties derives from the arbitrator's status.[48]

However, the relationship between the arbitrator and the parties cannot solely be based on either the Contractual or the Status theory. A specific contract between the parties and the institution would lay down the exact terms, however, the statutory obligations under the national law would be underlying this relationship.

Under the English Arbitration Act, the arbitrator has a statutory duty under Section 33[49] to provide a fair resolution of the matters falling to be determined and the parties are under a statutory obligation to comply with the arbitrator's directions under Section 40.[50] An

[42] CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 346 (Oxford University Press 2014).
[43] Norjarl A/s v. Hyundai Heavy Industries Co. Ltd, [1992] 1 QB 863, 885.
[44] Philippe Fouchard, *Relationships between the Arbitrator and the Parties and the Arbitral Institution*, THE STATUS OF THE ARBITRATOR: SPECIAL SUPPLEMENT 12-13(ICC 1996).
[45] CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 346 (Oxford University Press 2014).
[46] *Id.*
[47] Jivraj v. Hashwani, [2011] UKSC 40.
[48] Mattew Gearing, *The relationship between arbitrators and parties: is pure status theory dead and buried* (June 17, 2011).
[49] The English Arbitration Act, 1996, §33.
[50] *Id.*, at § 40.

arbitrator can also enforce his right to remuneration under Section 28. However, based on these statutory provisions, the relationship cannot be solely based on the "Status" theory. Under the same English Act, there also exist provisions that directly refer to the parties' agreement in certain situations.

Various jurisdictions consider this relationship between the arbitrator and the parties to be a hybrid one. The English courts have taken a stand that contractual and status elements cannot be separated and the rights and the duties of the arbitrator flow from the conjunction of these two elements. The ICC Working Committee Report concluded that the arbitrator and the parties are bound by a "special contract". The Committee defined this as a "*sui generis*" contract, i.e a contract which is overlaid with a special adjudicatory function, which is public.

The relation between the arbitrator and the institution.

Institutions when involved in the process of arbitration reserve more discretionary powers with themselves, which creates conflicts with the arbitrator who usually exercises the power over the entire arbitral process. Arbitrators and the institution have an obligation towards the parties which is focused on the result. If the relation between the arbitrator and the institution is not properly defined, it would directly affect the enforcement of the contract. The absence of a contractual relationship between the arbitrator and the institution also results in a waste of time, an increase in costs, and unenforceable awards.

In the case of *Getma v. Guinea*,[51] there was a conflict between the arbitrator and the institution. The dispute was regarding the fees of the arbitral tribunal. In this particular case, the arbitrators entered into an agreement with the parties for additional fees, to which the institution objected. Getma paid the agreed amount to the arbitral tribunal, however, the other party objected and challenged the award on the basis that the tribunal has breached the institutional rules by entering into a contract with the party for the additional fees. This challenge resulted in the annulment of the arbitral award. However, the outcome in this particular case could have been different if there would have been a written contract between the arbitrator and the institution which elaborated on the fee structure of the arbitral tribunal.

To avoid the conflict between the arbitrator and the institution, changes should be made in the institutional rules. However, the institutional rules are not meant to govern the independent relationship between the arbitrator and the institution. If the arbitrator and the institution enter into a detailed contract, the parties will have a clearer picture of the roles and functions of each stakeholder.

Such contractual clarity is very important in the Indian context. Institutions like ICC or LCIA are the established ones and even if they do not formalize their relationship with the arbitrators, their reputation ensures that parties opt for their services. However, the proposed New Delhi Arbitration Centre and the ACI will be institutions wherein a single

[51] Getma International v. Republic of Guinea, No. 16-7087 (D.C. Cir. 2017).

conflict between the arbitrator and the institution will directly affect the reputation of the Centre. Therefore, the institution and the arbitrators must enter into a formal agreement that defines mutual obligations and responsibilities of each other.

The relation between the parties and the institution

Mutual consent and consideration are the basic requirements for a legally binding contract.[52] There is mutual consent between the parties and the institution, as the institution provides administrative services during the arbitral proceedings. Even the consideration requirement gets fulfilled as the party promises to pay the fees to the arbitral institution and the institution in return provides services to the party. Therefore, there is a reciprocal flow of consideration in the arbitral process.

Some authors are of the view that the relationship between the arbitral institution and the parties is contractual. According to this view, the relationship between an adjudicative body and parties is not considered to be contractual, therefore it should be governed by public law rather than private law. However, 'contract' as a concept exists in public as well as in private law. Therefore, even if a relationship has a public law nature, it could still be governed by a contract. An arbitration agreement is a mixture of procedural and substantive elements, due to which the process is governed by different fields of law.[53] It could thus be said that the public law nature of relationships could be governed by private law as well.

Further, establishing a contractual relationship between the parties and the institution would help in maintaining the essence of arbitration. In the process of arbitration, all the stakeholders are in the same position, i.e. no one is subordinate to the other. Even the arbitral institution does not have coercive powers over the parties.

Domestic or International arbitration has two forms, i.e. ad-hoc and institutional arbitration. In an ad-hoc arbitration, the parties enter into a contract directly with the arbitrator. However, in the case of institutional arbitration, the parties need not decide on the procedural details. This means that as soon as the institution gets involved, its pre-fabricated set of rules applies in the arbitration proceeding. The contractual relationship between the party and the institution comes into question when dispute regarding administrative fees, liability, etc. arises.

Further, arbitral institutions are usually separate entities, however, certain institutions lack personal identity. If a particular institution is a subdivision of a parent institution, then the parties enter into a contract with the parent institution and not its sub-division. For example, LCIA and SIAC are independent bodies, however, ICC Court is a subdivision of the ICC. The contract between the parties and the institution could ensure consistency on the following terms:

1. Selection and confirmation of the appointment of arbitrators.
2. Procedure on the challenge for the removal of arbitrators.

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[52] Jürgen Ellenberger, *Introduction to § 145*, PALANDT, BÜRGERLICHES GESETZBUCH, BECK'SCHE KURZ-KOMMENTARE 157 (vol. 7, 70 ed. CH Beck 2011).

[53] KRÖLL STEFAN ET AL., COMPARITIVE INTERNATIONAL COMMERCIAL ARBITRATION 100 (Kluwer Law International 2003).

3. Fixation of the costs including the fees of the arbitrators.
4. Fixation of time limits within which the arbitral proceedings need to be completed.

The parties opt for the process of arbitration through an arbitration agreement. The arbitration agreement is sufficient in case of an ad-hoc arbitration. However, in the case of institutional arbitration, the arbitration agreement is a necessary but not a sufficient condition. To strengthen the process of institutional arbitration, the institution's consent is essential. Keeping in mind the broader goal of contractual enforcement, the relationship between the parties and the institution must be a contractual one. The contract will form the sole basis through which the institution will take up the parties' case.

Therefore, the authors have relied upon the Contractual theory as against the Status theory for establishing the relationship between all the stakeholders involved in the process of arbitration. Further, the application of the Contractual theory would ensure that the broader goal of contractual enforcement is achieved, as there would be certainty in the relationship between the parties, institution, and the arbitrator.

STATUS QUO AND THE WAY FORWARD

Despite these numerous fall-backs, ad-hoc arbitration remains the preference of Indian parties over institutional arbitration. The Srikrishna Report 2018 identifies the problems faced by the parties when they have to choose institutional arbitration in India, the findings of which are in sync with the objective of being recognized as an important seat in the global arbitration regime.[54] These problems arise mainly from two situations: *first*, where parties choose ad-hoc arbitration over institutional arbitration for resolution of domestic disputes, and *second* where parties choose International institutional arbitration instead of domestic Institutions for resolution of international commercial disputes. In 2016, out of 307 cases administered by the Singapore International Arbitration Centre, 153 involved Indian parties, chiefly due to lack of adequate emphasis on institutional arbitration in India.[55]

The process of strengthening contractual enforcement in India is heavily dependent on the institutionalization of arbitration in India due to the faster and more efficient dispute resolution mechanism. Henceforth, it is pertinent to identify the problems in the status quo, analyze the impact of the amendments made to the legal framework of Institutional Arbitration, and propose the necessary reforms. The Sri Krishna Report 2018 adequately identifies the issues with institutional arbitration in India. These are as follows:

(a) Lack of credible arbitral institutions;

(b) Misconceptions relating to institutional arbitration;

(c) Lack of governmental support for institutional arbitration; and

(d) Lack of legislative support for institutional arbitration.[56]

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[54] BN Sri Krishna Report, *supra* note 16.
[55] *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, QUEEN MARY UNIVERSITY OF LONDON AND WHITE & CASE LLP (2015), http://www.arbitration.qmul.ac.uk/docs/164761.pdf.
[56] BN Sri Krishna Report, *supra* note 16, at 16.

Apart from these, there is one additional issue which, in the opinion of the authors, is imperative to be mentioned while discussing the problems and reforms under the institutional arbitration regime in India i.e. (e) Procedural Inconsistencies between the Commercial Courts Act, 2015 and the Arbitration and Conciliation Act, 1996.

Each of these issues is discussed in detail below.

Lack of Credible Arbitral Institutions

While there are established arbitral institutions in India, these arbitral institutions lack access to quality legal expertise and exposure to international best practices, which in consequence, affect the adequacy of the institution's rules and practices. Other problems are linked to the infrastructure, availability of skilled staff, and administrative support within the regime. These issues transpire to the absence of a dedicated bar, lack of interaction with international communities in the same sphere, and lack of progressive standards.

Reforms:

The 2019 Amendment Act sets up the ACI through the addition of Part-1A in the Arbitration Act. However, as pointed out before, the constitution of the ACI only promises yields for a short period. To be set up as a global hub for arbitration and to promote institutional arbitration, the constitution of the Council should be devoid of any governmental or judicial intervention. Consequently, the skewed metric used by these authorities should be replaced by a metric derived from the international best practices of institutions worldwide. However, the same should be adapted to be in sync with the socio-political culture of the country.

An alternative to the composition of the ACI could be to formulate a collegium of individuals who can be qualified as Arbitrators only. This should include both national as well as international arbitrators, thereby serving a dual function: *first*, removal of bureaucracy in the Institution; and *second*, bringing the International best practices to India. This reform is only about the appointment of the Council and does not put any restrictions on the recognition of the Institution or the financial aid provided by the Government if any.

Another reform that should be brought in is that the Institutions conducting Arbitrations in India should be provided ample resources and opportunities to participate in important international arbitration conferences and to mandatorily host 1-2 major international arbitration conferences at least in a year. This would ensure maximum interaction with the International arbitration professionals.

Further, the following essentials could be added for accreditation of arbitrators and institutions: attendance in a minimum number of International Conferences; subsequent contribution to the arbitration regime of the country by the lawyers aiming to be accredited; for being accredited as an arbitration institution, a minimum number of international conferences must be organized annually. Additional provisions can also be made to ease out the financial burden imposed on the institutions, by the making of grants by the Government, on a minimum contribution basis of the Institution in organizing the conference.

Misconceptions relating to institutional arbitration

There are several misconceptions relating to institutional arbitration that exist among parties, the most infamous of which are related to the cost and time of arbitration. As mentioned previously, the cost of ad hoc arbitrations can easily exceed the costs of institutional arbitration, and even if they do not, they help save the procedural difficulties and time. In addition to this, there is a misconception as regards the administration cost of arbitration, which is reasonable in the case of most of the Indian institutions. Further, there are misconceptions about the inflexibility of arbitration rules and regulations, which in actuality are only limited to the legality of the procedure of arbitration. All of the misconceptions transpire to the need of spreading awareness about the functioning of arbitration institutions in particular.

Reforms:

To encourage the participation of law practitioners and corporates in international conferences, which would help build the trust and faith of the corporates to resort to institutional arbitration, a subsequent reform is necessary which makes it compulsory for the Counsel of such corporates to lay down all the possible options of dispute resolution to them (ad-hoc or institutional arbitration, mediation, conciliation, litigation, etc.), while entering into any commercial contract, domestic or international.

Another could be to introduce Credit Courses in the Curriculum of law students, and also make them available to law practitioners. Mere inclusion in the academic curriculum would not be of much practical help. The removal of misconceptions is closely rooted to the involvement of governmental support for institutional arbitration.

Finally, regulation of the costs of arbitration through institutions can be undertaken to ensure that the same is not relegated as a privilege of only the rich and wealthy. It should also be ensured that the institutions are made accessible for all members of the society, for the resolution of their disputes.

Lack of governmental support for institutional arbitration

The problem arises from the fact that the Government is the most prolific litigant in India, despite which, it does not put to use this factor, to encourage institutional arbitration. The general conditions of contract used by the Government and PSUs often contain arbitration clauses, but these clauses generally do not expressly provide for institutional arbitration. Additionally, there is a lack of general motivation to resort to institutional arbitration for disputes involving huge amounts.

Reforms:

In a developing country like India, the actions of the government are closely watched and followed by the general public. When the government resorts to the institutional form of arbitration in its contracts, especially those involving huge amounts, this would act as a motivation for the other disputant parties to resort to institutions for adjudication of their

disputes and educate themselves with the cost and time effectiveness of the procedure. The same can be implemented only through practice and not through the force of law.

Additionally, the government being a prolific litigant can resort to institutional arbitration to solve the problem of insufficient caseload and high operational costs faced by the internationally acclaimed and other institutions in India.

Lack of legislative support for institutional arbitration

Lastly, the Arbitration Act has been ad-hoc arbitration agnostic, with no provisions specifically geared towards promoting institutional arbitration in India. The 2019 Amendment Act, in this regard, is a positive step, as it gives the arbitration Institutions the prerogative to appoint the arbitrators in case the parties are unable to appoint the arbitrators themselves. Additionally, it also aims at removing the deadline for the completion of proceedings within 12 months as imposed by Section 29A, which was wary of the functioning of the institutional arbitration in particular. This is in accordance with the International best practices like the Arbitration Ordinance, 2011, in Hong Kong, wherein the Hong Kong International Arbitration Centre was designated as the appointing authority for arbitrators where the parties are unable to agree on the appointment of arbitrators.[57] This issue has more or less been dealt with at a preliminary level by the enactment of the 2019 Amendment Act.

Procedural Inconsistencies between the Commercial Courts Act, 2015 and the Arbitration & Conciliation Act, 1996

Time is of the essence for the parties when they opt for an Alternate Dispute Resolution method like arbitration. However, due to judicial interference at the pre-arbitral stage and the stage of enforcement of arbitral awards, the arbitration disputes in India end up significantly delayed. The Commercial Courts Act, 2015, provides an alternative to the parties from the process of arbitration to approach the commercial courts. This Ordinance was brought in with the purpose of speedy disposal of commercial disputes. The commercial courts were set up to improve India's ranking on the "Ease of Doing Business Index" released by the World Bank. "Specified value" was decided for a commercial dispute which would bring the matter under the jurisdiction of the commercial courts. Earlier the "specified value" was Rs.3 Crores, however, through the 2018 Amendment, this value was reduced to Rs.3 Lakhs. This was done keeping in mind India's position in the Ease of Doing Business Index.

The Commercial Court (2018) Amendment Act, has introduced commercial courts even in jurisdictions where the High Courts have original jurisdiction. The commercial courts also have jurisdiction in arbitration matters. In international commercial arbitration matters, all the applications and appeals are heard by the commercial division. Even in case of domestic arbitration, all the applications or the appeals filed before the High Court having original jurisdiction, will be heard and disposed of by the Commercial Division. However, if the matter is before any principal civil court of original jurisdiction, then it will be taken up by

[57] BN Sri Krishna Report, *supra* note 16.

the Commercial Court. Further, for speedy disposal of matters, Section 12A was inserted in the 2018 Amendment in the Commercial Courts Act. Section 12A states that where a suit does not contemplate urgent interim relief, the plaintiff has to undergo pre-institution mediation. However, this provision does not apply to arbitration matters.

But there exist certain procedural inconsistencies between arbitration and the Commercial Courts Act. Section 13(1) of the Commercial Courts Act provides for an appeal against the judgment or order of a Commercial Court below the level of a District Court to the Commercial Appellate Court within 60 days. However, the Supreme court in the case of *Kandla Export Corporation v. OCI Corporation,*[58] held that there was no further right of appeal under Section 13(1) of the Commercial Courts Act in the matter of arbitration where such right of appeal is not provided under the Arbitration Act. Further, in the case of *D.M. Corporation Pvt. Ltd. v. The state of Maharashtra & Ors*[59], it was held that if the subject matter of arbitration is a "commercial dispute" of a specified value, then the commercial court will have jurisdiction if an application is filed under Section 9 of the Arbitration Act.

Reforms:

A proper interplay between the Arbitration Act and the Commercial Courts Act is necessary to ensure that the process of arbitration becomes more efficient. Therefore, procedural inconsistencies between both the Acts need to be rectified, so that the entire process of arbitration right from its commencement till the enforcement of awards becomes effective.

CONCLUSION

Parties that enter into business contracts prefer a foreign arbitration centre for resolving their dispute, primarily owing to the lack of institutionalized arbitration in India. The newly passed Arbitration and Conciliation (Amendment) Bill 2019, was brought in to put India at a parallel footing with arbitration hubs like the Singapore International Arbitration Centre (SIAC) and the London Court of International Arbitration (LCIA).

Over the years, executive and legislative changes have been brought about to make the process of arbitration user-friendly, cost-effective, and to ensure speedy disposal of matters. However, neither the 2015 Amendment Act nor the 2019 Amendment Act has successfully resolved the decades-old problems of ad-hoc arbitration in India. Further, the reforms brought in within the institutional arbitration regime have also been unsatisfactory.

In the second part, the authors have further revisited the relationship between the stakeholders involved in the arbitration process. They have gone ahead to suggest and substantiate that a contractual relationship should exist between the stakeholders involved i.e. between the disputant parties and the arbitrator, between the parties and the institution, and between the arbitrator and the institution. This is essential to promote institutional arbitration in India.

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[58] Kandla Export Corporation v. OCI Corporation, MANU/SCOR/08005/2018.
[59] DM Corporation Pvt. Ltd. v. State of Maharashtra, Writ Petition No. 3119/ 2018 decided on April 5, 2018, (Bombay High Court).

Lastly, in the third part, the authors, after analyzing the BN Sri Krishna Report 2018 and other statutes like the Commercial Courts Act 2018, have tried to resolve the problems associated with institutional arbitration, as had been previously identified. The impact of the recent amendments has been traced and necessary reforms have been suggested. The authors strongly believe that the reforms suggested shall yield positive results once included in the legislative framework of arbitration in India.

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A PRAGMATIC PERSPECTIVE TO THE COMMERCIAL COURTS ACT, 2015

By: *Amrutha Shankar & Harshini S*[*]

Abstract

Disputes along commercial lines have been on the rise over the decades. Although steps have been taken to resolve the issue of high-stakes commercial disputes, the predominant legislative reform was witnessed after the enforcement of the Commercial Courts Act, 2015. Improvement of India's ranking in the Ease of Doing Business Index and demonstrating it to be a lucrative destination for investment by expeditious enforcement of contracts has been the primary basis upon which the Act has been enacted. The authors in this paper have made a pragmatic study of the Commercial Courts Act, 2015. Reference has been made to the origin and history of the Act and its necessity highlighted. Further, the paper discusses the special features of the Act. The authors have also charted out the highpoints of the Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts (Amendment) Act, 2018. An analysis has also been made to evaluate the extent of effective disposal of commercial disputes within the Act. The authors have concluded by stating the causes for delay in resolving disputes by the courts, along with measures to improve the current regime.

INTRODUCTION

The core purpose of commercial courts is to furnish an effective dispute resolution mechanism for speedy disposal of commercial disputes. The concept of commercial is quite prevalent internationally and has been embraced in almost seventeen nations, namely France, Canada, Belgium, Germany, Australia, New Zealand, United States of America (22 States), Philippines, Pakistan, United Arab of Emirates, Poland, Russia, Romania, Ukraine, Ghana, Sri Lanka, and Singapore. Various expert bodies such as the Law Commission of India ("**LCI**") and the Standing Committee on Personnel, Public Grievances, Law and Justice ("**SC PPGLJ**") have examined the necessity of courts serving as apparatuses for speedy and efficient commercial disputes resolution.

The Commercial Courts Act, 2015 came into force on 23rd October 2015, and is an Act that provides for the constitution of Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and matters connected therewith or incidental thereto."[1]

[*] Amrutha Shankar & Harshini S, students BBA. LL.B., School of Excellence in Law, Chennai.

[1] The Commercial Courts Act, 2015, pmbl.

HISTORICAL BACKGROUND

The Law Commission of India *suo moto* conducted a study on the international practice of specialized courts disposing of commercial disputes and made certain recommendations in consonance with the need of such systems in India, during the phase of post-liberalization of the economy. In 2003, a marginal degree of reformative action exercised in favor of the Indian civil justice system was witnessed, after the publishing of the 188th Report of the 17th Law Commission titled "Proposals for the Constitution of Hi-Tech Fast Track Commercial Divisions in High Court". The major aim was to give clear assurance to investors that high-value commercial suits would directly go before the Commercial Division constituted in all High Courts and that such cases would be disposed of within a period of one year or at the most, two years in all states in India. The Law Commission proposed fast track procedures similar to those recommended in the 176th Report on "Arbitration and Conciliation (Amendment) Bill, 2002" along with high tech video conferencing facilities similar to those used in commercial courts abroad.

With the approval of the Union Cabinet, the Commercial Division of High Courts Bill, 2009 was introduced in Parliament and subsequently passed by both the Houses, after irrefutable amendments suggested by the Select Committee were concluded. However, the revised Commercial Division of High Courts Bill, 2010, introduced in the Rajya Sabha was dissenting, and thus the 20th Law Commission of India was referred to, for the re-examination of the various provisions of the Bill. The Commission along with an Expert Committee, comprising of sitting judges and specialized legal professionals, came out with the 253rd Report titled "Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015", to target high-value commercial litigation for expedited disposal. A highlighted point of discussion of the Bill was to emphasize on the definition "commercial dispute". Substantial procedural modifications were made in the form of Amendments to the Code of Civil Procedure, 1908 while drafting the aforementioned bill.[2] The Report thus recommends the establishment of Commercial Courts, and Commercial Divisions and Commercial Appellate Divisions in the High Courts to ensure the speedy disposal of high-value commercial suits. The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015 is merely an improvement over the Commercial Division of High Courts Bill, 2009.

Due to the exigency of disposing of commercial disputes at a faster and more effective pace, the Government of India promulgated an Ordinance amending the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("Act**"**). The Ordinance greatly focused on minuscule details, hence the name of the Act was amended from Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 to Commercial Courts Act, 2015. This was done to remove the confusion as to whether these courts were merely a separate division of the High Courts or new courts because in case these courts were merely separate divisions of the High

[2]LAW COMM'N OF INDIA, REPORT NO. 253, COMMERCIAL DIVISION AND COMMERCIAL AMENDMENT TO THE COMMERCIAL COURTS ACT, 2015.

Courts, then the Act did not bring about any significant changes, given that the High Courts were already functioning with commercial benches.[3]

NEED FOR COMMERCIAL COURTS IN INDIA

Accelerate Economic Growth

On account of the remarkable changes India has experienced since 1991, the commercial and industrial sectors of the country have widened. Changes in government policies, including the Economic Policy of 1991 have additionally opened the economy to foreign investments. Moreover, liberalization, privatization, and globalization have magnified the competitive economy of India. Quick enforcement of contracts, easy recovery of monetary claims, and award of just compensation for damages suffered are critical to encouraging investment and economic activity, which necessarily involves the taking of financial and enforcement risks.[4] Growth of international trade in a globalized economy in commerce was bound to increase the commercial disputes involving high stakes, therefore necessitating the requirement of an effective mechanism to resolve such commercial disputes efficiently and speedily. Most commercial disputes, especially of high value, have an impact on financial investments and larger economic activity in the country.

Improve the International Image of Indian Justice Delivery System

India has not emerged as a preferred destination of commercial dispute resolution due to delay in Indian judicial forums. In India, it takes nearly four years to resolve commercial disputes, however, the Singapore International Commercial Court (SICC) takes 5 months for the same. Delay in adjudication by courts amounts to a breach of India's obligation under bilateral and multilateral investment treaties to provide effective means for assertion of one's claims. In circumstances where the judiciary is ineffective, improvements and amendments to substantive law are of no use. This may be due to reasons such as the high pendency of existing cases and complex litigation procedures. In 2013, 32,656 civil cases were pending in various high courts, of which 52% were commercial disputes.[5] The proposition of exclusive Commercial Divisions in High Courts, proposed in the Law Commission's 188th Report, was a measure to save the Indian judiciary from the spate of adverse criticism by foreign courts on procedural sluggishness, delays and breakdowns in the Indian courts, particularly concerning civil litigation.[6] Litigants have approached foreign courts and sought extraterritorial jurisdiction over high stake commercial cases as the Indian judicial system had broken down and was unable to provide effective relief.

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[3] Ashish Kabra and Mohammad Kamran, Amendments to the Commercial Courts Act , BAR AND BENCH LEGAL NEWS INDIA (May, 2018), https://barandbench.com/amendments-commercial-courts-act/.

[4] LAW COMM'N OF INDIA, REP. NO. 188, PROPOSALS FOR CONSTITUTION OF HI-TECH, FAST – TRACK COMMERCIAL DIVISIONS IN HIGH COURTS 34 (Dec. 2003).

[5] Report No.78, Standing Committee on Personnel, Public Grievances, Law and Justice: The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015, Rajya Sabha, 34, December 2015.

[6] AMEEN JAUHAR & VAIDEHI MISRA, COMMERCIAL COURTS ACT, 2015: AN EMPIRICAL STUDY, VIDHI CENTRE FOR LEGAL POLICY (Dec. 2018), https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf.

Foreign investors in India require assurance that the Indian courts are as fast as the courts in the most developed countries of the world and that there exist no long delays in the judicial process. The Law Commission of India states that procedural reforms for improving the litigation culture in India will prove to be ineffective unless supplemented with long-term reforms. This issue remains unaddressed by the government in its policies and legislative reforms.

SPECIAL FEATURES OF THE ACT

The special features of the Act, with strict reference to the highlights of the Commercial Courts, Commercial Division, Commercial Appellate Division of High Courts (Amendment) Act, 2018, have been analyzed, evaluating the extent of effective disposal of commercial disputes, causes for delay in resolution of disputes by the courts, and recommendations for improvement have been suggested.

Commercial Dispute

The term "commercial litigation" has not been defined but has been generally confined to mean "litigation pertaining to commercial matters agitated before the different hierarchy of courts throughout the country". The definition of "commercial dispute" in the Commercial Division of High Courts Bill, 2009 was criticized and it was suggested that the definition be expanded to include joint venture agreements, shareholders' agreements, subscription and investment agreements, and those pertaining to the service industry, including outsourcing of services, business process outsourcing, banking and finance, financial services and the like.[7] As the Bill was not given assent by both the Houses, it was referred to the Twentieth Law Commission of India for the re-examination of certain provisions of the Bill, with special emphasis on the scope and definition of commercial dispute. The term "commercial dispute" under Section 2 (1)(c), an inclusive definition, although may seem considerably exhaustive but has wide scope for more additions to the term. It covers most kinds of transactions of merchants, bankers, traders, investors, etc. relating to and in particular commercial transactions. The definition enumerated under Rule 58 of Civil Procedure Rules, 1998 of the UK appears to be similar to the definition proposed.

The authors are of the view that the present definition of a commercial dispute is very wide and may lead to multiple interpretations and confusion as these provisions have already been defined in their parent Acts. Therefore, the authors side with the Law Commission's suggestion to specify relevant Statues in the Schedule of the Bill, as that would be more appropriate than listing commercial disputes in the definition clause of the Bill. The Union/State Governments may add any statute which it believes as having a commercial transaction in the Schedule of the Bill.

The Bill has failed to include, in its definition of a commercial dispute, the disputes arising out of direct and indirect taxes such as customs duties, central excise, etc. Recommendations

[7] LAW COMM'N OF INDIA, REP. 253, COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION OF HIGH COURTS AND COMMERCIAL COURTS BILL, 2015 (Jan. 2015).

for a separate Commercial Appellate Division, especially for tax-related cases may be established in each High Court.

Specified Value

In relation to a commercial dispute, the term "Specified Value" means the value of the subject-matter in respect of a suit. The Act prescribes a minimum value of the subject matter of suit as determined in accordance with Section 12 of the Act.

The specified value of the commercial suits in the Commercial Division of High Courts Bill, 2009 was fixed at rupees five crore and above. The 17th Law Commission, Select Committee on the Commercial High Courts Bill, 2009, the 20th Law Commission, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 prescribed the "Specified Value" of the subject matter of the dispute as one crore rupees; however, the Standing Committee on Personnel, Public Grievances, Law and Justice in 2015 recommended the Specified value as two crores. Therefore, any commercial litigation failing such valuation would not be tried under this Act, but instead would be adjudicated as an ordinary civil suit. The Ordinance promulgated by the President in 2018 has now widened the pecuniary jurisdiction of the commercial courts, by amending and lowering the specified value required for initiating litigation under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 Act from one crore to three lakhs.

The authors are of the view that reducing the pecuniary jurisdiction under the Act has opened the doors of the commercial courts to countless commercial disputes, bringing a large number of disputes within its ambit which were previously outside their scope, resulting in lesser prioritization of relatively higher value cases. With an increased number of commercial cases, there arises a necessity to constitute new commercial courts and commercial appellate courts at the levels of the district court and below, which was successfully established by the promulgation of the ordinance. The authors further support the Standing Committee on Law and Justice's (2015) Recommendations, whereby the minimum value of commercial disputes was increased from one crore to two crores. The authors believe that the failure of the Executive to address these issues could cause a significant delay in the disposal of the increasing number of cases, instead of expediting it.

Pre-Institution Mediation

Many changes were made in the 2018 Bill of the Commercial Courts Act, 2015. One such provision change was the insertion of 12A of The Commercial Courts Act. This section enables the parties to resolve their dispute through alternate means with the help of a mediator in a case where the suit does not contemplate urgent interim relief. The authorities to conduct the mediation process are to be instituted under the Legal Authorities Act, 1987.[8]

[8] Aparna Gaur & Arushi Jain, *Pre-Institution Mediation Under The Indian Commercial Courts Act: A Strategic Advantage*, NISHITH DESAI ASSOCIATES (May, 2019),

These authorities are entrusted with the completion of the mediation process within 3 months. The settlement through mediation shall have the same status as that of an arbitral award. The model of undergoing mandatory mediation in the initial stage and having the right to opt-out and approach the court for further relief is referred to as the opt-out model. This process of mediation has seen a considerable rate of success in other countries like Italy and Turkey. For instance, in Italy, such a mediation process was introduced in the year 2010 and 50% of the process was reported as successful.[9]

The authors feel that it is a welcome push to enable and accelerate alternate dispute resolution, at the same time, there is no denying that the implementation and success of this pre-mediation institution remain questionable. The time-bound process proves to be less time consuming and more cost-effective. Further, Section 12A gives an option to opt out of mandatory mediation for urgent interim relief, but neither the Act nor the Bill clearly states what constitutes an urgent interim relief. The authors feel that this could potentially be misused by the parties or by their respective counsels to avoid the mediation process. The primary principle of mediation is the client's autonomy in choosing the mediator, this accepted principle gets breached here. The ultimate aim of this pre-institution mediation is to resolve commercial disputes and the Legal Services Authority has been constituted to provide free and competent service to the weaker sections of the society. By appointing these Legal Service Authorities as mediators, the burden of disposing of the commercial disputes will fall on NALSA and there might be a lack of responsiveness and careful management and concentration on the weaker sections. There will be a situation where the NALSA has to divide its infrastructure and work between handling commercial disputes and fighting for the underprivileged; this will affect the efficiency of the mechanism of pre-institution mediation. There is also no motivation for the parties to attend the mediation in good faith. For instance, Singapore and Hong Kong impose penalties for breach of confidentiality in mediation proceedings.

Appointment of Judges

Another critical change brought in through the Ordinance is the appointment of judges to ensure that commercial matters are dealt with by persons having vital skills and experience in commercial law, as prescribed by the Act. Section 20 further requires the sitting judges to receive continued education and training.

An analysis shows that the judges of commercial division and commercial courts are adjudicating not only the commercial issues but also other civil disputes. The authors have observed that by letting judges handle other disputes, it might overburden them and the ultimate aim of resolving the disputes quickly gets defeated.

Another important change was that previously the judges were appointed by the state government with the suggestions made by the Chief Justice of the Supreme Court, but post

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http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/190506_A_Pre_Institution_Mediation_Under_the_Indian_Commercial_Courts_Act.pdf.

[9] Juhi Gupta, Mandatory *Pre-institution Commercial Mediation in India*, THE RESOURCEFUL INTERNET SOLUTION (Sept., 2018), https://www.mediate.com/articles/gupta-pre-institution.cfm.

the Amendment, the state government has the power to appoint judges without even consulting the judiciary.[10]

The authors are of the view that giving sole authority to the state government in appointment of judges might intrude with the supremacy of the judiciary, and may also lead to the exercise of powers arbitrarily by the state government. It is believed that the appointment of judges would be more organized when assisted by a person or a committee consisting of members of the judiciary.

Over the years, the Law Commission and the Standing Committee have observed that due to the vacancy of judges, which led to a high pendency of cases, the judiciary is unable to dispose of the cases in a timely manner. As of March 2017, there has been a vacancy of 41% of the judges in high courts, and 23% in subordinate courts. It must be noted that without filling up existing vacancies and increasing the strength of judges, commercial courts cannot function as specialized courts. In the authors' view, it is of utmost importance that a database of judges who have 'real' experience of dealing with commercial disputes be prepared and maintained.

Structure of Courts

As of December 2017, state governments have constituted over 247 commercial courts in various districts across the country. The Ordinance of 2018 introduced commercial courts even in High Courts having ordinary original civil jurisdiction and also commercial appellate courts at the district level. The Ordinance also provided for the establishment of commercial divisions in 5 High Courts which have ordinary original civil jurisdiction, i.e., the High Courts of Delhi, Bombay, Calcutta, Madras, and Himachal Pradesh and commercial appellate divisions in all 24 high courts to hear appeals against orders from (i) commercial divisions of high courts, and (ii) commercial courts at the district level.

With respect to Commercial courts at the district level, the Amendment allows commercial courts to be set up in areas where all 24 High Courts have jurisdiction. Where there is no original jurisdiction, the state government may constitute commercial courts under the district judge.

The 2018 Ordinance has also split the appellate process, under Section 13 between the commercial appellate courts at the district level and commercial appellate division at the High Court. Previously, all appeals from Commercial Courts at the district level, or Commercial Divisions of High Courts, would go before the Commercial Appellate Division set up in each High Court. However, under the amended Section 13, appeals against Commercial Courts' orders will lie before the Commercial Appellate Court, unless such Commercial Courts of the first instance are below the level of a district judge (typically a

[10] Raj Panchmatia & Peshwan Jahangir, *The Commercial Courts Act: Is It the Solution For Delayed Justice?*, LEXOLOGY (July 19, 2016), https://www.lexology.com/library/detail.aspx?g=5e937154-d669-495a-8c96-8b0679009d46.

civil judge). Any appeals of the first instance from the commercial court at the district judge level will lie before the commercial appellate division.[11]

The authors feel that there exists ambiguity regarding whether the appeals from the commercial appellate court at the district will lie with the commercial appellate divisions of the High Court with original jurisdiction. The 'constitution' of a new hierarchy of Courts under the Act is incongruous since all that the Act does is entrust this specialized jurisdiction of commercial disputes to the existing hierarchy of High Courts exercising ordinary original civil jurisdiction and district courts in other States.

Section 17

The Report provided by the 253rd Law Commission is that there exist inadequacy and inconsistency in maintaining the court case data. Thus, there is a need to systematically collect and publish data in an organized manner to estimate the performance of the forum introduced under this Act. In pursuance of this, Section 17 was introduced through the 2015 Bill and was further supplemented by the Commercial Courts Rules, 2018. The maintenance of court case records has proved to be more proper and uniform post the enactment of the 2018 Amendment. Section 17 has always directed the maintenance of data but the statistical data rule makes it more powerful and mandatory. The format provided by the statistical data rule also requires the data regarding the number of days taken to dispose of a case. Section 17 thus acts as a remedy for the previously inadequately maintained record. The data collected must be published by the High Courts in their respective websites on the 10th of every month.

By survey conduction by a private source, it has come to light that, out of 24 High Courts, only 8 High Courts have partially disclosed the information as prescribed under the Act. The Delhi High Court has the record of maintaining the data for the longest period and it has also come into focus that most of the courts have started maintaining their records only after July 2018.[12]

AMENDMENTS TO CPC

> "Rules of procedure are not by themselves an end, but are a means to achieve the ends of justice, and the tools forged are not intended as hurdles to obstruct the pathway to justice…Procedure is meant to subserve and not rule the cause of justice."[13]

The Commercial Courts Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was a significant step in enhancing India's status in the Ease of Doing

[11] Mohammad Kamran & Ashish Kabra, *Amedments to the Commercial Courts Act*, NISHITH DESAI ASSOCIATES (May, 2018), http://www.nishithdesai.com/information/news-storage/news-details/article/amendments-to-the-commercial-courts-act.html.

[12] Ameen Jauhar & Vaidehi Misra, *Commercial Courts Act, 2015: An Empirical Study*, VIDHI CENTRE FOR LEGAL POLICY (Dec. 2018), https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf

[13] ARUN MOHAN, JUSTICE,COURTS AND DELAYS (2009).

Business Index. This act was retitled as Commercial Courts Act, 2015 through the 2018 Ordinance which led to certain significant amendments to the original statute.

The Act also states that the provisions of the Code of Civil Procedure, 1908 in its application with respect to any suit related to commercial courts of specified value shall stay amended as prescribed in the Schedule of the Act.

Some of the noteworthy amendments made to the Code of Civil Procedure concerning the Commercial Courts Act, 2015 are:

Order XI

Order XI of Code of Civil Procedure lays down the procedure for inspection and discovery of facts through interrogation. Under the new substituted provision, the plaintiff or the defendant are required to file all the documents, not only the documents relied upon in the written statement or the plaint but also all documents relating to any matters in question in the proceedings, irrespective of whether they are in support of or against the plaintiff or defendant's case [Rules 1(1) and 7 of Order XI]. They are also mandated to go on oath stating that they do not possess any documents. It is also stated that the duty to disclose documents that come to the notice of the party shall continue till the disposal of a suit [Rule 12 of Order XI].

Order XV A

According to Lord Woolf's Report, chapter 5, para 18, it is stated as follows

> "the term case management is a comprehensive system of management of time and events in a law suit as it proceeds to the justice system from initiation to resolution. The two essential components of case management system are the setting up of a timetable for pre-determined events and suspension of the progress of law suit through its timetable"[14]

The internationally practiced case management system was introduced in India for the first time through the insertion of Order XV A of the Code of Civil Procedure; this Order lays down the timeline, procedure, format, rules, and regulations regarding the case management system. This is also a step taken by the Legislature in support of the Commercial Courts Act for the speedy and organized disposal of cases. According to this Order, the case management is to be held within the first four weeks from the date of filing an affidavit. These hearings require the judge and the parties to the proceeding to establish a mutually agreed schedule for smoother and speedy disposal and arguments have to be closed within six months of the first Case Management Hearing.[15] No adjournment of Case Management Hearing would be entertained for the sole reason of the absence of the parties, and it would be accepted only if a prior application has been made regarding the absence.

[14] Justice M. Jagannadha Rao, Case Management and its Advantages, Law Commission of India, http://lawcommissionofindia.nic.in/adr_conf/Mayo%20Rao%20case%20mngt%203.pdf.

[15] J.Mandakini & Varsha Subramanian, commercial courts act,2015:important changes in provision of cpc (January 2016), https://www.indialaw.in/blog/blog/law/commercial-courts-act-2015-changes-in-provisions-of-cpc/.

Non-compliance with the management hearing shall be condemned by the court by the imposition of penalties.

This mandatory procedure, in accordance with the Act, was conducted only in 2 out of 150 cases. And from a survey conducted by a private source, it has come to view that out of the 450 cases under analysis, the order sheet of Delhi and Bombay reflected that no Case Management Hearing had taken place. And at Vadodara, out of 150 cases, only 28 cases had had Case Management Hearing. Though the Case Management Hearing mandates the judges to hold meetings and prepare schedules, the empirical evidence shows a lack of maintenance and implementation of this order.[16]

Order XIII-A

Apart from the case management system, the Act has also made another initiative for quick disposal of cases. That process of disposal is introduced under order XIII-A which provides for a mechanism of summary judgment in respect of a claim without recording oral evidence. Under this mechanism, the application to initiate summary judgment can be made by either party after the summons of the defendant but such an application shall not be entertained after the framing of issues by the court. Upon consideration and if the evidence is in favour of the applicant, upon satisfaction of the court, summary judgment may be given without going through the elaborate trial process.[17]

Though the concept of summary judgment is a procedural reform, its implementation was not as expected. By a study conducted by the Vidhi Centre for Legal Policy in the year 2018, it has come to light that out of 450 cases analyzed, not even one single case has gone through summary judgment. Just like Case Management Hearing, this provision has also failed its purpose. There is a need for the appointment of a separate committee to work on the process and implementation of the Case Management Hearing and summary judgment.[18]

CONCLUSION

The core purpose of commercial courts is to furnish an effective dispute resolution mechanism for speedy disposal of commercial disputes. Excessive adjournments, across all courts, continue to be a major cause of delay and remain unaddressed under the Act. The authors stress upon the urgency for policymakers to recognize the limitations of isolated procedural reforms in tackling judicial delays. This has been a longstanding problem with most stakeholders, time and again, giving effect to sweeping procedural laws in India with the idea of expediting disposal, but to no avail. It is thus time to think beyond mere procedural reforms.

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[16] Jauhar & Misra, *supra* note 12.

[17] Ajit Warrier, *The Commercial Courts Act, 2015: Bridging The Gap Between Reality And Promise , Bar And Bench Legal News India*, BAR & BENCH (August 2018), https://barandbench.com/commercial-courts-act-promise-reality/.

[18] Pratik Das, *Summary Judgement Under Order XIII A of The Civil Procedure Code*, MONDAQ (2018), http://www.mondaq.com/india/x/615538/Trademark/Summary+Judgment+In+Intellectual+Property+Disputes+Under+Order+XIIIA+Of+Civil+Procedure+Code.

AN ASSESSMENT OF LIQUIDATED DAMAGES AND PENALTY CLAUSES IN CONTRACTS

By: *A.P. Shree Kalaivanee & S. Shiva Sundharri*[*]

Abstract

The parties to a contract, in advance, have a consensus about the compensation to be paid in case of breach of contract. These stipulated damages are called liquidated damages. The minimal damages which are awarded over and above the reasonable consideration are called under liquidated damages. An unreasonably huge compensation is termed as a penalty. Penalty clauses have been under scrutiny due to contradicting views taken by various researchers because there is a general presumption that they are imposed as a punishment rather than as compensation. The main aim of liquidated damages is to assess how much a party loses in case of breach of contract or non-performance. The court usually determines whether the amount compensated is proportionate to the loss if it is a penalty. In the case of the latter, the provision will be deemed to be void and becomes unenforceable in the court of law. This proclamation about the penalty is deep-rooted in many common law countries. However, attempts are being made to enforce penalty clauses under certain conditions.

According to the Indian Contract Act, 1872, liquidated damages which are about to be paid by the party who commits a breach depends upon the doctrine of reasonable compensation. The court will assess reasonable compensation. Section 74 of the Indian Contracts Act, 1872, states that the aggrieved party will receive a sum equal to or less than the agreed sum but not more than the stipulated amount.

Considering the above facts, the objectives of the authors are to determine the position of the two provisions and also the basis on how liquidated damages are being assessed as well as to ascertain whether the penalty clause should be eliminated or included in the Indian regime of contracts.

INTRODUCTION

The parties to a contract decide the amount of compensation to be paid upon its breach. These damages are called liquidated damages. When these damages are paid superfluously they constitute penalty. Commonly, penalty clauses are unaccepted and are forbidden according to the penalty doctrine. The penalty doctrine is a theory of contract law that has been in existence for several centuries. This doctrine is applicable when a party to a contract has failed to perform their obligation and therefore has to give compensation for breach of contract. There are certain measures to distinguish between liquidated damages and penalty clauses. The first criterion is that the parties must agree to a sum which equals the loss. The second criterion specifies that the injury is unpredictable and incalculable. The third criterion is that the specified amount must be an equitable pre-estimate of the loss. Liquidated damages are equivalent to the loss suffered. They are measured ex-ante (at the initial stage of the performance of the contract). At the same time, liquidated damages may offer incentives for the performance of the contract. The reason for the prior estimation of

[*] A.P. Sree Kalaivanee & S. Shiva Sundharri, students, BB.A. LL.B., Tamil Nadu Dr. Ambedkar Law University, School of Excellence in Law (Chennai).

liquidated damages is that the judge might have complications while computing losses. Similarly, the promisee will not disclose his predisposition honestly. Therefore, these damages are determined ex-ante. In the beginning, the parties have a choice to enter into the contract or not. So, if the parties decide to go for a higher amount as compensation it will constitute a penalty. Where the parties observe a breach of contract and the damages are difficult to establish, they will calculate a stipulated amount as liquidated damages and do not consider it as a penalty.[1] The parties are independent in determining their damages as long as they are reasonable. The intention of the parties constitutes a necessary element in liquidated damages. The parties must have the primary intention to consider them as liquidated damages or the courts will consider it as a penalty.

AN INTRODUCTION TO THE CIVIL LAW AND COMMON LAW APPROACH

There are two different approaches to penalty clauses, these are the civil law and the common law approach. In the common law approach, the purpose of liquidated damages clause is to ascertain how much a party loses in case of non-performance. When these damages are disproportionate to the loss incurred, the courts rule it as a penalty. The civil law countries hold a different view of penalty clauses. In these countries, there is no distinction made between these two. However, in recent times, attempts have been made to reduce the amount of compensation if it is excessive.[2] Usually, in the common law countries, penalties are included as a way to make the party fulfill the contract, whereas the liquidated damages clause is inserted to make sure the injured party is compensated. There is no need to demonstrate that damage has occurred when invoking the penalty clause. Courts worldwide have the potential to curtail the extent of these penalties. There are several components that the court takes into account to decide if the penalty is excessive or not.

INTERNATIONAL PERSPECTIVE

The reason behind including liquidated damages provision is to determine the loss incurred in case the contract is breached. The primary function of the court is to enforce this provision and to give a reasonable compensation that is not more than the loss suffered. If the court deduces that the damages are a penalty, then it will be ruled as void. As a result, the wronged party will only obtain the damages mentioned in the contract. There are minor differences in how various law systems treat liquidated damages and penalties. There are two factors to decide if the particular provision is valid or not. The first one is unreliability i.e calculating actual damages is strenuous. The second one is whether the compensation awarded is proportionate to the harm caused.

In the US, liquidated damages will be given when the court perceives that the harm caused by the breach is difficult to estimate but the amount of damages is reasonable and not disproportionate. If the liquidated damages are not proportionate, this provision will become a penalty clause. This clause then becomes void and the damages will be compensated as

[1] *Liquidated Damages and Penalty,* 2 VA. L. REV, 290-292 (2015).
[2] Gerrit De Geest & Filip Wuyts, *Penalty Clauses and Liquidated Damages,* [Volume No.?] ENCYCLOPEDIA OF LAW AND ECONOMICS 3,141-161, (2000).

per the injury resulting from the breach. Safeguarding of interests by the Courts of the aggrieved as well as the defaulting party has caused major confusion between the law of liquidated damages and penalty.[3] The Indian perspective, however, does not differentiate between the two.

Liquidated damages form an important segment of construction contracts. Usually when a contractor is unable to complete the work by the specified date. he shall pay the employer a specified amount at the rate of per day or week for the remaining time. Therefore, the primary obligation to finish the work on time is restored by the secondary obligation to pay liquidated damage, and this same arrangement is used to achieve performance. Liquidated damages are based on the principle of "genuine covenanted pre-estimate of damage".[4]

Similarly, under the English law of Contracts, the parties agree on an amount prior (ex-ante) in case of breach of contract i.e. liquidated damages clause. Here, the performance of the contract is a primary obligation, and in case it has been breached, the secondary obligation of paying liquidated damages comes into effect. English law does not implement penalty clauses. The test to determine whether a liquidated damages clause is a penalty clause is by assessing whether the liquidated damage is an actual pre-estimate of damage caused by the breach. The case of *Cavendish Square Holdings v. Talal El Makdessi*,[5] lays down the previous English position on liquidated damages. In this case, Mr. Makdessi entered into an agreement with Cavendish to sell him a stake in one of the largest marketing companies in the Middle East. Two clauses were specified in the agreement which stated that if Mr. Makdessi breached definite restrictive covenants, he will not be eligible to receive two installments and will be compelled to sell the remaining shares to Cavendish. Mr. Makdessi held that these two clauses were penalties. The Court held that the clauses were not penalties and could thus be enforced. In an appeal, the higher Court changed the decision by the lower court and held that the clauses were unenforceable and deemed them to be penalties. An appeal was then made to the Supreme Court. Lords Neuberger and Sumption gave a common judgment and ruled that the penalty clause was enforceable. They also highlighted that the rule of penalties covers only the matters pertaining to the secondary obligation to pay compensation[6]. The English law still does not endorse penalty clauses as enforceable. The liquidated damages clause must be demonstrated as a secondary obligation, which comes into effect only after the primary obligation is breached.

Another case that may be relevant here is that of *Parking Eye Limited v. Beavis (Consumers Associations Intervening).*[7] In this case, Parking Eye Ltd. and River Side Retail Park managed a car park. Parking Eye put up notices stating that on noncompliance with the two-hour parking time limit, a parking charge of £85 would be issued. One Mr. Beavis stayed an hour extra and asserted that the fee was a penalty and therefore would not be enforced. Initially, the Court disagreed with Mr. Beavis, and the charge was not enforced. After appealing to

[3] J.F.H, , *Damages. Penalty or liquidated damages,* 63 UNIV. PENNSY. L. REV., 220, 220-223 (1915).
[4] *English law of Liquidated Damages and Penalty* (Apr. 2016), https://www.lexology.com.
[5] Cavendish Square Holdings v. Talal El Makdessi 2015 UKSC 67.
[6] Sakthi Agarwal, *Liquidated damages and penalty* (Nov.6,2016), https://www.lawtimesjournals.com.
[7] Parking Eye Limited v. Beavis (Consumers Associations Intervening), (2015) 3WLR 1373.

the Supreme Court, the penalty clause was enforced. The actual test to identify whether a clause is a penalty or a liquidated damages clause depends upon the party's "legitimate interest." This case summarizes the current position of English law on penalties.

Civil law countries have a different view of these provisions under their Contract Law. The Civil Codes are founded on the Napoleonic Code, which permits contracts to be implemented by the usage of penalties. The Civil Code makes no distinction between the two provisions. The court sometimes distinguishes between these two provisions relating to their usage. For instance, penalties will be included as a way to motivate the party to perform the contract, whereas liquidates damages are to ensure that the wronged party is compensated. Penalty clauses which are permitted in civil law countries will not be executed as liquidated damages in common law countries. An illustration of the same is stated below. In 1971, a resolution emerged by the Council of Europe. It was to provide all member countries with a uniform approach to handle all penalty provisions[8]. The Resolution allowed penalty provisions with the qualified exception that the courts can minimize the penalty if it is excessive.

The court considers the following factors to determine whether the impugned penalty is uncurbed and should be reduced.

1) If the breach of contract was made in good or bad intention;
2) If the contract form is common;
3) The interests of both the parties;
4) Finding the differences between the estimated and the prevailing damages.

Several Civil Codes follow the model of the Resolution which enables Courts to minimize the excessive penalty as given by the following countries:

- France: Articles 1226 to 1233 of La Code Civil regulate penalty clauses (*La clause penale*) and Article 1152 regulates liquidated damages (*domages-interets*).[9] The penalty would be reduced by a Judge if a part of the contract has been performed and if it is excessive. Liquidated damages, on the other hand, will be altered if it is disproportionate to the damage caused.
- Italy: The concepts "*clausola penale*" and "*liquidazione convenzionale del danno*" exist. Penalties are enforced but are subject to reduction if found to be excessive.
- Germany: According to Article 340 and 341, both liquidated damages (*schadenspauschale*) and penalties (*vertragsstrafe*) are permitted.
- Netherlands/Switzerland: The rules are similar to that of Germany.
- Belgium: Penalties are permitted unless the compensation exceeds the damage.
- Scandinavia: Here, if a penalty clause is extreme, then it will be deemed as void.
- China: Article 114 of the Chinese Contract Law permits penalty clauses.
- Russia: The new Civil Code of 1994 specifies that both the provisions are permitted and are likewise subject to reduction.

[8] *Liquidated damages vs. Penalty*(2019), https://www.upcounsel.com.
[9] J.Frank McKenna, *Liquidated damages and Penalty clauses: A civil law versus common law comparison* (Spring, 2008), https://www.reedsmith.com.

- Denmark: The Supreme Court ruled out the usage of penalty clause because the compensation being provided was excessive in relation to the actual damage.
- Spain: In a particular case, the penalty clause was unenforceable because it had no contractual obligation. The court did not discuss in detail whether the damages offered were excessive or not. Article 1154 of the *Codigo Civil* describes the penalty clause (*clausula penal*).
- Portugal: The position on penalty clauses is similar to that of the aforementioned countries.[10]

INDIAN SCENARIO

According to the Indian Contract Act, damages are divided into general damages and special damages. General damages deal with situations that have been provoked in the course of a breach. Special damages occur under special circumstances and can only be reclaimed when it is brought to the knowledge of the other party. Liquidated damages are dealt with in detail under the Indian Contract Act, 1872, in Sections 73[11] and74.[12]

Section 73 puts forward the principles relating to damages. The Court's primary duty is to ascertain whether the injury caused can be compensated by liquidated damages or penalty. In its determination of the same, it considers the following factors,

- The nature of the agreement.
- Rights and duties arising out of the agreement.
- Conditions of the parties.[13]

Earlier, the attempts to differentiate between penalty clauses and liquidated damages were based on the English position. It stated that the injured party will not be sanctioned any extravagant amount but, only the pre-estimated amount. The term penalty was included under the Indian Contract Act through an amendment in 1899.[14]

In the case of *Fateh Chand* v. *Bal Kishan*,[15] it was ruled that there would be no difference between awarding liquidated damages and penalties. The Supreme Court observed that an aggrieved party is eligible to get a reasonable amount as compensation that should not surpass the sum of penalty or the pre-estimated amount. The Court also ruled that the provision will not be applied to cases whose primary intention is to approach the court solely for relief. Various benefits of fixing a pre-estimated amount were discussed by the Court.

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[10] Ugo Mattei, *The comparative Law and Economics of Penalty Clauses in Contracts, Vol.43, No.3, 427-444 (1995).*
[11] The Indian Contract Act, 1872, §73 ("*when a contract has been broken, the aggrieved party is entitled to get compensation or any loss or damages which has been inflicted to him or her naturally during the usual course of breach of contract or about which the parties to the contract has prior knowledge when they enter the contract."*).
[12] The Indian Contract Act, 1872, §74 ("*when a contract has been broken, and if a sum is named in the contract as the amount to be paid for 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 there by , to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or ,as the case may be, the penalty stipulated for."*).
[13] Vikas Goel & Abhishek Kumar, *Liquidated Damages- A Chimera Without Proven Loss* (Dec.1, 2019), https://singhania.in.
[14] Shivprasad Swaminathan, *Re-inventing the Wheel: Liquidated Damages, Penalties, and the Indian Contract Act, 1872,* 6 THE CHINESE JOURNAL OF COMPARATIVE LAW 103-127 (2018).
[15] Fateh Chand v. Bal Kishan Das, AIR 1963 SC 1405.

These included the minimization of calculation mistakes; minimization of the risk of low compensation; and reduction of the expenses while trying to establish loss and damage.[16]

A rule was laid out in Section 74 that an applicant in the case of breach of contract is entitled to "reasonable compensation" and this must not exceed the sum pre-estimated. The reason for whether actual loss or damage has to be proved was initially found by the Privy Council in the case of *Panna Singh vs Arjun Singh.*[17]

In the obiter dictum of *Oil and Natural Gas Commission* v. *Saw Pipes Ltd.*,[18] the Supreme Court stated that if the parties have agreed upon a particular sum as damages in case of a breach, no actual loss or damage has to be proved when the breach occurs. The Court held that Section 73 and 74 should be read together. While deciding compensation, the terms and conditions have to be examined.

In *BSNL* v. *Reliance Communication Ltd.*,[19] a dispute arose regarding the caller line identification device, and it was discovered that the calls of CLI had been mishandled. Therefore, BSNL imposed an amount of Rs. 9.89 crores on Reliance. The Court ruled that, according to Section 74, the damages have to be provided based on reasonable compensation. The basic aim of Section 74 is to avoid litigation and to provide certainty in commercial cases".[20]

In *Kailash Nath Associates v. DDA*,[21] a new perspective on Section 74 was established. It stated that the wronged party will be entitled to reasonable compensation that will not exceed the sum which is pre-estimated in the contract, in case of a breach of contract. Before the amendment of 1899, the common law perspective was followed. After the amendment, the scope of Section 74 widened because a new clause added "any other stipulation by way of penalty". In this case, the court declared that Section 74 will not extend to giving relief in cases of penalty clauses, where this provision does not apply. But in the previous cases, Section 74 was applicable in unavoidable circumstances.

Thus, based on various case laws, both Indian and foreign, it can be stated that different judges have different opinions regarding the determination of a penalty clause. Lords Neuberger and Sumption mention the true test as *"whether the impugned provision is a secondary obligation which enforces a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation*" and that an essential test is to focus on the lawful intention of the parties. The Supreme Court evaluated certain presumptions on liquidated damages and penalties and gave the following explanations:

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[16] B.V.R Sarma, *Adjudication for claim of damages under sec 73, 74, 75 of the Indian Contract Act,* https://www.manupatra.com.

[17] Panna Singh v. Arjun Singh, (1929) 30 LW 281. (The Privy Council held that "the effect of section 74 of the contract act is to disentitle the plaintiffs to recover simply the sum specified in the contract, whether a penalty or liquidated damages ,and hence in a suit by vendors for damages for breach of contract of sale ,the plaintiffs must prove the damages they have suffered").

[18] Oil and Natural Gas Commission v. Saw Pipes Ltd, (2003) 5 SCC 705.

[19] BSNL v. Reliance Communication Ltd, (2011) 1 SCC 394.

[20] https://indiacorplaw.blogspot.in/2010/12/supremecourt-in-bsnl-v-reliance.html.o. (last visited Aug. 20, 2019).

[21] Kailash Nath Associates v. DDA, (2015) 4 SCC 136.

(i) The choice is not between a clause of "genuine pre-estimate" or penalty. Lords Neuberger and Sumption proclaim that "*a damages clause may be neither or both*";

(ii) The events amounting to a party to enter into a contract is applicable to determine if a particular provision amounts to a penalty or not.'

REASONS FOR PERMITTING PENALTY CLAUSES

Initially, the courts were unwilling to use penalty clauses in contracts based on these reasons:

A) That it is an overcompensation.

B) Dissimilar negotiating power between both the parties.

C) Insufficient information provided to the contracting parties.

But in recent times many scholars have a new perspective on enforcement of the penalty rule.

1) Penalty clauses stimulate order in contracts: Permitting penalty clauses provides for compensation to the parties that have been wronged due to the mistake caused by another party. In *Carpel v. Saget Studios,* a married couple hired a photographer to take black and white photos. The photographer failed to deliver and therefore damages were sought. The court held that the damages were theoretical and could not be recovered due to breach.[22] It was also determined that if the Carpels' had included a penalty clause, they would have acquired a reasonable amount of compensation.

2) The penalty rule provides some information about the parties' performance: Including penalty provisions in the contract provides details about one party's promise to perform the contract. The party who is obligated to perform will be compelled to do the act owing to the fear of paying an excessive penalty. Penalty provision is also an economical call and an uncomplicated way of expressing information of such kind.

3) Penalty provisions assign risk bearing to the alleged party[23]: A consistent application of the penalty rule does not impose risk on both parties but allots it to the one who failed to perform the contract. As a result, both the parties to the contract efficiently perform their obligations within it.

4) The existing rule is chaotic: One of the principal reasons to allow a penalty clause is that the present rule is confusing. The courts grapple to decide if the liquidated damages clause is a reasonable expectation of loss or whether it is unreasonable. Therefore, if there is a straightforward rule that the penalty will be imposed on non-performance, then such confusion can be avoided. Also, the basis to determine whether a provision is liquidated damage or a penalty currently is not uniform.

[22] 326.F.supp.1331 (E.D.Pa.1971).
[23] David Brizzee, *Liquidated Damages and the Penalty Rule:A Reassessment,* BYU L. REV. 1613 (1991).

REASONS FOR NOT PERMITTING PENALTY CLAUSES

1) The difficulty of the courts to determine: The courts will be less troubled if they did not have to decide whether a particular compensation is liquidated damage or penalty. The courts are deficient regarding the means to determine.
2) The penalty provisions are penal: The penalty clause is often introduced as a way of punishment rather than compensation. In the case of non-performance of the contract, the defaulting party has to provide the amount which is equal to the injury caused and not an excessive amount.
3) The penalty clause causes varying side effects[24]: The penalty, if enforced, poses a burden on the party which committed a breach to pay a huge sum of money as compensation. On the other hand, if it is not incorporated then it leaves the defaulting party unpunished. Therefore, a careful assessment of all the costs which might be incurred in case of breach should be included in the contract.
4) The legal errors are excessive for penalty clause: Enforcing a penalty clause is usually dangerous. Sometimes the judge might incorrectly enforce the penalty clause which poses a problem for both parties.

CONCLUSION

After a thorough analysis, it is established that the penalty rule has its pros and cons. Penalty clauses have been a major concern for a long time due to their controversial nature. Many scholars support the rule that prohibited the penalty clause. Penalty clauses have many drawbacks but they also have several advantages. We firmly believe that a penalty clause should be permitted under certain conditions. In our opinion, rather than disapproving the penalty clause, the Courts should examine carefully the position of both the parties at the time the clause was agreed upon. The penalty clauses are well-organized means of allotting risks, conveying information, and furnishing suitable information. At the same time, a high threshold for allowing penalty clauses should be set.

Since ages, penalties have been viewed as inferior and unacceptable based on considerations of equity. Therefore, the penalty rule is often viewed as a secondary control with various limitations. Under the liquidated damages clause, the amount estimated to be paid should be equal to the injury caused; otherwise, it will be considered void and will not be enforceable. Despite major developments in the liquidated damages clauses, a penalty clause for the breach of contract or non-performance might still be a means to achieve the proper execution of a contract. But again, there should be certain yardsticks governing the enforcement of a penalty clause. There is a major difference in response to penalty clauses between common law and civil law jurisdictions. In common law, penalty clauses are generally not enforceable. In civil law, such clauses are enforceable but the Courts have the

[24] Charles J.Goetz & Robert E. Scott, *Liquidated damages, Penalties and the just compensation principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach* (1977).

liberty to decrease the amount if it is found to be excessive. Therefore, the most predominant feature of elucidating the penalty rule is to recognize and compare the stipulated amount and the equivalent injury caused. Several factors about liquidated damages and penalty clauses have been discussed in the above article. It is recommended that the courts should assume a dominant role to resolve the enforceability of the penalty clause.

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CLASS ARBITRATION: PROSPECTS AND PROBLEMS

By: *Aarvi Singh & Swantika Kumar Rajvanshi*[*]

Abstract

Privity of contract is the basic doctrine that creates the legal boundary within which the rights and obligations of parties to the contract flow and no third person can transgress the boundary to claim any benefit. With time, this boundary has witnessed some infiltration and any party being substantially affected by the acts of the contracting parties can bring a suit against them. Contractual jurisprudence has seen a rise in arbitration clauses with agreements. These clauses govern disputes arising between parties and give them the right to seek an alternative forum for achieving speedy results. Adhesion contracts or standard form contracts are part and parcel of the mercantile and finance world and are mostly used in goods and services, finance, and employment sectors. Some of these contracts have arbitration clauses that can be invoked by either party. In sectors like goods and services, many people buy, consume, and utilize the product or service and hence constitute a class. This paper attempts to consider the prospect of each contract clause for arbitration being clubbed as a class. Thus, class arbitration takes place and the skewed balance of bargaining power is balanced with a number of people coming together against one common person to claim compensation or relief. In the case of *Keating v Superior*, the entire class of disputants was clubbed to form a class for a better bargain. A class claim of homebuyers, consumers, and employees can help in the framing of proper claims. Recently in India, the Johnson and Johnson company compensated the consumer for the faulty implants but the amount of compensation was much lower to the counterparts in the US. Class arbitration seeks to kill this evil as it provides better representation and claims. Another benefit of class arbitration is that in India, people are ignorant of their rights and are sceptical of speedy justice in legal proceedings, and thus end up waiving their claims altogether. The downside of class arbitration is interaction with unknown parties, the desire to seek different forums, and the inability to understand the working of the arbitration mechanism. This paper traces the prospect and problems of class arbitration and also recommends suggestions to overcome such problems.

INTRODUCTION

Disputes are a part and parcel of commerce and with the increasing number of disputes, there arises the need for a resolution mechanism that is speedy and effective; the legal mechanism even if effective, is time-consuming. A substitute for legal processes can be found in the methods of alternative dispute resolution. Alternative dispute resolution comprises the techniques of mediation, conciliation, arbitration, among others. The herald of globalization witnessed an increase in commercial transactions, cross-border businesses, and various other incidentals connected with the economy. The economic mobility ushered stakeholders into negotiating the terms of trade and this further increased the formation and breach of contracts. In case of a breach of the contract or any aberration from its terms, the aggrieved party would approach the court for relief and compensation. As it is an established principle

[*] Aarvi Singh & Swantika Kumar Rajvanshi, students, BB.A. LL.B., Rajiv Gandhi National University of Law, Punjab.

under contract law, time is of the essence for a contract, and so is a speedy remedy in case of its breach. The time factor is compromised in case of litigation, which is why arbitration becomes a suitable alternative for it.

The new face of arbitration is that of class arbitration. It is the collective submission of parties, sharing common interests to arbitrate under single arbitration proceedings.[1] The consolidated arbitration is still in much debate, no single institution has come up with substantive rules dealing with every aspect of class arbitration. The arbitrability in class arbitration is mired with procedural, substantive, and definitional shortcomings, yet institutions are dealing with cases of multiple parties and stakeholders.[2] The paper attempts to familiarize the readers with the concept of class arbitration, the issues surrounding it, and also provides recommendations to deal with the specified problems.

CLASS ACTION LAWSUITS: TRUTH AND REALITY

Class action suit is a representative action on behalf of each constituent,[3] a multi-party action suit where the objectivity of law and the emotionally handicapped legal procedure fails to understand the differences, demands, and issues of the parties. The history of class action suits can be seen through the case of *West v. Randall*, where the Court held that it is a general rule in equity that all persons materially interested in the matter of the bill, as plaintiffs or defendants, ought to be made parties to it, however numerous they may be.[4] Later the equity principle of class action suit convenience was incorporated by the Federal Equity Rules.[5] The rule of *locus standi* was too rigid and did not frequently allow class-action suits. The slow development of class suits ultimately converged in states incorporating its laws.

Collective redressal devices have recently been introduced in multiple jurisdictions; Belgium brought certain changes in its Economic Law Code on February 28, 2014; France introduced the *Loi Hamon* (class actions) on October 1, 2014; the United Kingdom brought some changes on October 1, 2016.[6] In India, class action lawsuits are of recent origin, the public interest litigation is a form of class suit, but so far it has been invoked in matters of public importance, constitutional rights, and not much in civil law cases of mass torts or product liabilities. India's experiment with representative suits is reflected in the Civil Procedure Code, 1908,[7] which dictates that any action for representative suit needs to be filed before the court with requisite territorial and pecuniary jurisdiction.[8] The Competition

[1] Société BKMI & Siemens v. Dutco, French Cour de Cassation, Revue de l'Arbitrage (1992) 470.
[2] LARA MICHAELA PAIR, CONSOLIDATION IN INTERNATIONAL COMMERCIAL ARBITRATION – THE INTERNATIONAL CHAMBERS OF COMMERCE AND SWISS RULES, 2011 (University of St. Gallen, Eleven Publishing, 2011).
[3] P. RAMANATHA IYER, ADVANCED LAW LEXICON 820 (3rd ed. 2005).
[4] West v. Randall, 29 Fed. Cas. 46 [2 Mason, 181] 1820.
[5] Federal Equity Rules, 1842, rule 48 (U.S.A.).
[6] Elie Kleiman, *Chapter 13 - The Future of Class, Collective and Mass Arbitrations in Europe: A European Approach to Collective Redress*, *in* BERNARD HANOTIAU & ERIC SCHWARTZ (EDS.), CLASS AND GROUP ACTIONS IN ARBITRATION, DOSSIERS OF THE ICC INSTITUTE OF WORLD BUSINESS LAW, (VOLUME 14) 183 - 201 (Kluwer Law International, International Chamber of Commerce, 2016).
[7] CODE CIV. PROC., Order 1, Rule 8.
[8] Jasleen K Oberoi, *Class/Collective Actions in India: Overview*, WESTLAW (Nov. 1, 2016), https://content.next.westlaw.com/4-618-0149?transitionType=Default&contextData=(sc.Default) &lrTS=201 90601191139904 &firstPage=true&bhcp=1.

Act also contains a provision for representative suits when numerous persons having the same interest suffers loss or damage due to any anti-competitive conduct, then any person representing the interest of all can file an application before the COMPAT.[9] The Consumer Protection Act, 1986 also has provisions for representative action suits. In cases related to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided, a complaint can be filed by the government on behalf of consumers,[10] or by any consumers in a representative capacity.[11]

To infuse class action suits in the Indian legal system, the Companies Act, 2013 came up with a class action suit subject to a minimum threshold of individuals filing the suit.[12] The lofty dreams did face reality as not a single case was reported since the inception of the provision.[13] A representative suit under any law in India must fulfill the threefold requirements of common interests, voluntary association, and numerous parties (number of parties is such that it is impracticable to bring them all before the court)[14] and there is the adjudication of absent parties' interests, thereby precluding additional litigation.[15] Every representative suit has inherent problems of fair representation, adequate compensation, and effective remedies.

But the formula of adequate representation has not been worked out well, even when attempts have been made to chalk it out, the premise of similar interests remains unresolved. For example, take the case of homebuyers. If the builder defaults, remedies can be sought by approaching the NCLT, RERA, or the Consumer Forum, and every buyer has different interests, some might want a refund and some would rather wait and claim the flat. In such a situation, a class action suit would not meet its object and hence might fail. Alignment of similar interests can never be proven as not each person gets adequate opportunity to present its claim before the Court, it is then the representative that decides the corpus of interests and presents it before the Court. The Court adjudicates upon the submission even in the absence of some parties. The decision given by the Court superimposes the principle of *res judicata* and absent parties are left with no option but the very verdict that failed to acknowledge their interests. The foreclosure of the due process for certain absent parties jeopardizes their interests.[16] Rule of convenience cannot always serve as a duct tape stitching the distinct interests of individuals.[17]

The next issue in the line of problems of class action suits is the cost of the imaginary pie. Everyone shares the pie and eats it but some do not pay,[18] the method of distribution of the

[9] The Competition Act, 2002, §53N(4).
[10] The Consumers Protection Act, 1986, §12(1)(d).
[11] *Id.*, §12(1)(c).
[12] The Companies Act, 2013, §234.
[13] Ashish Rukhaiyar, *Class Action Suits Ripe for Review?*, THE HINDU (Aug. 27, 2017), https://www.thehindu.com/business/Industry/class-action-suits-ripe-for-review/article19570982.ece.
[14] STORY, COMMENTARIES ON EQUITY PLEADINGS 87 (8th ed. 1870).
[15] Kainz v. Anheuser- Busch, Inc., 37 194 F.2d 737 (7th Cir. 1952).
[16] Hansberry v. Lee, 311 U.S. 32 (1940).
[17] Clay v. Field, 138 U.S. 464 (1891).
[18] *European Commission Evaluation*, EUROPEAN COMMISSION 10 - 11 (2008).

cost of litigation and the advocates' fees amongst the parties is not clearly defined. Many times, class action suits are invoked for societal demands.[19] In the case of *Bandhua Mukti Morcha,*[20] it took more than a decade for adjudication to be finalized and the victims were bonded labourers incapable of affording attorney's fees or any legal expenses. These have to be borne by representatives and post the verdict, the cost has to disburse to the heads of expenses but there remains a problem of a Samaritan holding for so long to serve the interests of so many out of one's pocket. In any other class suit, the attorney's fees and legal expense burden cannot always be balanced, and sometimes it is the reason for the delay in proceedings. Subsequent verdict, proportionate disbursement of fund, and handling multiple parties' claims is another issue in class litigation.[21]

In a class-action suit, parties that initiated the class action have absolute control over the suit.[22] Thus, the defaulting party may collude with other parties, thereby dismissing the suit altogether or settling at a meagre price. Even when the other party questions the suit, it becomes a different set of litigation altogether and the plight of class members continues to persist. The whip of limitation is another stipulation in cases of class action suit. Parties are bound by the limitation statute and it is difficult to loosen the knuckles of time when the suit is brought before the court for hearing.

An overall analysis of the legal system *vis-a-vis* class action or representative suits, highlights that the overburdened courts, even when trying to adjudicate upon class action suits, and that the pendency of cases, costs, and other procedural hurdles are major roadblocks in litigation. In India, the concept of class arbitration in cases of product liabilities, motor accidents, tortious claims and the like are yet to develop and litigation is the first option for all the claimants.

CLASS ARBITRATION: THE PROSPECTS

Class arbitration in any case arises when there is an adequate number of representatives with similar claims from one or more persons.[23] It has been defined as a procedural device allowing a party to redress their grievances collectively and on behalf of others.[24] *Joshua Lipshutz* defines arbitration clauses in "any agreement as falling under three baskets, namely, where the clause is precise and clear of the intention of parties for arbitration, where the arbitration clause is unenforceable on the ground of unconscionability of the contract, and where the contract is ambiguous over the option of class arbitration."[25]

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[19] M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 1086; Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802.
[20] Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802.
[21] Joseph J. Simeone, *Procedural Problems of Class Suits*, 60(7) MICH. L. REV. 905 – 969 (1962).
[22] Schatte v. International Alliance, 183 F.2d 685 (9th Cir. 1950).
[23] BERNARD HANOTIAU, MULTI-PARTY ARBITRATION, DOSSIER OF THE ICC INSTITUTE OF WORLD BUSINESS LAW 10 (2010).
[24] BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTI CONTRACT, MULTI-ISSUE AND CLASS ACTIONS ¶ 560 (Kluwer Law International, 2005).
[25] Joshua S. Lipshutz, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57(5) STAN. L. REV. 1677 - 1719 (2005).

Centralized Jurisdiction

Even though class arbitration may offer a chance for more suitable outcomes or less procedural fallacies, irrespective of this possibility, it is still not considered as an optimal mode of resolving large-scale disputes.[26] But it is deemed to play a potentially vital role in domestic and international disputes. It grants parties, of large scale cross-border disputes belonging to various states, with an opportunity to resolve their legal issues in a single go and at one, neutral venue.[27] This assists the parties in reaching a settlement more swiftly and efficiently without dealing with the problem of the jurisdiction of all the parties from different states. Even the arbitrators appointed are experts in their respective specialized fields. Thus, it creates a centralized jurisdiction for the large scale, cross-border, multi-party disputes, whilst saving time and avoiding procedural technicalities.

The capability of class arbitration to gain a single, centralized jurisdiction over multi-jurisdictional class actions moreover encourages the increase in domestic class arbitration in different states. This not only results in reaching a single multi-faceted decision but also makes it easier to enforce arbitral awards internationally.[28] This is facilitated by the enforcement of the arbitral award in multiple jurisdictions by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1959 ('New York Convention').[29] However, difficulties in enforcement of civil judgments in judicial class relief actions have surfaced due to a belief that representative actions are jurisprudentially unsound.[30] Some states have even unconditionally refused to identify and recognize any judgment arising out of a judicial class action. This makes arbitration the best alternative to provide class relief to the geographically diverse group of parties to the claim.[31]

Joinder of Third Party

Even though third parties have been held to not have any sort of 'right' to intervene in or join an arbitration proceeding, however, efforts have been made to protect their interests in their absence.[32] According to the generally accepted international law and practice, parties may not grant the arbitrator any authority that directly concerns a third party.[33] The predicament is, of course, when arbitrations indirectly affect the rights of third parties. Such circumstances are far more widespread than that of the direct cause, as these third parties

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[26] S.I. Strong, *Collective Arbitration under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration?* 29 ASA BULL. 139 - 140 (2011).
[27] S.I. Strong, *Resolving Mass Legal Disputes through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT'L L. & COM. REG. 921 (2011).
[28] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 7 - 10 (2009).
[29] New York Convention, 1959, art. 3, 4.
[30] Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L. L. & BUS. 310 - 311 (2007).
[31] Richard A. Nagareda, *Aggregate Litigation across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 32 - 41 (2009).
[32] S. I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or A Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915 (1998).
[33] W. LAURENCE CRAIG, INTERNATIONAL COMMERCIAL ARBITRATION: INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 271 (1997).

are often effectively stripped of their rights when they are barred from intervening in ongoing arbitrations.[34]

It becomes a necessity that the arbitral tribunals should take into account the interests of third parties in the arbitration proceedings, as they are directly or indirectly affected by the outcome of such arbitration. It becomes important to let third parties intervene and join the arbitration proceedings as it could even result in a change in the future outcome. It also provides them a platform where they can make others recognize their interests and offers a chance to the respective states to protect the same to the best of their ability. This principle requires arbitrators to allow third parties to intervene or be joined in arbitration when the third parties have sufficient interest in the outcome of the arbitration. Even the law should be made to include such provisions to deter procedural irregularities.

Even the London Court of International Arbitration Rules, 1985 contains a provision of joinder of third parties under Article 22(1)(h). Under these rules, joinder is a type of interim relief that may be granted by the arbitrators on the application of any party or *sua sponte*, unless the parties 'at any time' agree otherwise.[35] But under the earlier rules of the International Chamber of Commerce, no provisions had stated the joinder or intervention of third parties in class arbitration proceedings. Now, under the International Chamber of Commerce Rules, 2011, specific provisions for arbitration with multiple parties exist.[36] But these provisions do not dwell on the technicalities and the details of such joinder or intervention.

Applicable law

The parties to a class arbitration claim have the liberty to decide which law will be applicable during the arbitration proceedings. They can even decide the mode and kind of arbitration they want to enter into while drafting their arbitration agreements. They have two options: they can either opt for ad hoc arbitration or they can choose for the arbitration to proceed under the auspices of any one of the international arbitral institutions (institutional arbitration).[37]

Caveat Emptor

In the case of *Johnson & Johnson*,[38] faulty ASR hip implants were used in hip implantations of almost 4,700 Indian patients. The haphazard handling of claims and settling it with compensation which was much less than its American counterparts raised a question of how the state would protect the interests of parties in a class arbitration claim, and bring the compensation awarded in such cases in parity with the parallel international arbitration claims. Such cases bring forward the necessity to follow the foundational principle of consumer law, which is *'caveat emptor'* in class arbitration claims. This means that the class of

[34] ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 15 (2nd ed. 1991).
[35] London Court of International Arbitration Rules, 1985, art. 13.
[36] International Chamber of Commerce Rules, 2011, art. 10.
[37] Stuart H. Bompey, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. L. Rev. 53 - 58 (1997).
[38] Mukesh v. DGHS Central Drugs Standard Control Organisation, 2017 S.C.C. OnLine 10488.

aggrieved parties needs to be beware of the prejudice and negligence projected on their interests as consumers from large conglomerates. This casts a duty on the states to preserve justice and ensure a fair and equal settlement in large-scale cross-border class arbitration claims.

CONTRACTS AND CLASS ARBITRATION

In any class arbitration, the two-pronged question that arises with respect to the validity of the arbitration is if the validity of the arbitration agreement and the domain of dispute must be within the arbitration agreement.[39] The forms and nature of the contract are changing as, in Durkheim's analysis, the complexities within the social system are increasing. In the contemporaneous setup, adhesion contracts are the most common form of contracts in commercial transactions.

Adhesion Contracts

Adhesion contracts are standardized contracts drafted by one party and accepted by another,[40] in this the party with the superior bargaining power lays down the terms and conditions of the contract and it is in form of a 'take it or leave it' contract.[41] These contracts have been upheld and are usually prominent in the field of product sale, employment, and trade.[42] Arbitrability in adhesion contract is a common feature; consolidation of a class of individuals affected by the breach of the terms and conditions enhances their ability to bargain well. If an adhesion contract has a mandatory clause for arbitration, then it creates deterrence and also serves the interests of parties to pursue quick and effective remedies.

The problems with adhesion contracts in India are unawareness and poor bargaining power. Consumers are not well versed with the terms and conditions of the standard form of contract and hence any breach therein by the big companies results in consumers approaching the courts or simply taking no action at all. In cases where such a contract has an arbitration clause, it will increase uncertainty and create more problems for the aggrieved parties' as many are unaware of the legalities of arbitration. They would simply forgo their right to even arbitrate. Any party that signs an arbitration agreement forgoes its right to approach the court. Arbitrability under adhesion contracts must be scrutinized closely to protect the interests of the innocent party. In cases of adhesion contracts, the reasonable man expectation test[43] must be applied, that is the question of arbitrability must be tested on the intention of the parties and their unfettered choice to arbitrate the matter.

A Call from Developing Nations

The Third World Approach to International Law (TWAIL) uses the lens of developing nations to look into the failure of international law. Legal luminaries studying the third world countries' experience of International law fear that the law would be used by the developed

[39] Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 966 - 67 (2000).
[40] Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of Contrac*t, 43 COLUM. L. REV. 629, 631 - 632 (1943).
[41] Maddala Thathiah v. Union of India, A.I.R. 1957 Mad. 82.
[42] Schroeder Music Publishing Co. Ltd. v. Macaulay, [1974] 3 All. E.R. 616 H.L.
[43] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).

countries to assert their dominance on third world nations.[44] The historical experiences and present disadvantages of third world countries must be considered while framing any legislation or BITs (Bilateral Investment Treaties). One episode of the impact of state regime over the future of nationals due to the ill-formed contract between the state and foreign bodies is the Dabhol Arbitration,[45] where the entire procedure took place outside the Indian jurisdiction and the contracts between the parties were questioned by legal experts around the world.[46] The contracts were for the production of electricity and were signed in haste, the tariff was much higher than the market price, and the operation of the powerhouse entailed ecological harm. Despite all these problems, the Maharashtra government signed the contract with the American companies.[47] International arbitration needs to balance the bargaining powers of parties situated at different footings. The various BITs entered by the nations should be re-drafted to cover issues like mass torts, losses from economy or investment, and consumer frauds. There is a likelihood of unawareness among consumers in developing nations.

PROBLEMS IN COLLECTIVE ARBITRATION

Arbitration is still an emerging field in India and the law needs to shape itself according to the needs of the time. There are multiple riders in class arbitration and the legislative response should be such that these riders are dealt with properly.

Fair Representation

Class arbitration's biggest issue is that of fair representation. In some countries, the representation certificate is issued by the courts and in some by the arbitrator.[48] 'True representation' in case of class arbitration is dependent upon the legal relationship between the parties.[49] The fair representation formula remains absent from every institution's glossary. The attempt at structuring collective arbitration under institutional rules faces the initial question of whether forceful consolidation should be recognized or not. The ICC changed its rule in 2011 regarding the consolidation of arbitrations,[50] a court may, on request of an interested party, decide upon consolidation of arbitration if, there is a voluntary agreement, claims are made under the same arbitration agreement, and that there is a legal relationship between the parties and their dispute is better suited for arbitration.[51] Thus, in cases where there is a legal relationship arising out of multiple arbitration agreements and judicial mind is in favor of arbitration, there can be a forceful consolidation of arbitration. Thus, a fair representation can have forceful consolidation. The solution to such forceful representation can be to give the parties a 'put option' where the individual either opts to

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[44] B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT. COMM. L.REV. 3 - 27 (2006).
[45] Editorial, *Enron's Indian Negotiation Debacle*, NEGOTIATION EXPERTS, https://www.negotiations.com/case/negotiation-project-india/. (last visited Aug. 15, 2019).
[46] Gus Van Harten, *TWAIL and the Dabhol Arbitration*, 1 TRADE L. AND DEV. L. REV. 131 (2011).
[47] *Id.*
[48] Daniel R. Higginbotham, *Buyer Beware: Why the Class Arbitration Waiver Clause presents a Gloomy Future for Consumers,* 58(1) DUKE L. J. 103 - 137 (2008).
[49] International Chamber of Commerce Rules, 2017, art. 4(6).
[50] International Chamber of Commerce Rules, 2017, art. 10.
[51] *Id*.

sue individually or forces the opposite party to purchase its right with the certain settlement amount, inclusive of compensation.[52] The exit mechanism can whistle out any tension and coercion in the procedure.

Issue of Waiver Clause

Companies nowadays are incorporating waiver clauses and the waiver clause pre-empts a party from invoking arbitration clauses. The validity of waiver clauses is tested on two grounds, substantive unconscionability and procedural unconscionability.[53] Under the laws of the USA, written agreements to arbitrate are valid, irrevocable, and enforceable.[54] Hence, a contract may be detrimental to the interests of a party, but since it has an arbitration clause and the same is invoked by another party, the party in the disadvantageous position is bound to accept that. The oil in fire is the waiver clause;[55] the party is simply placed in a situation where it has to wait for the verdict and can then challenge it. Imagine a situation where a company invokes the arbitration clause which states that *'all parties to the arbitration must be individually named'* and that there is *'no right or authority for any claims to be arbitrated or litigated on a class action or consolidated basis.'*[56] In such a situation, the individual is bound by the clause and the limited remedies available to them are to complain to the arbitrator or seek an interlocutory appeal to the court, of manifest arbitrariness in the contract, which may be rejected by the court, or to wait for the passing of the award and then challenge the award on limited grounds.

However, courts do scrutinize such contracts on grounds of unconscionability. Under the Indian law; a contract against public policy is unenforceable.[57] In case of substantive unconscionability, doors of the courts are open and courts decide whether such contracts are valid, and whether the disputes between the parties are arbitrable or not.[58] Procedural unconscionability focuses upon the contractual due process, that is, whether the parties have equal bargaining power or not. In the case of a standard form of contract, the court tests the contract on the doctrine of public policy.

In case of a waiver clause, the court must equate the parties' bargaining capacities, as such waiver eliminates the weaker party's ability to solidify claims and does not circumvent around authorities for help. The Court in *Wilko v. Swan*[59] declared the contract as invalid, as the consumers were left in lurches as the clause prohibited class arbitration and an individual's ability to efficiently put forth their claim too was subdued.[60]

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[52] Richard A. Nagareda, *The Pre-existence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 231 (2003).
[53] Daniel R. Higginbotham, *Buyer Beware: Why the Class Arbitration Waiver Clause presents a Gloomy Future for Consumers,* 58(1) DUKE L. J. 103 - 137 (2008).
[54] The Federal Arbitration Act, 1926, 9 U.S.C., §2.
[55] The Arbitration and Conciliation Act, 1996, §4.
[56] Dale v. Comcast Corporation, 498 F.3d 1216, 1224 (11th Cir. 2007).
[57] The Indian Contract Act, 1872, §23.
[58] Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982).
[59] Wilko v. Swan, 346 U.S. 427 (1953).
[60] Muhammad v. County Bank of Rehoboth Beach, Del., 912 A.2d 88, 103 (N.J. 2006).

Suppression of Individual Autonomy

The very essence of a contract is that it should be of free will and voluntary, thus, forcing parties to accept the terms to fulfill a utilitarian goal cannot be sustained by strangulating the voices of the minorities. Different parties have different interests even when sharing similar legal relations. In the case of *Green Tree Financial Corp. v. Bazzle,*[61] the Court held that in the absence of any clause on the consolidation of arbitration, class-wide arbitration can be ordered. Similarly, in the case of *Chicago Incorporation v. Kaplan,*[62] the Court bestowed the decisional sovereignty on the arbitrator for invoking class arbitration.[63] In cases where class action arbitration is invoked, there must be an exit mechanism for members of the same class to opt-out to resort to another forum. Even when the parties have signed the agreement (in case of adhesion contracts particularly), the agreement must be put in place post the dispute, as the parties are in the position to assess the viability of arbitration and the method of approaching it.

Notice and Confidentiality

The basic feature of arbitration lies in its privity of contract. The secrecy and confidentiality surrounding an arbitration agreement come in direct conflict with class-action arbitration. Under the AAA Rules, the presumption of secrecy and confidentiality has been done away with, thus once the class arbitration is invoked, proceedings are open and in the public domain.[64] Just like the judicial proceedings, notice to all stakeholders is necessary for class action arbitration.[65] It is difficult to locate absent parties and this is a challenge in class arbitration.

Appointment of Arbitrator

In class-action arbitration, the appointment of the arbitrator and the rules governing the procedure remains in a quagmire. It is difficult to create a consensus amongst the class members who are tied with legal relationship threads and are distributed across the global spectrum. In case of dispute for the appointment of the arbitrator, the tribunal can appoint one, at the request of a party. The UNICITRAL Rules do allow the intervention by the tribunal for the appointment of the arbitrator, but the discontentment of the parties over the selection of the arbitrator may create rifts and delay the procedure further. Even if a small batch of the group selects the arbitrator, the numerical value becomes the next line of debate. The issue can be dealt with by leaving the choice of appointment on an institution or the courts as this ensures equitable treatment of the parties and helps expedite the procedure.

CONCLUSION

When we weigh the pros and cons of class arbitration, the advantages outweigh the disadvantages, especially in the Indian regime, and in wake of incidents like the faulty hip implants by *Johnson & Johnson,* had there been common voice agitating their issues

[61] Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 449 (2003).
[62] Chicago Incorporation v. Kaplan, 514 U.S. 938 (1995).
[63] THOMAS E. CARBONNEAU, CARBONNEAU ON ARBITRATION: COLLECTED ESSAYS 36 (Juris Net, 2010).
[64] *AAA Policy on Class Arbitrations*, AMERICAN ARBITRATION ASSOCIATION, Rule 9 & 10 (2005).
[65] Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982).

collectively, the impact would have been different and the compensation better than what each victim received. A class arbitration thrusts upon equal bargaining power to the parties who may otherwise not be situated at the same stature as the companies. John Rawls' second principle of difference deals with distributive justice.[66] Thus, a party that is at a disadvantageous position must be brought at equal stature for the proper adjudication of its claims. The arbitration clauses can come to the rescue of the hapless consumers, employees, or victims if there is synchronization with consent paradigms and procedural propriety in arbitration proceedings.

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[66] JOHN RAWLS, A THEORY OF JUSTICE (Cambridge, MA: Belknap Press of Harvard University Press, 1971).

DRAFTING: A PRECAUTIONARY MEASURE TO THE INTERPRETATION OF CONTRACTS

***By**: Pruthvirajsinh Zala & Nandini Goyal**

Abstract

There are several reasons why India's Ease of Doing Business ranking is not up to the mark, as there lie several hurdles in the enforcement of contracts in India; one of them relates to the interpretation of contracts. It is the common cause of commercial disputes as vague, conflicting, and ambiguous wordings are encountered in the process of interpretation of contracts. It is an era where the face of contractual relationships is changing. Now a wide range of contracts take place for Public-Private Partnerships, Minor Sports contracts, and commercial contracts. Without just interpretation of contracts, they shall remain uncertain and impotent. The researchers of this paper have analyzed the different hurdles in the interpretation of contracts and have discussed how the drafting stage plays a role of paramount importance in the interpretation of contracts. The importance of efficient drafting in strengthening contractual enforcement in India has also been emphasized upon. While discussing the hurdles, clauses of the Indian Contract Act, 1872 that cause ambiguity in interpreting a contract have also been considered. Finally, the paper also lays down the different mechanisms involved in the resolution of commercial disputes, which include the doctrine of *Contra Proferentem* in India, among other mechanisms of Commercial Dispute Resolution.

INTRODUCTION

There may be several reasons why a dispute between two contracting parties occurs; one of them is the presence of vague and ambiguous clauses in contracts. The ambiguity in a contract stems predominantly from the stage of drafting, as it is the first stage from where the contract comes into the picture. Even commercial litigation often occurs as a result of common and recurring mistakes made during the drafting of contracts.[1] When the clauses in a contract are riddled with ambiguity, it falls upon the court to interpret the contract correctly. Construction of contracts thus plays an important role, as much of dispute resolution depends on the interpretation of the contract. For instance, to see whether the property in good has passed on or not depends upon the interpretation of the contract by analysing the intention of the parties. Even the disputes in insurance contracts revolve around the construction of contracts. Interpretation becomes difficult when the terms are not simple but vague as could be observed in the case of *M/s Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission and Ors.* In this case, the Supreme Court of India held that effect must be given to the plain, literal, and grammatical meaning of clauses used in

* Pruthvirajsinh Zala & Nandini Goyal, students, BA. LL.B, Institute of Law, Nirma University.

[1] David I. Rosenbaum, *Mistakes When Drafting and Negotiating Contracts*, MONDAQ (May 11, 2007), http://www.mondaq.com/unitedstates/x/46720/Contract+Law/Top+Ten+Mistakes+When+Drafting+And+Negotiating+Contracts.

the contract[2] and if the terms are not simple, it becomes difficult for the Court to interpret it correctly. This further consumes time and contributes towards delay in enforcement of the contract.

The first part of the paper is an introduction to the interpretation of contracts and the second part focuses on the stage of drafting as crucial for reducing impediments in contract interpretation. This is followed by a discussion of Construction contracts.

HISTORICAL CONTEXT

"*Though a private convention is not competent to change the meaning of five hundred feet to one hundred inches, or the meaning of Bunker Hill Monument to the Old South Church, the local or technical usage, if different from ordinary or normal usage, may be competent to produce this result.*" —Samuel Williston.[3]

When one considers the historical context of the practice of the interpretation of contracts, it is almost pertinent to refer to Wigmore's remark that 'the history of the law of interpretation is the history of progress from a stiff and superstitious formalism to flexible rationalism'.[4] Truth be told, our present liberal way of dealing with contracts is profoundly rooted in the entire existence of contract law, maybe considerably more so than the much older rule of 'strict interpretation'. The historical backdrop of the interpretation of contracts is not that of direct progress, but recurrent patterns. The interpretation of deeds shaped a huge piece of the common law's bread and butter. Be that as it may, under the watchful eye of the sixteenth-century, judges were not especially inspired by articulating terrific hypotheses of interpretation. Rather, the judges back then simply believed interpretation to be 'an incidental, routine function of judicial administration'.[5]

The sixteenth century gradually brought a radical change in common law with a paradigm shift in the judicial approach, as a humanist and rational path was incepted[6]. With the recognition of a plethora of theories[7] of statutory interpretation, contractual interpretation likewise developed. *Throckmerton v. Tracy*[8] is a great example in which the Court was confronted with the decision of determining intention and technicalities. The majority agreed that the party's 'intent shall be pursued rather than the words'.[9] Saunders J, went further to urge judges not to 'cavil about the Words in a subversion of the plain intent of the parties', which was 'a kind of trickery, and an excessively clever but wicked interpretation of

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[2] *Courts Can Imply a Term in Contract Only if Literal Interpretation Fails to Give the Result Intended by Parties : SC*, LIVE LAW (Jul. 04, 2019, 12:41 PM), https://www.livelaw.in/top-stories/courts-can-imply-term-contract-literal-interpretation-fails--146087.

[3] 2 SAMUEL WILLISTON, SELECTIONS FROM WILLISTON'S TREATISE ON LAW OF CONTRACTS §611, at 1180 (1926).

[4] 9 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE 187 (3d ed., 1940); *See, e.g.*, SIR KIM LEWISON, THE INTERPRETATION OF CONTRACTS 3 (5th ed., 2011); GERARD MCMEEL, THE CONSTRUCTION OF CONTRACTS 22, (2d ed., 2011); JONATHAN MORGAN, CONTRACT LAW MINIMALISM 229 (2013); Lord Nicholls, *My Kingdom for a Horse: The Meaning of Words*, 121 LQR 577, 577 (2005); Bank of Credit and Commerce International v. Ali, [2001] UKHL 8, [2002] 1 AC 251, 265.

[5] SAMUEL THORNE (ED), A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES 3 (1942).

[6] SIR JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND 13 (2003).

[7] *See, e.g.*, Georg Behrens, *Equity in the Commentaries of Edmund Plowden*, J. LEGAL HISTORY 25 (1999).

[8] Throckmerton v. Tracy, (1555) Plow 145.

[9] *Id.*

the law'.[10] Stanford J.'s observations are also noteworthy to understand this historical development. These judgments are highly important as they showcase two of the initial attempts at presenting the common law of interpretation as a coherent and principled system. The mannerisms of this methodology can be seen most plainly by looking at the development of construction and interpretation of wills. It was entrenched that the testator's intention was of fundamental significance for the understanding of a will; as Henry Swinburne observed, 'it is the mind and not the words of the testator, that gives life to the testament'.[11]

Contractual interpretation during the mid-sixteenth century was fundamentally focussed on actualizing the intention of the parties. These intentions could be found within the contract itself; from the encompassing setting or from the Court's comprehension of what sensible gatherings would have needed. It was comprehended that contracts derived their power from the goals behind them, as opposed to the words that comprised them. It is also worth noting Lord Hoffmann's definition of interpretation: 'the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties'.[12] One shall not be surprised by the ever-evolving law of contractual interpretation, as undoubtedly ICS was not the end.

INTERPRETATION OF CONTRACTS AND ITS IMPORTANCE

Generally, a dispute arises when one party fails to do something that it was obliged to do and in a contractual relationship, the dispute majorly arises as to the meaning of a particular clause in the contract.[13] When the courts try to decipher the meaning of the disputed clause, it can be referred to as the interpretation of the contractual clause by the Court. In the case of *Investors Compensation Scheme Limited v. West Bromwich Building Society And Others*, interpretation has been defined as, "the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."[14] This principle plays a paramount role as Commercial Dispute Resolution is based on the construction of contracts. Whether the case is before the Commercial Courts, Supreme Court, an Arbitrator, Mediator, or Negotiator; each one of them is required to apply the principles of interpretation of contracts. Cases like *SAIL v. Gupta Brother Steel Tubes Ltd.*,[15] *G. Ramachandra Reddy v. Union of India*,[16] are some of the instances where the contract has been interpreted by the arbitrator and the interference of court has been ruled out. In the case of

[10] *Id.*, 161 ('calumnia quaedam et nimis callida sed malitiosa juris interpretatio').
[11] HENRY SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES 261 (1st ed., 1590).
[12] *Id.*
[13] Timonthy Fancourt QC, *Interpretation of Contracts: Are the Principles of Interpretation Now Certain*, FALCON CHAMBERS (2015), https://www.falcon-chambers.com/images/uploads/articles/Global_Law_Lecture_Interpretation_of_Contracts.pdf.
[14] Investors Compensation Scheme Limited v. West Bromwich Building Society, [1997] UKHL 28.
[15] Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd., (2009) MANU 1624.
[16] G. Ramachandra Reddy v. Union of India, (2009) MANU 0998.

M/s Triveni Glass Ltd v. M/s Gail (India) Ltd.,[17] it was held that the interpretation of a contract is within the domain of the arbitrator even if it involves a question of law. So, we can conclusively say that the construction or interpretation of contracts is the central theme for resolving contractual disputes.

There are various approaches to the construction of contracts before the Courts. In the case of *Zurich Insurance (Singapore) Pvt v. Bgold Interior Design & Construction Pvt Ltd*,[18] the three traditional routes to the interpretation of contracts have been discussed namely, absurdity, ambiguity, and the technical route. It is a contextual approach that is used in current times by the Court and this approach traces its root to the case of *Investors Compensation Scheme Limited v. West Bromwich Building Society and Others.*[19]

DRAFTING: A PREVENTIVE MEASURE OF INTERPRETATION OF CONTRACTS

Every contract is a story and when the same is put in black and white, it becomes a draft. A draft is a framework or certain guidelines which the parties themselves agree to abide by, and when this framework is not clear and is riddled with ambiguities, it becomes really difficult to carry on the business or transaction between the two contracting parties. A legal contract or an agreement is not just drafting a mere piece of paper but reflecting the intention of the parties, protecting one's business entity with its rights and remedies,[20] predicting all future disputes and liabilities that may arise, and laying down the respective obligations of the parties with necessary safeguards and remedies. When a drafter fails to incorporate all the necessary elements, it leads to a dispute and then the adjudicator has to interpret the contract. Even the adjudicator is no sage and cannot instantly decipher the intention of the parties. He also then needs to go beyond the literal rule of interpretation and employ certain other tools to ascertain and understand the ambiguities in the clauses. This is not a single day task; it takes time and as a result, enforcement of the contract is delayed. One of the most important reasons for infructuous drafting of contracts these days is the cut-copy-paste clauses, without an examination of their applicability,[21] and it is mostly observed in cases of Construction contracts. They are referred to as back-to-back contracts (discussed in greater detail in the Paper at a later stage). The importance of drafting cannot be ignored as it is the foundation of commercial contracts and without this, the contracting parties cannot go forward in their business dealings. This calls for the need of strengthening drafting skills. Problems arising out of the drafting stage include the following:

[17] M/s Triveni Glass ltd v. M/s Gail (India) Ltd., O.M.P. 224 of 2015, decided on May 21, 2018 (Delhi High Court).
[18] Zurich Insurance (Singapore) Pvt v. Bgold Interior Design &amp, (2008) MANU 0052.
[19] Investors Compensation Scheme Limited v. West Bromwich Building Society, [1997] UKHL 28.
[20] Amlegals, *India: Legal Contracts/Agreements Drafting and Legal Vetting*, MONDAQ (Nov. 23, 2015), http://www.mondaq.com/india/x/445620/Contract+Law/Legal+ContractsAgreements+Drafting+And+Legal+Vetting.
[21] BHUMESH VERMA, PRACTICAL GUIDE TO DRAFTING COMMERCIAL CONTRACTS (2018).

Ambiguity and Vagueness

According to Michigan Law, the cardinal rule of interpretation of contracts is to ascertain the intention of the parties, and other rules are regarded as subordinate to it.[22] The courts heavily rely on the language of the contract and place a great deal in contract interpretation on the plain language. But the problem arises when there exists more than one possible interpretation of the ambiguity in the contract.[23] A word or statement is said to be ambiguous when it has two or more primary meanings, each of which may be adopted without distortion of the language.[24] The ambiguity can be further classified into two; latent and patent ambiguity. The latter refers to ambiguity which appears from the language of the instrument that is which appears on the face of it. For instance, in a contract where the parties' interest has been assigned in the *freight* of a ship, now the patent ambiguity can arise as to whether the word *freight* refers to the goods on board the ship or an interest in the earnings of the ship.[25] On the other hand, latent ambiguity refers to that which does not appear on the face of it, but is collateral to it.

There are three other types of ambiguities; semantic, contextual, and syntactic. Semantic ambiguity refers to the multiplicities in dictionary definitions, which exist independent of context. Contextual ambiguity arises when one provision or clause contradicts the other clause, and there is no clarity which on will prevail.[26] Lastly, syntactic ambiguity refers to the way words are arranged in a sentence and it lies in the modifier at the end of the sentence, and also where words allow more than one grammatical relationship.[27]

In *Antaios Compania Naviera S.A. v. Salen Rederiena A.B.*, Lord Diplock stated that "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."[28] Analysing this statement of Lord Diplock, the Bombay High Court, in the case of *Central Warehousing Corporation v. Aqdas Maritime Agency Pvt. Ltd*. discussed the rule of Business Interpretation. According to this rule, a commercial document should be interpreted in consonance with sound commercial principles and good business sense.[29]

Omitted terms[30]

The literal meaning of the word 'omit' is to leave out, fail to include or mention it. If in an agreement a term is omitted, it leaves out space for certain things. This omission occurs when parties prefer to not deal with certain things or they could not foresee certain terms. They are sometimes also referred to as incomplete contracts. Such incompleteness creates indefiniteness in the contract. The indefiniteness may concern important and unimportant

[22] Sault Ste. Marie Tribe of Chippewa Indians v. Jennifer Granholm, 475 F.3d 805 (6th Cir, 2007) (U.S.)
[23] Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUMBIA LAW REVIEW, 1271 (2008).
[24] KIM LEWIS, THE INTERPRETATION OF CONTRACTS 8.01 (Sweet et al eds., 4th ed. 2007).
[25] S.H.O, *Patent and Latent Ambiguities in Written Instruments*, 14 UNIV. PENNSY. L. REV., 140 (1866).
[26] Kermit L. Dunahoo, *Avoiding Inadverent Syntactic Ambiguity in Legal Draftsmanship,* 20 DRAKE L. REV. 137 (1970).
[27] Neal A. Hoopes, *Chevron's Pure Questions: Searching for Meaning in Ambiguity,* BYU L. REV. 663 (2017).
[28] Antaios Cia Naviera SA v. Salen Rederierna, AB (1984) MANU 0036 (UK).
[29] Central Warehousing Corporation v. Aqdas Maritime Agency Pvt. Ltd., (2019) MANU 1441.
[30] Chris Goddard Ammy Fellner & Rue-Ann Ormand, *Basic Principles of Contract Drafting*, ULAPLAND, https://www.ulapland.fi/loader.aspx?id=60a15dd5-ebc6-4d06-a730-c363a4cf4327.

terms. When it concerns the latter, then certain gap fillers are used by the court to supplement those terms, on the other hand, when it concerns the important terms, the court may presume that the contract does not exist. For example, a contract to pay an employee a fair share of profit is indefinite without specifying the precise fraction of share and thus cannot be enforced.[31]

CONSTRUCTION CONTRACTS

A construction contract is a contract specifically negotiated for the construction of an asset or a combination of assets that are closely interrelated or interdependent, in terms of their design, technology, and function, or their ultimate purpose or use. It may be negotiated for the construction of a single asset such as a bridge, building, dam, pipeline, road, ship, or tunnel. It may also deal with the construction of several assets that are closely interrelated or interdependent in terms of their design, technology, and function or their ultimate purpose or use; examples of such contracts include those for the construction of refineries and other complex pieces of plant or equipment.[32] The construction industry in India commonly uses the standard form of contacts published by FIDIC (International Federation of Consulting Engineers), IIA (Indian Institute of Architects), and the model published by the ICE (Institution of Civil Engineers). Governmental construction authorities have their own standard form contract, as per their requirements (particularly for Public and Private Partnership projects).

When standard templates are used in construction contracts, ambiguities and disputes are bound to arise. While interpreting construction contracts, a balance must be struck between objective literalism and equitable reasonableness. The intention of the parties is important to decipher while seeking to understand what the parties meant by the reference to the words which they chose.[33] Reasonableness and absurdity must be considered contextually. Primarily, the words used in the contract are the guide to decode the intention of the parties. Any ambiguity must be attempted to be resolved by resorting to well-recognized rules of contractual interpretation, such as the rule of literal interpretation, harmonious construction, giving effect to the intention of the parties, and resorting to an interpretation which upholds business efficacy of the contract. A resort may also be made to the rule of *contra proferentem* as an exception in certain cases.

In several construction contracts, it is necessary to imply terms to fulfil the very essence of the contract. It is vital to see the touchstone through which the courts examine and imply terms. This criterion is usually referred to as the 'of course' or 'officious bystander' test. It acts as a gap filler implicating the term from an understanding, as perceived through the parties' intentions. In *Liverpool City Council v. Irwin*,[34] the House of Lords was dealing with whether there was an implied term that common parts and services of a block of flats would be maintained by the landlord at its expense. It was held that there was an implied term.

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[31] Omri Ben- Sahar, *Agreeing to Disagree: Filling Gaps in Deliberately Incomplete Contracts*, 389 WIS. L. REV. (2004).
[32] Accounting Standard (AS) 7, *Construction Contracts*, Ministry Notification, http://www.mca.gov.in/Ministry/notification/pdf/AS_7.pdf.
[33] Wickman Machine Tool Sales Ltd v. L Schuler, AG (1974) AC 235.
[34] Liverpool City Council v. Irwin, (1977) AC 239.

While in *Trollope & Colls v. Northwest Metropolitan Regional Hospital Board*,[35] the question was of an implied term being considered in relation to the phasing of work and the extension of time provisions. Lord Pearson stated that "the court will not even improve the contract which the parties have made for themselves, however desirable improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves...an unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract[...] it must have been a term that went without saying a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves." Disputes may arise between the contractor and the owner due to various reasons, including the supply of materials from the owner to the contractor, extra works carried out without contract agreement, delay in the completion of the work, sub stranded or defective work, payment to the contractor through running bills, substituted performances (its payment and liability, both), the supply of stores, pieces of machinery and the rent for the machinery, etc. During several unforeseen circumstances which arise as result of an effective external/internal factor may lead to the frustration of the contract. It may also be frustrated due to a sudden unprecedented price rise. In the case of *Easun Engineering Co. Ltd. v. Fertilizers and Chemicals Travancore Ltd.*,[36] as a result of a 400% rise in the price of transformer oil due to war conditions, the Court held that it was a case of frustration of the contract. In situations of concurrent delays on the part of the contractor and an employer, the option of relying upon it for substitution with the extension of time for payment/damages is open. Whereas most contracts include relevant provisions for stipulations during a change in law, however, usually the employer bears a greater risk.

CONCLUSION

Interpretation is no rule but a process by which courts try to interpret what parties intended to incorporate into their contract but failed to do so. Either the terms are vague, ambiguous, unresolved, or omitted by the drafters and thus lead to a dispute. The only possible way to ease the burden of courts and reduce impediments in the interpretation of contracts is strong drafting. As we have discussed above, mistakes being committed while drafting the contracts, if avoided, will lead to the strengthening of the contracts. This will, in turn, strengthen the enforcement of contracts in India, as strong drafting will serve as a precautionary measure. Construction contracts are one of the contracts where recurrent disputes arise, as there is a contract at every stage in this sector. This causes a chance for the duplication of certain clauses from the templates, so greater precision has to be practiced while drafting such contracts.

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[35] Trollope & Colls v. Northwest Metropolitan Regional Hospital Board, (1973) 1 WLR 601.
[36] Easun Engineering Co. Ltd. v. Fertilizers and Chemicals Travancore Ltd., (1991) AIR Mad 158.

FORCE MAJEURE AND ADAPTATION: EXIGENCIES FOR CONTRACT ENFORCEMENT

***By**: Siddharth Jain & Sridutt Mishra**

Abstract

Commercial transactions between corporate entities, be it domestic or offshore, form the foundation of a booming economy. In the present era of heightened liberalization, transactions are based on the sacrosanct principles of *pacta sunt servanda* and business efficacy which advocate the survival of the contract. However, the Indian jurisprudence is shackled by the bounds of a static legal approach. Precisely, in Force Majeure and hardship situations, the Indian legal regime has little to offer. The Indian Contract Act 1872, by way of Section 56, prescribes the sole remedy of declaring the contract void in cases of Force Majeure. Notably, a contract is the product of humongous investments in terms of effort, time, and money and no reasonable person would want such inputs to vanish in vain without reaping its fruits. Therefore, the parties resort to court proceedings to invalidate the consequence under Section 56, for the situations of Force Majeure or hardships. Doing so demands exorbitant amount of time owing to the infamous Indian court processes. The same has also been highlighted by the Ease of Doing Business Index where India has jumped from the 142nd to 77th position in 4 years, but still has not improved even marginally in the contract enforcement indicator of the index.

In this article, the authors suggest that since the formation of contracts is based on party autonomy, the remedies for non-performance of the contract owing to Force Majeure and hardship should also align with the principle of party autonomy. In lieu of the same, this article seeks to provide a detailed alternative in lines of the abovementioned principle. Further, it compares the current Indian legal framework concerning contract enforcement at times of Force Majeure with that of other domestic laws to bring home the idea of adaptation. In conclusion, the article prescribes that the parties resort to the expeditious methods of contract enforcement through ADR techniques, thereby tapping the remedy of adaptation. By way of adaptation, parties alter the terms of the contract to the changing circumstances, based on a consensual approach, ensuring its survival. The same resonates with the internationally recognized standards as codified in the *UNIDROIT Principles of International Commercial Contracts*. *In toto*, it can safely be concluded that changing the remedy from automatic void contracts to voidable contracts based on party autonomy is an exigency for ameliorating contract enforcement in India.

INTRODUCTION

In April 2019, Foxconn, Apple's largest manufacturer of iPhones, announced that they will start producing the latest generations of iPhones, the iPhone X and XS in India.[1] This was unimaginable in the last decade. The government over the last 8 years has been pushing for India to emerge as a favorable destination for investment and several global companies that

* Siddharth Jain & Sridutt Mishra, students, National Law University Odisha.

[1] Sanket Vijayasarathy, *Apple to start mass production of iPhones in India with the help of Foxconn*, INDIA TODAY (April 16, 2019), https://www.indiatoday.in/technology/news/story/apple-foxconn-iphone-mass-manufacturing-in-india-report-1502794-2019-04-16.

were earlier not present in India have shown an interest in establishing their business in India. Apple Inc., a brand that is quintessentially American, had stayed out of India for a very long time, considering the huge customer base in India that it has. Apple started its manufacturing in India 2 years back, with its mid-range iPhone SE and has taken more than 2 years to establish manufacturing units for its latest generation flagships the iPhone X and the XS.[2] This growth can be partially attributed to the massive climb that India has made on the World Bank's "Ease of Doing Business Index".[3] India had a rank of 130 in 2016 and has climbed to 77 in 2019. This has had direct implications on investments in India, as can be seen.

The Ease of Doing Business Index of the World Bank has twelve indices under which it ranks the countries and a cumulative of all the indices are taken to find the Ease of Doing Business rank. The "Enforcing of Contract" index has always been one where India has underperformed constantly.[4] The reason behind this is the time and cost taken by the Indian justice system to resolve commercial disputes. The government of India enacted the Commercial Courts Act in a series of commercial legislations to improve India's ranking in the Ease of Doing Business rankings and augment its reputation as an investment destination by improving the speed at which contracts could be enforced in India.[5] The policy decisions were taken targeting the political optics and consequently helped in improving India's rank in the Index, but were not as successful at the implementation level.[6] The improvement of only one rank in the "enforcing of contract" index, when the government is trying to give an impetus to establish India as a destination for investments, is abysmal.[7]

In this article, the authors opine on how the Contract Enforcement indicator can be improved through certain judicial amendments and general changes in commercial practices. The scope of this article is limited to the discussion on events covered under Section 56 of the Indian Contract Act.

The events which make the performance of the contracted act impossible, primarily Force Majeure are covered under Section 56 of the Indian Contract Act.[8] Force Majeure directly translates to a "superior force". Force Majeure clauses are an essential part of a contract, listing down circumstances in which performance under the contract will be excused.[9] However, Force Majeure clauses are not as straightforward and are not always a way out for the parties, in the performance of their obligations. The circumstances of hardship,

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[2] *Id.*

[3] The World Bank, *Rankings & Ease of Doing Business Score*, EASE OF DOING BUSINESS (2019), https://www.doingbusiness.org/en/rankings.

[4] The World Bank, *Doing Business in India*, EASE OF DOING BUSINESS (2019), https://www.doingbusiness.org/en/data/exploreeconomies/india.

[5] *Commercial Courts Act, 2015: An Empirical Impact Evaluation,* VIDHI CENTRE FOR LEGAL POLICY (2019), https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf.

[6] *Id.*

[7] *India Improves Rank by 23 Positions in Ease of Doing Business India at 77 Rank in World Bank's Doing Business Report*, PRESS INFORMATION BUREAU (October 31, 2018), http://pib.nic.in/PressReleseDetail.aspx?PRID=1551403.

[8] Karl Ettlinger v. Changandas & Co., AIR 1915 Bom 232.

[9] POLLOCK AND MULLA, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS (13th ed 2006).

which do not make the performance of the contract impossible, but tilt the contract equilibrium heavily towards one party, are still a grey area in India.

It was first in 1954, by way of *Satyabrata Ghose v. Mugneeram Bangur & Co*[10] that the Supreme Court opined on hardship. The economy was unstable due to the war, during which the parties had agreed on the development of land, which was later requisitioned by the government. The defendant stated that this made the contract impossible to perform, in a suit for specific performance by the plaintiff. The Court held that the requisitioning made the performance difficult but not impossible. It stated that "*the Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events*".

The Indian Courts have further deliberated on the issue of hardship recently in *Energy Watchdog v. Central Electricity Regulatory Authority*, which shall be dealt with in detail in later chapters. On account of this ambiguity regarding how the cases of hardship are dealt with in India, and the complicated and time-consuming process of enforcement of contracts in such situations, the authors shall discuss the idea of adaptation to overcome such issues.

LEGAL STANDINGS: A COMPARATIVE VIEW

In terms of Force Majeure situations and the degree of liberty of the remedies, the legal jurisprudence can be roughly segregated into three broad heads- non-conservative, semi-conservative and conservative states.[11]

Conservative Perspective

The most common of all segments is the conservative perspective which has adequate representation in English common law as the doctrine of frustration and in French law as 'imprevision'.[12] The fundamental principle guiding contract enforcement in these jurisdictions is *pacta sunt servanda.* In other words, the doctrine of frustration and imprevision does not extend to situations of economic hardship. Consequently, the parties ought to execute the contract in its originality, even in cases where the contractual equilibrium is modified drastically.[13]

When it comes to the Indian subcontinent, it follows its colonial master in dealing with the question of Force Majeure and its statutory laws have little to add. Instead, much of the jurisprudence has been developed by judicial dicta, which enunciates that the concerned issues shall be assessed within the parameters of the principles of impossibility of performance or, in popular voice, Force Majeure.[14]

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[10] Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 AIR 44.
[11] 2 PIETRO FERRARIO, THE ADAPTATION OF LONG-TERM GAS SALE AGREEMENTS BY ARBITRATORS CONTRACTS WITHOUT AN ADAPTATION CLAUSE, THE ADAPTATION OF LONG-TERM GAS SALE AGREEMENTS BY ARBITRATORS 84 (2017).
[12] A.G. Castermans ET. AL., FORESEEN AND UNFORESEEN CIRCUMSTANCES, 157 ET SEQ. (2012); Paradine v. Jane, Aleyn's Reports, 26 EWHC (KB) 26.
[13] Jackson v. Union Marine Insurance Co. Ltd., 1874 LR 10 CP 125.
[14] The Indian Contract Act, 1872, §56.

The *Indian Contract Act, 1872* dedicates a single provision for Force Majeure situations by way of Section 56. The Section, in its crux, provides that in situations where parties face impossibility of performance, after the conclusion of the contract, the contract becomes void.[15] Precisely, it is the scope of 'impossible situations' which has been the subject of severe speculation for long and has led the Supreme Court to step in and clear the air. In the seminal case of *Satyabrata Ghose v. Mugneeram Bangur & Co*, the Court stated that Section 56 is not limited to physical or legal impossibility but rather extends to all unforeseen events which the parties cannot overcome with any degree of care and diligence.[16] Owing to such liberal interpretations, the parties started manipulating the courts to extend the interpretation of Section 56 to include economic hardships. This led to the recollection of *Alopi Parshad & Sons Ltd v. Union of India,* wherein the Court had negated the above-mentioned practice.[17] The rationale behind denouncing economic hardship of a status similar to that of Force Majeure is that in such cases, the non-performance is caused not by external factors but by the parties' own decision not to perform.[18] This goes against the very essence of the principle of impossibility of performance, where the non-performance originates from external events entirely outside the sphere of control of the parties.

It was only in 2013 that the Supreme Court clarified the position on this by way of *Energy Watchdog v. Central Electricity Regulatory Commission and Anr*.[19] To elucidate the factual matrix in a nutshell, this case concerned the contract for the supply of power for the Mundra Power Project. Yet, owing to certain policy changes in the Indonesian Laws, the export prices were drastically increased. In consequence, the receiving party sought relief for an increase in contractual price effected by such changes in the law.

The Court held that the field of Force Majeure events comes within the ambit of the Indian Contract Act via Section 56. It further declared that a wide interpretation of this provision provides that the performance of contractual obligation need not be explicitly impossible to trigger this provision. It shall be sufficient if the occurrence of the event has made the performance impractical and useless from the perspective of the original intention of the parties. This itself indicates the Judiciary's inclination towards the American theory of impracticality, which is synonymous with the common law principle of hardship. However, since the contract, in this case, contained a clause excluding such an increase from the ambit of Force Majeure, the Court was forced to uphold party autonomy by way of that clause, over its interpretation of Section 56 of the Indian Contract Act. Nevertheless, the case was crucial as it clarified the legal stance on the inclusion of hardship within the purview of Section 56.

In toto, the Indian legal framework provides no respite to parties in situations of extreme severity, distinct from theoretical impossibility. The judicial dicta too do not serve the cause well, as it provides remedies in extremities- either of the performance of the contract,

[15] Karl Ettlinger v. Changandas & Co., AIR 1915 Bom 232.
[16] *Id*, at 10.
[17] Alopi Parshad & Sons Ltd v. Union of India, AIR 1960 SC 588.
[18] Markus Petsche, *Hardship Under the UN Convention on International Sale of Goods*, 19 VINDOBONA J. INT'L L. 157 (2015).
[19] Energy Watchdog v. Central Electricity Regulatory Commission and Anr., CA No.5399-5400 of 2016.

regardless of the level of onerousness, or declaration of the contract as void. Conferring such discretion to the judges seems dangerous as they might override the contractual provisions irrespective of the parties' intentions, thereby undermining the sacrosanct principle of party autonomy. Consequently, the parties may be left with no other option but to refrain from opting for Indian laws to govern their commercial transactions.

Problems encountered in India

The conservative approach towards Force Majeure cases in Indian jurisprudence has inadvertently increased the burden on the judicial system. In a country where there are more than 16,267 pending cases in the courts, this leads to a delay in the resolution of commercial disputes. The stress on commerce and industry increases due to such delay in the enforcement of contracts. The parties lose their faith in the Indian system and that has an adverse effect in the case off-shore industries willing to invest in India.

The basic premise of the authors' point of view is allowing the parties to have an option to renegotiate the terms of the contract. This will allow them to skip altogether the judicial road to enforce their contracts. Furthermore, even the cost percentage of these proceedings with respect to the claim value is much higher in India (at 31.0), which is much higher than even the financial hubs of the world, such as Singapore (at 25.8) and New York (at 23.2).[20]

Semi-conservative Perspective

As for the semi-conservative perspective, Italian jurisprudence holds a monopoly in this field. Here, the law recognizes the principle of economic hardship and remedies the same with adaptation. Adaptation, in bare terms, is the consensual alteration of the terms of the contract owing to a substantial shift in the contractual equilibrium.[21] Yet at the same time, it does not confer the power of adaptation on the judges.[22] In other words, it extends the liberty of contractual modification, based on hardship situations, solely to the parties to the contract and not to third persons.

Non-Conservative Perspective

The non-conservative segment is majorly dominated by German, Dutch, Swedish, and American jurisprudence. Each of these jurisdictions not only covers the hypothesis of economic hardship within the concept of Force Majeure but also bestows the power of adaptation upon the arbitrators.[23] Giving due consideration to the progressive nature of the contractual legal framework, these nations deliberately use broad terms like 'impracticality' and 'hardship', thereby acting as an all-encompassing umbrella where '*one size of economic risk fits all*'.[24]

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[20] *Id.*

[21] 18 CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 391-420 (2008).

[22] Civil Code of Germany, art. 2908.

[23] Restatement (2d) of Contracts 1981, §261; R. PENNAZIO, LA DOTTRINA DEL FONDAMENTO NEGOZIALE NEL DIRITTO GIUDIZIALE EUROPEO, 1 CONTRATTO IMPRESA/ EUROPA, 304 (2009); C. RAMBERG, SWEDISH LEGAL SYSTEM/ CONTRACT LAW AND OBLIGATIONS, 284 (2010).

[24] Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse under U.C.C. 2-615 and CISG Art. 79*, 27 PENNSY. J. INT'L ECO. L. 789 (2006).

This approach has reaped well for nations in the Contract Enforcement segment of the 'Ease of Doing Business' Index by the World Bank. The gratuities of such an approach are evidenced by the favourable rankings backed by the United States (16) and Germany (26) in the Index.[25] In other words, there seems to be a direct tangible link between the liberal standards of remedies offered for *Force Majeure* situations and the ease of contract enforcement.

UNDERLYING PRINCIPLES OF CONTRACT ENFORCEMENT

On this point, it seems imperative to hark back to the age-old principles of contract formation that form the foundation of commercial transactions. In the authors' view, the sacrosanct principles of *pacta sunt servanda,* business efficacy, and party autonomy constitute the founding pillars of a contractual relationship. In light of the same, this part seeks to divulge the structural flaws in the remedy adopted by the conservative nations, particularly India by way of Section 56 of the Act. This is largely owed to the fact that the remedy offered (i.e., void contracts) goes against the very principles over which the jurisprudence of contract enforcement stands, which envisages the competition and continuance of the contract.

Right from the dawn of civilization, the sole principle which ensured that promises were kept was that of the sanctity of the contract or *pacta sunt servanda.* The proposition, in its essence, provides that contracts ought to be performed based on good faith.[26] Over the years, this principle has also evolved with the increasing complexities of the corporate world. Consequently, a crucial exception to this doctrine which has developed off late is *clausula rebus sic stantibus*, indicating that only those 'things thus standing' ought to be fulfilled. This implies that in situations where the changed circumstances make the performance excessively onerous, only those obligations which can be reasonably fulfilled must be performed.[27] Hence, it nevertheless espouses the continuity of the contract instead of declaring it void.

This principle is based on a mixture of a variety of elements. First is the principle of good faith. Second is the principle of reasonableness which requires the parties to act in the manner of a reasonable person. The third is the principle of cooperation, which demands collaboration between the parties to the contract for its successful performance. The fourth is the principle of mitigation of losses. The last one is the principle of *favour contractus*, or what has now come to be referred to as the principle of business efficacy.[28] This principle provides that wherever possible, a solution should be opted in favour of the existence of the contract, rather than settling for its premature termination.[29] It further guides the Courts to take such steps that aid the business expediency of the parties.[30] A natural corollary to such a principle

[25] *Id.*, at 4.
[26] Elena Zaccaria, *The Effects of Changed Circumstances in International Commercial Trade*, 9 INT'L TRADE BUSINESS L. 160 (2004).
[27] *Id.*
[28] M Silveria, *Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation*, KLUWER L. INT'L 325 (2014).
[29] *Id.*
[30] Chris Parker and Simon Chapman, *Escaping from a Bad Bargain: suspending, Modifying or Terminating Performance of Long-Term Energy Contracts*, 7 I.E.L.R. 243-246 (2010),

would be the continuation of the contract (may or may not be by way of adaptation) and not its termination.

All these elements purport to ensure the continuity of the contract, which essentially indicates that the principle formed out of these elements, *pacta sunt servanda*, also endeavours to ensure the same.

More to the point, the 'eternal dilemma' between the changed circumstances and sanctity of contracts can also be solved by the cardinal principle of party autonomy.[31] This principle enunciates that the will of the parties is the supreme authority in determining the issues arising out of the contract. In other words, this doctrine hands the baton of determining the future course of action to the parties to the contract. Because it was the parties' will that led to the formation of the contract, the same would only be terminated by the will of the parties, and not due to any other reason. Indeed, by way of this principle, it is possible to fulfil the legitimate expectations of the parties and to respect their will as to the future continuation of the contract.

It is on these commercial philosophies that the non-conservative nations and international treaties, such as the UPICC and the CISG, base their remedies. The principles of party autonomy and business efficacy shape the remedies of adaptation through the techniques of mediation and negotiation.

REMEDIES AND THE WAY AHEAD

In light of the status quo, the authors propose to replace the isolated statutory remedy codified in Section 56 of the Act with a two-layer model, wherein the status of the contract would remain voidable to enable the parties to attempt at reaching a consensus. Subsequently, if the loggerheads are not removed, the contract would be deemed void by the Courts, resulting in its premature termination.

The conditional voidability of the contract may be resolved by optional negotiations as the first step. Negotiation, in its essence, is an informal arrangement between the parties in conflict to harmonize the interests and resolve the ongoing conflict. The primary reason for considering negotiation as the primary step for contract enforcement is that it resonates perfectly with the cherished principle of party autonomy.

The advantage of taking this approach to solve the issue of hardships would be skipping the courts altogether, thereby avoiding any judicial delays. It would save both the time and money of the parties transacting in the commercial world. This first phase of the approach towards renegotiating the terms of the contract which have become onerous/impossible to perform is through an informal set-up of negotiation. There are no governing rules when this is followed, the parties have the autonomy to take up any route to renegotiate the terms for part performance, adjusting the terms, among other options.

The second phase under this approach will be pre-institution mediation. This already falls in line with the current practice under the new Commercial Courts (Pre-Institution

[31] *Id.*

Mediation and Settlement) Rules, 2018, formed in pursuance of the Commercial Courts Act, 2015.[32] A mediator imitates the courtroom set-up, only without the time-consuming processes, and when the parties are in a deadlock situation, a mediator may act as a catalyst by ensuring proper communication between them.

Under Section 12A, the remedy of pre-institution mediation shall be exhausted before the parties approach the commercial courts. The 'authorities' which conduct this pre-institutional mediation are to be constituted under the Legal Services Authorities Act, 1987. The authority under the Rules then has to appoint a 'mediator', if both the parties to the contract agree to undergo the mediation. The authorities are required to ensure the completion of the mediation process within three months from the date of application made by the plaintiff. If the parties come to a settlement through the mediation process, then the settlement shall have the same status and effect as an arbitral award, on agreed terms under Section30(4) of the Arbitration and Conciliation Act, 1996. This change in the commercial dispute resolution arena is a welcome step. Moreover, if the parties are unwilling to undergo this mediation process, they can approach the court for relief and can "opt out" of the same.

The process of voluntary negotiation as the first phase and mandatory pre institution mediation as the second phase, in this first layer of the suggestion, is a matter of procedure. The remedy that the authors feel is best suited for such situations which can be implemented through mediation and negotiation is adaptation. The cooperation between the parties to rewrite the terms for performance of contracts that have been hit by hardship will ensure that India's position in the Contract Enforcement segment of the World Bank's Index improves.

On a practical aspect, other countries that have introduced this model have experienced considerable success. For example, in Italy, this model of mandatory mediation was introduced in 2010, and 50% of the mediations were reported to be successful.[33] Further, in Ireland, a law on mediation improved contract enforcement within the country.[34]

CONCLUSION

The idea to introduce the remedy of adaptation in India might seem radical but has been proven to work in other commercial hubs of the world. Countries such as France which have a non-conservative approach, as stated above, have performed fairly well when it comes to contract enforcement.[35] The success of this model of pre-institution mediation and adaptation largely depends on the quality of mediation services that are provided. It is not uncontested that the infrastructure for alternative dispute resolution in India is not ideal and mediation is a very new approach in the country. The Supreme Court in *Salem Advocate Bar*

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[32] The Commercial Courts Act, 2015, §12A.

[33] Avnish Satyang & Sohini Mandal, *Mandatory Pre-Institution Mediation: Commercial Courts*, MONDAQ NOVO JURIS, (2019) http://www.mondaq.com/india/x/727214/Arbitration+Dispute+Resolution /Mandatory+PreInstitution+Mediation+Commercial+Courts.

[34] *Doing Business 2019: Training for reform*, THE WORLD BANK-EASE OF DOING BUSINESS (2019), 141 https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/ DB2019-report_web-version.pdf.

[35] *Enforcement of contract index*, The WORLD BANK – EASE OF DOING BUSINESS (2019), https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts.

Association v. Union of India[36] recognized mediation as an informal proceeding and in the Third Report of the Committee chaired by Justice M. Jagannadha Rao, laid down the mechanism for an effective mediation process. But these guidelines were majorly directory and only the Bombay and Delhi High Courts formulated their mediation Rules according to these. The effectiveness of the Commercial Courts Act, 2015, and mandatory pre-institution mediation will be determined only gradually, but the remedy of adaptation has already stood the test of time and the authors feel that it would bring about a huge change in the entire regime of contract enforcement.

Hence, having minimal judicial intervention in the enforcement of contracts in situations of Force Majeure will not only safeguard the interests of the parties and save their time, but will also help them manage their finances better rather than spending a substantial amount of the business transaction in legal fees.

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[36] Salem Advocate Bar Association v. Union of India, (2003) 1 SCC 49.

MANDATORY ARBITRATION: A PLAUSIBLE SOLUTION FOR THE RESOLUTION OF COMMERCIAL DISPUTES

By: *Gururaj S M & Ann Clara Tomy*[*]

Abstract

Commercial disputes are those concerned with rights and liabilities of parties undertaking commercial transactions, which are primarily governed by contracts between them, guided by the principles laid down in various statutes. Under the conventional court regime, commercial transaction disputes were dealt with by the ordinary civil courts, which were later replaced by the creation of special courts through the Commercial Courts Act, 2015. Simultaneously, a strategic evolution took place in the dominion of alternate dispute resolution through the adoption of arbitration to resolve commercial disputes. However, this growth was restricted to only high-cost cases and the scope remains unexplored amongst smaller business transactions. Functioning of the Commercial Courts, which initially dealt only with cases of high value i.e. 1Cr., was reformed through the Commercial Courts (Amendment) Act 2018 by reducing the value of admissible subject matter to 3lakhs, to deal with a large number of such smaller business transactions, but also due to lack of adequate infrastructure. Tracing the parallel development in alternate dispute resolution, arbitration, which is governed by the Arbitration and Conciliation Act 1996, was amended in the year 2015 and incorporated major changes to the areas of interim orders to be passed by the tribunal, appointment, roles, duties, the fee structure of arbitrators, and curtailed unnecessary adjournments. These amendments aimed at the faster adjudication of disputes through Fastrack Arbitration, which prescribes a time limit for the procedure and determination of finality in the disputes. Although these amendments improvised the area of ADR, it still requires significant efforts for the reformation of its implementation and large-scale adoption.

This paper intends to provide an amicable solution to the efficacious administration of arbitration while addressing commercial disputes. Therefore, the suggested solution is the introduction of mandatory arbitration in the realm of commercial dispute resolution. Jurisprudentially, such imposition can be justified through the commercial common-sense doctrine evolved by the judiciary. The proposed system imposes arbitration on the parties, as it is the most apt mechanism to deal with disputes arising out of commercial transactions. Such a change provides parties the liberty of opting for either ad-hoc or institutional arbitration. This would not require additional infrastructural improvements, as the expertise of existing institutions like the Chamber of Commerce can be utilized.

INTRODUCTION

Commercial disputes are those concerned with rights and liabilities of parties undertaking commercial transactions, which are primarily governed by contracts between them, guided by the principles laid down in various statutes. Under the conventional court regime, commercial transaction disputes were dealt with by the ordinary civil courts, which were later replaced by the creation of special courts through the Commercial Courts Act, 2015.

[*] Gururaj S M & Ann Clara Tomy, Students, BB.A. LL.B., School of Law, CHRIST (Deemed to be University).

Simultaneously, a strategic evolution took place in the dominion of alternate dispute resolution through the adoption of arbitration for the resolution of commercial disputes. However, this growth was restricted to only high-cost cases and the scope remains unexplored amongst smaller business transactions. Functioning of the Commercial Courts, which initially dealt only with cases of high value i.e. 1Cr., was reformed through the Commercial Courts (Amendment) Act 2018 by reducing the value of admissible subject matter to 3 lakhs, to deal with a large number of such smaller business transactions, but also due to lack of adequate infrastructure. This specifically includes the dearth of the required number of specialized judges who possess relevant expertise, the overall efficiency of the mechanism remaining far below optimum, among other problems. Tracing the parallel development in the domain of alternate dispute resolution, arbitration, which is governed by the Arbitration and Conciliation Act, 1996, was amended in the year 2015 and incorporated major changes in the areas of interim orders to be passed by the tribunal, appointment, roles, duties, the fee structure of arbitrators, and curtailed unnecessary adjournments. These amendments aimed at the faster adjudication of disputes through Fastrack Arbitration, which prescribes a time limit for the procedure and determination of finality in the disputes. These amendments improvised the area of ADR to a limited extent, and it still requires that ample efforts be undertaken for its implementation and large-scale adoption.

This paper intends to provide an amicable solution towards the efficacious administration of arbitration while addressing commercial disputes. Therefore, the suggested solution is the introduction of mandatory arbitration in the realm of commercial dispute resolution. Jurisprudentially, such imposition can be justified through the commercial common-sense doctrine evolved by the judiciary. The proposed system imposes arbitration on the parties as it is the most apt mechanism to deal with disputes arising out of commercial transactions. Such a change provides parties the liberty of opting for either ad-hoc or institutional arbitration. This would not require additional infrastructural improvements, as the expertise of existing institutions like the Chamber of Commerce could be utilized. Thus, the twin benefits of reducing the burden on the courts and upholding the will of the parties could be achieved through such a way.

LAW ON COMMERCIAL DISPUTE RESOLUTION

Commercial disputes can be defined to include suits arising out of the ordinary transactions of merchants, bankers and traders, and amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, carriage of goods by land, sea or air insurance, banking and mercantile agency and mercantile usages[1]. Commercial disputes arise out of the non-fulfillment of contractual obligations under commercial transactions. Therefore, they fall within the wide ambit of contractual disputes, which are not confined merely to commercial disputes.

[1] *Commercial Suits*, HIGH COURT OF DELHI (July 20, 2019, 5:50 pm) http://delhihighcourt.nic.in/writereaddata/upload/CourtRules/CourtRuleFile_LP517545.PDF.

Given this context, the need is to analyze the gambit of laws that govern commercial disputes. The Indian Contract Act, 1872 along with its allied principles may be considered here. The Act plays a very important role in commercial law; carrying on trade and other business activities would have been extremely difficult had the Act not been in existence. The prime objective of a contract is to ensure that the rights and obligations arising out of a contract are honored and legal recourse to violations are available. Likewise, the Sale of Goods Act, 1930, defines and amends the law relating to the sale of goods wherever it is expedient to do so and the ambit of goods is wide enough that it includes every kind of moveable property other than actionable claims and money. This includes stocks, shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before the sale or under the contract of sale. This wide description of goods involves a major part of the commercial transactions that happen and hence the rules prescribed in the Act become significant. With respect to intangible goods, there are a couple of legislations which form the basis of such commercial transactions, namely, the Patent Act, Copyrights Act, and the Trademark Act. The Patent Act 1970[2] prevents unwarranted exploitation of new inventions which are technologies which have not been anticipated by the publication in any document or used in the country or elsewhere in the world before the date of filing of the patent application with complete specification, i.e. the subject matter has not fallen in public domain or that it does not form part of the State of the Art. The Copyrights Act, 1957[3] protects the artistic work which includes paintings, sculptures, drawings, engravings, or photographs, whether or not any such work possesses an artistic quality, a work of architecture, and any other work of artistic craftsmanship. It protects the author from unjust enrichment to another person from his work. The Trademark Act, 1999 protects marks capable of distinguishing the goods or services in connection with which it is used, in the course of trade.[4] Another legislation that clearly avoids the jurisdiction of dealing with commercial matters is the Consumer Protection Act 1986. The Act does not provide recourse for any good purchased or any service accepted for commercial purposes.

Now having dealt with the laws that govern the limits and characteristics of commercial transactions, we need to analyze the laws that deal with commercial dispute adjudication and its principles. Specific Relief Act, 1963 is an important remedy for breach of contract.[5] The recent amendments[6] to the Act effectively make specific relief the rule and damages the exception, while it used to be the other way around before the amendment wherein the court had wide discretion in granting specific relief.

A major revolution that took place in the arena of commercial dispute resolution is the enactment of the Commercial Courts Act, which created a dedicated court system to entirely deal with commercial disputes which are defined[7] as those disputes that relate to ordinary transactions of merchants, bankers, traders, import-export of merchandise and services,

[2] The Patents Act, 1970, § 2l.
[3] The Copyright Act, 1957, § 2c.
[4] The Trademarks Act, 1999, § 2e.
[5] The Indian Contract Act, 1872, §73.
[6] The Specific Relief (Amendment) Act, 2018.
[7] The Commercial Courts Act, 2015, §2c.

franchising agreements, shareholder agreements, joint venture agreements, management consultancy agreements, construction infrastructure contracts, admiralty and maritime-related issues, partnership agreements, sale of goods/services, insurance reinsurance, technology development agreements, etc., which are widely disputes arising out of contracts. Under the Commercial Courts Act, the State government must, in consultation with the concerned High Court, constitute Commercial Courts at the district level,[8] however, such court shall not be set up in areas where the High Court has ordinary original civil jurisdiction. The territorial jurisdiction of such established courts is to be notified by the State Government. Further, the judges having expertise in dealing with commercial disputes are to be given charge of such courts. However, in case of areas where High Courts have ordinary original civil jurisdiction, the Chief Justice of the concerned High Court[9] shall designate dedicated benches to deal exclusively with commercial disputes as specified in this Act. The recent amendment[10] to the Act has reduced the pecuniary value of suits that can be handled by such special courts from 1crore to 3 lakhs, thereby including a large number of cases within the ambit of commercial disputes. Regarding the appeal procedure, the appeals from the district commercial courts have to be directed to the respective High Court Commercial benches and no further appeal has been granted under the Act. The commercial Appellate Division shall try to dispose of such appeals within a period of six months.[11]

CONSTITUTIONAL ANALYSIS OF ADR MECHANISM

Dispute resolution is inevitable in the event of social interactions when one's interest conflicts with that of another, and additionally if such conflict gives rise to a legal injury or the violation of a legally protected right. Violation of a legally protected right means that the mechanism for redressal in the circumstance of such dispute arising requires an enforceable sanction to exist against the violator which, in effect, means to ensure justice. Access to justice as a right is hence derivable from the very fact that there exist rights and duties that one needs to abide by in the relevant jurisdiction of legal application. The right to effective access to justice has emerged as a new social right and such a right is of supreme importance because the enjoyment of traditional and new social rights presupposes the existence of an effective mechanism to protect their rights. Such a correlation means that an effective redressal mechanism is a basic human right for every system that guarantees or vests in its people certain rights. Magna Carta, a document of great value to the courts in England formed the fundamental principles of common law as basic human rights guaranteed to all. It was these principles that transformed to the Bill of Rights and formed the basis of the maxim, "*Ubi Jus Ibi Remedium*", which means every right, when it is breached, must be provided with a right to remedy, and has been incorporated in the Constitutions of various countries. Judicial decisions have dealt with the concept of access to justice in detail and have interpreted it to be the State's obligation to make available to all its citizens the means

[8] *Id.*, §3.
[9] *Id.*, §3(3).
[10] The Commercial Courts (Amendment) Act, 2018.
[11] The Commercial Courts Act, 2015, §13.

for a just and peaceful settlement of disputes between them, as to their respective legal rights.[12]

The position in India is not different from what the majority of democracies across the world respect; the right of access to justice has been recognized as a valuable right in the country. Access to justice as a right is recognized under Article 10 of the Universal Declaration of Human Rights (UDHR) as well as Articles 9 and 14 of the International Convention on Civil and Political Rights (ICCPR).[13]

Access to justice has two essential facets; firstly, access to a redressal forum, and secondly, speedy redressal. The Supreme Court has stated that the right to a speedy trial is an integral and essential part of the fundamental right to life and liberty enshrined under Article 21.[14] The National Commission to Review Working of the Constitution recommended that access to speedy justice be incorporated as an express fundamental right.[15] Timely justice is essential for the rule of law and thus there is a dire need to find a practical, effective, and achievable system for speedy disposal of disputes.

Lord Mustill had once said that "the great advantage of arbitration is that it combines strength with flexibility...flexible because it allows the contestants to choose the procedure which fits the nature of the dispute and the business context in which it occurs."[16] Arbitration is a mechanism that is speedy, expeditious, and cost-effective for dispute resolution. The characteristics of ADR avoid vexation, expense, and delay, which is effectively the promotion of the ideal of "access to justice". The growing effort of the court to divert commercial cases into arbitration and greater autonomy and power granted to arbitrators prove to be the stark evidence of ADR as a promising mechanism to lessen the judicial burden and help litigants' get better access to justice. Rulings have leaned in favor of the arbitrator possessing all the powers as are necessary to do complete justice to the parties undergoing arbitration in the same manner as a civil court, that would have tried a similar case, would possess. It has been reiterated by the court that by opting to choose arbitration and agreeing to settle cases arising out of contracts specifically without approaching a court for protection cannot be said to have frittered their rights and given up any lawful claim but rather must be understood to mean that the parties have opted for a different forum of adjudication, which has a less cumbersome procedure, less delay, and expense.[17]

These observations result in a fair understanding that courts are not the only way to access justice and obtain the resolution of disputes. The court has also stated in a case wherein it had to decide if administrative tribunals could replace the power of High Courts under Articles 226/227 concerning service matters, that such administrative tribunals set up by the Parliament do not violate the Constitution, and the disputes involve interpretation of

[12] Anita Kushwaha and Ors. v. Pushap Sudan and Ors., AIR 2016 SC 3506
[13] International Convention on Civil and Political Rights, 1966, art. 9, 14.
[14] Hussainara Khatoon v. State of Bihar AIR 1979 SC 1369.
[15] The National Commission to Review Working of the Constitution, *Summary of Recommendations,* DEP'T LEGAL AFFAIRS (2019), http://legalaffairs.gov.in/sites/default/files/chapter%2011.pdf .
[16] Centrotrade Minerals and Metal Inc. v. Hindustan Copper Limited, (2006)11 SCC 245.
[17] Union of India (UOI) v. Ambica Construction, AIR 2016 SC 1441.

constitutional Articles and hence the adjudicators require judicial approach as well as knowledge and expertise in constitutional law. Justice Ranganath Misra opined that barring the jurisdiction of the High Court, it is not violative of the basic structure of the constitution and since judicial review by the Supreme Court has not been barred, it does not completely bar judicial review. It was further stated that the tribunal has been constituted as a substitute and not a supplement to the High Court in the scheme of administration of justice, hence barring of jurisdiction cannot be a valid ground of attack on the legislation.[18] The judgment sheds light on the power of the Parliament to devise an effective mechanism in the interest of justice to prescribe alternate institutions for dispute resolution.

THE TRADITIONAL COURT SYSTEM VIS-A-VIA ARBITRATION

The Second World War swept the nations around the world with post-war trauma and hardship in running the economy, as major investments during the War were made in building war machines and supplying war equipment. But after the war countries started focusing on rebuilding their economies. A lot of reformation was made in the country's legal system to create an environment for the smooth flow of free trade in the country. The ease of doing business flourished and trade and commerce saw prominent growth over time. With this, there was also an increase in the number of commercial disputes. Over a while, we evolved a more efficient system compared to the traditional court system. The arbitration process is swifter and involves lesser procedural barriers in the dispensation of justice. The increasing number of cases in the courts and the previously backlogged cases further results in delay. It is very crucial in matters of commercial disputes to dispose of the problem in as much less time as possible, as the parties have to continue with their business activities smoothly and the said dispute should not cause hindrance to the same. Due to this, the parties find it wiser to choose arbitration over litigation.[19] There are various factors that the parties in a commercial dispute look into, before choosing a legal recourse. Parties in an arbitration exercise prominent control over the proceedings and its happenings, they are given the freedom to choose their arbitrator (a person who has special expertise in the field of dispute), including the place, time, and various factors of the arbitration proceedings; unlike a traditional court system, it tenders more control to the parties and also provides for the better exercise of their freedom. The process of arbitration further proves to be less expensive than litigation, as huge court fees have to be paid, and also the fee for the advocates is high for every session in court. Further, the discovery of documents and procedures to be followed under the Code of Civil Procedure consumes a lot of time unlike arbitration. One of the most important reasons why parties to a commercial dispute opt for arbitration is the confidentiality aspect, whereas the dispute becomes public in a court. and confidentiality is extremely important for the parties as huge multinational companies do not want their business matters to be found in open public records. Thus, arbitration serves as the best alternative for them, to reach an amicable solution within proximity.[20]

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[18] S.P. Sampath Kumar and Ors. v. Union of India (UOI) and Ors., AIR 1987 SC 386.
[19] Murali Neelakantan, *Conciliation and Alternative Dispute Resolution in India*, LAW ASIA J. 143, 152 (1998).
[20] Stephen R. Stern and Sloan J. Zarkin, *Why Arbitration Beats Litigation for Commercial Disputes,* 32 DISPUTE RESOLUTION 40 (2015), https://www.jstor.org/stable/24632523.

According to a survey conducted by the PwC about the preference of companies between litigation and arbitration, about 91% of the companies chose arbitration over litigation for resolution of their disputes. About 61% of the companies engaged in commercial transactions in India and outside have indicated having a dispute resolution policy. Companies (36%) that did not have a formal dispute resolution policy also demonstrated positive signs of including a dispute resolution clause in their contracts. Further, 86% of the companies had previously experienced domestic and/or cross-border dispute resolution. Upon questioning the type of resolution methods, they have used for domestic/international disputes, nearly all respondents at about 95% stated to have used arbitration either as a standalone mechanism or in combination with other mechanisms (68% used litigation, 40% had attempted mediation). The greater part of the companies surveyed believed that the arbitration scenario in India looks promising (43% have explicitly mentioned that the scenario of arbitration in India looks either optimistic or very optimistic), similarly, of the companies with previous arbitration experience, about 82% indicated that they will continue to use arbitration in the case of future disputes. Moreover, of the remaining companies who had no experience of arbitration, over 46% of them were willing to use arbitration in the future.[21]

JURISPRUDENTIAL BASIS OF ADR AS A DISPUTE RESOLUTION MECHANISM

The very basis of the Arbitration Act is the will of the parties, it is that which justifies the introduction of the mechanism of ADR into contractual obligation disputes. The primary requirement for the formation of a valid contract is the intention to create legal relations or, in other words, to bind the other party to perform what has been stated in the contract under all possible circumstances. It is indeed the fundamental rule in English law that an agreement that possesses consideration does not create a contract and hence does not become enforceable unless it is joined with an intention to create a legal obligation. The following observation by an English judge strongly represents the importance of reasonable intention in commercial contracts, "Courts are no less willing to supply *implied terms* as to reasonableness in the case of collective bargaining agreements than in commercial contracts" which in effect can mean that certain terms can be read into a commercial contract by its very nature and the intention of the party to adhere to the same can be derived from the nature of the contract.[22] Another prominent tool of interpreting commercial contracts is the use of the doctrine of "commercial common sense" which means that a given construction of a contract must correspond with commercial good sense.[23] In a recent judgment, it was laid down that if two interpretations of a contract seem to be possible, then the Court would have to prefer that interpretation that is consistent with business common sense and reject the other interpretation.[24]

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[21] Vidya Rajarao, *Corporate Attitudes & Practices towards Arbitration in India*, PwC report 2013.
[22] National Coal Board v. Galley, [1958] 1 W.L.R. 16, 23-24.
[23] Prenn v. Simmonds, [1971] 1 W.L.R. 1381, 1389, H.L.
[24] Rainy Sky SA v. Kookmin Bank, [2011] UKSC 50

This effectively means that commercial common sense is a factor that aids the court to come about with decisions that give a "commercial solution" or "commercial result", which, in turn, promises "commercial objectives and aims" to the parties. This aspect of attaching commerciality to a contract means that: a) reading of the document must be from the perspective of commercial users, b) inapt words can be ignored or overridden if not consistent with the business common sense, c) absurd construction is to be avoided, d) commercial common sense can be used as a compass to point the way for the Court's interpretative role for a given contract.[25] The Supreme Court has emphasized that a term can be implied if it is necessary for the business sense, to give efficacy to the contract. The external normative basis that the court usually has recourse to is business efficacy. Business efficacy can be favored in the commercial context as it is always safe to assume that commercial parties are rational and seek to achieve business efficacy in their transactions.[26]

ARBITRATION AS AN EFFECTIVE MECHANISM FOR CDR

The Indian judiciary has taken up the task of being an interpreter of the Constitution and also the protector of the rights of its citizens. In performing its duties, courts have played a conscientious role and the evolution of a developed legal system in the country has led to an elaborate procedural framework with numerous provisions for appeals, revisions, and reviews, which increase the time consumed in the adjudication of a matter. One of the previous approaches of the judiciary towards alternate dispute resolution, and arbitration clauses in specific, was that it believed them to be against the public policy of a State, as it was considered to abridge the jurisdiction of the courts in deciding matters.[27] The predominant role played by the judiciary in handling commercial disputes tarnishes the premise of contractual supremacy in private contracts and the aspect of confidentiality of a private dispute between two parties. In understanding the approach taken by the judiciary, we have to look into the backdrop and evolution of arbitration in the Indian subcontinent from the period of the British reign. The Indian Arbitration Act, 1899 had its jurisdiction restricted to the major trading centers of Bombay, Madras, and Calcutta. The Act at that point was at a very primitive stage and the Court, in the case of *Gajendra Singh v. Durga Kunwar*,[28] observed that an arbitral award was essentially a trade-off between parties. In the case of *Nusserwanjee Pestonjee and Ors. v. Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor*,[29] the Court laid down the principle that a sitting judge of a Court could be an arbitrator if the parties agree to it in the terms of the contract.

[25] Neil Andrews, *Interpretation of Contracts and "Commercial Common Sense": Do Not Overplay This Useful Criterion*, UNIV. CAMBRIDGE REPOSITORY (July 19 2019), https://www.repository.cam.ac.uk/bitstream/handle/1810/267138/CCS-trimmed-final.pdf?sequence=1&isAllowed=y.
[26] Sembcorp Marine Ltd v. Ppl Holdings Pvt Ltd, [2013] SGC A43.
[27] Murali Neelakantan, Conciliation and Alternative Dispute Resolution in India, LAW ASIA J. 143, 152 (1998).
[28] Gajendra Singh v. Durga Kunwar, (1925) ILR 47All637.
[29] Nusserwanjee Pestonjee v. Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor, (1855) 6 MIA 134.

The Court, in the case of *Saha & Co. v. Ishar Singh Kripal Singh & Co.*,[30] observed that the Arbitration Act, 1940, recognized the clear demarcation between an application for setting aside an award and one for deciding that the award is a nullity. Further, it was seen that the said Act failed in perceiving that arbitration would be rendered ineffective if an innate error exists in the clause or if the clause does not exist at all. The Act was quiet about the deficiencies intrinsic to individual private contracts. The Court in the case of *Hindusthan Flash Light Mfg. Co. v. Great American Insurance Co. Ltd.*,[31] deliberated that the Act did not address various issues relating to the arbitrators, lack of regulation of arbitrators regarding their freedom to resign at any point during the arbitral proceedings, the appointment of a new arbitrator in case of their death during the proceedings, leading to a major standstill in the proceedings and incur huge loss to the parties, while delaying the proceedings and further resulting in prolongation of the dispute. These were considered as some of the major shortcomings of the 1940 Act.

Moving forward with the changing economy and to clinch the lacunas in the 1940 Act, the Parliament enacted the Arbitration and Conciliation Act, 1996. Further deliberation on the 1940 Act gives us a complete understanding of how the Act, although bringing about uniformity in the laws of the country, failed to address certain issues in hand. It also failed to take into account how the UNICITRAL Model law had influenced the legal system to move towards a more efficient system for speedy disposal of disputes. The 1996 Act became an umbrella legislation, covering both foreign and domestic arbitration in the country, through the implementation of various international conventions such as the New York and Geneva Conventions, Foreign Awards (Recognition and Enforcement) Act 1961, the Arbitration (Protocol and Convention) Act 1937.[32] The Act, although helped in bridging some of the shortcomings of the 1940 Act, did not attain all its objectives at a full scale, as it failed to provide for a judicial appeal in case a question was raised on the arbitrator's partiality. Further, the Act also fails to address the issue of placement of time limitation on the arbitral proceedings and the appeals that follow. It also does not make a provision for the implementation of the interim orders of the arbitral awards.[33] The Court in the case of *Sri Krishan v. Anand*,[34] while addressing the question under Section 17 of the said Act, emphasized on the legislative intent of providing the tribunal with the power to handle the disputes and to prevent them from being filed in civil courts under Section 9, which defeats the purpose of the creation of an arbitral tribunal. This case paved the way for the legal recognition of arbitral awards made them enforceable in a court of law. In the case of *SBP & Co. v. Patel Engg. Ltd.*,[35] the 7-Judge Constitutional Bench of the Apex Court, paved the way for the Courts to address the jurisdictional issue under Section. 11, while also deciding upon the role of judicial authority to refer a matter to arbitration under Section 8, thus

[30] Saha & Co. v. Ishar Singh Kripal Singh & Co., AIR 1956 Cal 321.
[31] Hindusthan Flash Light Mfg. Co. v. Great American Insurance Co. Ltd., AIR 1963 Cal 149.
[32] *Commercial Suits*, HIGH COURT OF DELHI (July 20, 2019, 5:50 pm) http://delhihighcourt.nic.in/writereaddata/upload/CourtRules/CourtRuleFile_LP517545.PDF.
[33] M. Rishi Kumar Dugar, *The Failure of Arbitration in India: Derailment in Fast Track Dispute Resolution*, LAW ASIA J. 129, 140 (2010).
[34] Sri Krishan v. Anand, (2009) 112 DRJ 657.
[35] SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618.

invoking the intervention of the judiciary in the pre-arbitration stage of the case. The Act had successfully attained its objectives of promoting arbitration as a cost-effective and speedy mechanism for the resolution of commercial disputes, but the exclusion of judicial intervention lead to various issues in the conduction of arbitration[36].

The evolution of trade and commerce in the country and the shift towards a more capitalistic economy with foreign investments and the need for a more efficient system to deal with disputes arising out these commercial affairs lead towards the Amendment to the Arbitration and Conciliation Act 1996, in the year 2015, as per recommendations of the Law Commission in its 246th Report,[37] to amend the law relating to international commercial arbitration, enforcement of foreign arbitral awards, and domestic arbitration, among others. Arbitration intends to resolve disputes within a limited period of time and is cost-effective, but the increasing number of cases has placed it in the same position as that of litigation. The finality of an arbitral award is always subject to appeal due to Section34 of the Act, thus there was a need for an immediate review of certain provisions to aid the smooth functioning of the arbitral process. In the process of achieving the said objectives, the Legislature has always strived to bring changes to the Act, and some of the changes under the 2015 Amendment were under the areas of interim relief by the courts [Sections 9(2) & 9(3)], the appointment of arbitrator (Section 11), fee structure (Schedule IV), curtailing unnecessary adjournments [Section 24(1)], fast track procedure, interest on the award, etc.,. The Court in the case of *Renusagar Power Co. Ltd. v. General Electric Co.*,[38] for the first time, described the term 'public policy' while discussing enforcement of a foreign award. It was stated that an award could not be enforced if it went against the fundamental policy of Indian law, or interests of India, or justice, or morality. The amendment to Section 34, innately reduces judicial intervention on the grounds of public policy. Further, an award could not be challenged based on the obscure grounds of 'interests of India', thereby providing for a speedy resolution of the parties' disputes. Likewise, in the case of *National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd.*,[39] the Court discussed in length the problems with the enforcement of arbitral awards. It was provided that where an award is passed by the tribunal, the party has to wait for its lapse and then claim from the Court under the CPC, as an ordinary court decree. Also, an appeal under Section 34 would inevitably stay the order. But the amendment to Section 34 prevents an automatic stay, as a separate application has to be made under the said section and it is up to the discretion of the court to grant the same, with proper reasoning to be mentioned therein.[40]

CONCLUSION

The rapid rise in commercial transactions in the country has led to a proportionate increase in the disputes regarding such transactions. This increase has increased the judicial burden

[36] Krishna Agrawal, *Justice Dispensation through the Alternative Dispute Resolution System in India*, 2 RUSS. L.J. 63, 74 (2014).
[37] LAW COMM'N OF INDIA, REP. NO. 246, AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996 (August 2014).
[38] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644: AIR 1994 SC 860;
[39] National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd., (2004) 1 SCC 540.
[40] The Arbitration and Conciliation (Amendment) Act, 2015, §36(2).

and has further caused inordinate delay in the disposal of cases, thereby affecting the parties' interests and the efficacy of commercial transactions. The concept of voluntary arbitration was initiated as a mechanism to deal with the drawbacks of the traditional court system of justice dispensation. The large-scale adoption of arbitration by global corporations led to a paradigm shift in the choice of dispute resolution framework in the country. The implementation of arbitration is governed by the Arbitration and Conciliation Act 1996, which recently underwent major changes through the Arbitration and Conciliation (Amendment) Act 2015. However, these developments have not been proved to be triumphant in uplifting the business market of India, which is primarily because of a major share of commercial disputes still being referred to the courts.

This scenario can be improved by introducing a mandatory arbitration system (ad hoc or institutional). The structure of mandatory arbitration can be implemented by statutory compulsion. This envisages achieving the twin feat of reducing the burden of the court and giving due importance to party interests. The jurisprudential justification of suggesting mandatory arbitration can be found in the judiciary evolved doctrine of "commercial common sense" which effectively prioritizes commercial efficiency in the interpretation of commercial contracts. Hence, through the imposition of mandatory arbitration and exclusion of the parties from approaching the courts introduces, by default, an arbitration clause in every commercial contract. This is because arbitration introduces speedier settlement of disputes, thereby avoiding lags in the continuity of business transactions and recognizes the value of time in business transactions.

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THE AMBIT OF FORCE MAJEURE AND THE ROLE OF LIQUIDATED DAMAGES IN COMMERCIAL CONTRACTS

***By**: Kaushik Chandrasekaran & Sanjana Rebecca*[*]

Abstract

A *force majeur*e clause in the construction of a commercial contract implies that in certain circumstances of the impossibility, impracticability, and illegality of performance, the parties are relieved of their contractual obligations. This paper aims to discuss how the implications of a force majeure clause have found a wider interpretation in the technical comprehension of commercial contracts and such misuse of the clause to dilute contractual responsibilities in the event of a breach of contract. Further, the role of liquidated damages in acting as a safety net to compensate for the actual loss and legal injury incurred by the non-breaching party due to the impossibility of contract performance for a time period is of paramount importance. Using *Engineers India Limited v. TEMA India Limited*, this paper aims to reiterate the standards for determining the loss for payment of liquidated damages in the delay of contractual performance in the backdrop of a force majeure event. One of the consequences of such an event is the frustration of the contract. The grounds for applicability of the doctrine of frustration under Section 56 of the Indian Contract Act is subject to myriad judicial interpretations due to its inherent ambiguity. This ambiguity, however, can be misused to avoid the performance of the contract. This paper thus seeks to provide some clarity in this regard by analysing past precedents and the recent decision of the Supreme Court in the case *of Energy Watchdog v. Central Electricity Regulatory Commission and Anr*. Deriving from the existing judicial mandate and the rule of *esjudem generis*, this paper highlights the legal lacunae in the judgment. Asserting the possible implications of this judgment over a wide field of commercial contracts, this paper seeks to mitigate these implications by providing a different line of reasoning.

INTRODUCTION

Commercial contracts hold immense value in the corporate sphere and often, the construction of commercial contracts plays a very important role in regulating corporate transactions and establishing contractual obligations. It must be understood that contracts must be rid of any ambiguity for the benefit of both the contracting parties. However, there may arise circumstances in the construction of such contracts, where the parties entering into a contract may not be able to isolate the said contract from the unforeseen events of impossibility of performance, which leads to the frustration of said contract. This is covered under the doctrine of frustration. The doctrine of frustration was initially used by the English Courts in 1863 in the case of *Taylor v. Caldwell*.[1]

In India, the Indian Contracts Act, 1872 has adopted this doctrine and the very essence of it is enshrined in Section 56 of the Act, which states that when the performance of a contract

[*] Kaushik Chandrasekaran & Sanjana Rebecaa, Students, School of Law, CHRIST (Deemed to be) University.

[1] Taylor v. Caldwell, [1863] EWHC QB J1.

becomes impossible or for some reason is beyond the prevention of the promisor, where such an act is unlawful, the contract thereby becomes void. Further, an act that is outside the confines of a contract which is beyond the control of the contracting parties and is therefore impossible to perform or complete may frustrate the contract. This also discharges the parties from their contractual obligations.

The frustration of contract can be established upon the fulfillment of the following conditions: (i) Existence of a valid contract between parties; (ii) The contract is yet to be performed; (iii) The performance of the contract becomes impossible or unlawful; (iv) The impossibility to perform is caused by an event which is beyond the control of both the parties. The present article looks into Force Majeure and Liquidated damages clauses in commercial contracts by undertaking a comprehensive analysis of the *Adani* case.

FORCE MAJEURE

The textbook definition of 'Force Majeure' can be understood as a supervening event or an Act of God which creates the impossibility of contract performance for such duration of the event. The parties will usually agree on a list, which may or may not be exhaustive of Force Majeure events, that form part of the Force Majeure clause. Force majeure events can generally be divided into two basic groups: natural events and political events.

(a) Natural event**s** include earthquakes, floods, fire, plague, Acts of God (as defined in the contract or under applicable law), and other natural disasters.

(b) Political and special events may include acts of terrorism, riots or civil disturbances; war, whether declared or not, strikes (usually excluding strikes which are specific to the site or the project company or any of its subcontractors), change of law or regulations, nuclear or chemical contamination, pressure waves from devices traveling at supersonic speeds, failure of public infrastructure.

The contracting parties may often incorporate a Force Majeure clause to apprehend the unforeseen or supervening effect that may render the contract impossible to perform. Rather than leave it to the interpretation of the courts in situations of the frustration of contracts, the parties may append a Force Majeure clause that covers Force Majeure events that are defined by the parties at the time of construction of the contract. The difference between the absolute impossibility of contractual performance and impossibility of performance during a Force Majeure event is that, in the backdrop of such an event, the parties are usually relieved from their contractual obligations for the duration of the said event. This differs from a situation of absolute impossibility wherein, as aforementioned, the contract becomes frustrated and the parties are relieved of any or all obligations arising from such a contract. For instance, a change in circumstances or the loss of the object, which is unprecedented by the parties and is integral to the contract, that makes the further performance of such a contract impossible.

However, during a Force Majeure event, the parties are granted an extension of time, as stipulated by the contract, that relieves them of their contractual obligations. This allows the parties to perform their obligations without non-performance being perceived as a subsequent breach of contract. This raises a question as to the compensation of loss suffered

by the non-breaching party and whether the breaching party is liable to pay such compensation, i.e. monetary damages, as required even in the case of a Force Majeure event. To further understand this, it is important to look into the role played by liquidated damages in such a situation.

LIQUIDATED DAMAGES

Sections 73 and 74 of the Indian Contract Act deal with liquidated damages. According to Section 73, "when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it". Section 74 further states that "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 provided to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or as the case may be, the penalty stipulated for". As per the Indian Contract Act, liquidated damages can simply be understood as stipulated damages that have been pre-estimated and agreed upon by the contracting parties at the time of formation of the contract, to minimize any loss suffered by either party that might arise as a result of non-performance of contractual obligations.

FORCE MAJEURE AND LIQUIDATED DAMAGES

In a scenario where there is no supervening event, the breaching party will be liable to pay liquidated damages, whether or not actual damage or loss has been suffered by the non-breaching party.

According to Section 74 of the Indian Contract Act, the non-breaching party is entitled to claim liquidated damages except on account of a Force Majeure event. This was reiterated in the case of *Gail India Ltd v. Paramount Ltd*,[2] where it was held that "in the event of either party being rendered unable by Force Majeure to perform any obligations required to be performed by them under the contract, the relative obligation of the party affected by such Force Majeure shall, upon notification to the other party, be suspended for the period during which Force Majeure event lasts". It was also held that:

> "Time is the essence of the contract and in case the party fails to complete the work within the stipulated period, then, unless such failure is due to Force Majeure, the party shall be liable to pay the aggrieved party by way of liquidated damages for delay, a sum that both the parties agreed to be a genuine pre-estimate of the loss/damage which will be suffered on account of delay/breach on the part of the breaching party, and the said amount will be payable on demand without there being any proof of the actual loss or damages caused by such delay/breach." [3]

[2] Gail India Ltd v. Paramount Ltd, 2010 OMP No 66 of 2004.
[3] Gail India Ltd v. Paramount Ltd, 2010, OMP No 66 of 2004 at ¶7.18.

Thus, it can be conclusively established that the breaching party is excused from the liability of liquidated damages for the duration of a Force Majeure event, after which the delay would be constituted as a breach of contract, and the breaching party will be liable to pay liquidated damages as estimated at the time of contract formation. Taking the above-cited case into consideration, the aggrieved party will also have the option of terminating the contract after two months of the passage of such Force Majeure event, where the breaching party will be required to compensate for such delay even after the termination of the contract by the non-breaching party.

Furthermore, in *Engineers India Limited v. TEMA India Limited*,[4] TEMA had invoked the Force Majeure clause for delay of delivery to EIL. EIL claimed that TEMA was required to pay damages for delay in delivery as actual loss had been suffered by EIL. However, the Delhi High Court held that TEMA was not required to pay any such compensation as may be demanded by EIL because they had failed to prove that actual loss had been suffered by them due to the delay of delivery by TEMA, and therefore TEMA was not held liable.

The Court also cited the case of *State of Kerala And Ors. v. United Shippers and Dredgers*[5] to determine whether any liquidated damages could be claimed in the instant case without proving actual loss/damage. The Court observed that: "when the section says that an aggrieved party is entitled to compensation, whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of compensation, whether a legal injury has resulted in consequence of the breach because compensation is awarded to make good the 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. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed."

THE ADANI CASE

Brief facts of the case

Adani Power Limited, a subsidiary of the Adani Group of Companies entered into a Power Purchase Agreement (PPA) on 2.2.2007 for the supply of electricity from Phase I and II of its Mundra Power Project to Gujarat Urja Vikas Nigam Limited (GUVNL) and another Power Purchase Agreement on 7.8.2008 for the supply of electricity from Phase IV of its Mundra Power Project to Dakshin Haryana Bijli Vidyut Nigam Ltd (Haryana Utilities).

Rule 3.13 of the Request for Proposal issued by GUVNL mandated that the onus of responsibility is upon the seller for fuel linkage, fuel transportation, and storage. Rule 4.14 of the Request for Proposal also mandated the duty of the bidder to update on fuel arrangements.

Adani Power Limited won the bid after a competitive bidding process and later, due to a 2010 change in the price of Indonesian Coal, submitted a petition before the Central

[4] Engineers India Limited v. Tema India Limited, First Appeal Order 487 of 2015.
[5] State of Kerala and Ors. v. United Shippers and Dredgers, AIR 1982 Ker 281.

Electricity Regulatory Commission (CERC) for non-performance of the contract based on the grounds of contractual impossibility. GUVNL and Haryana Utilities challenged this contention of Adani seeking to escape the performance of the contract due to commercial impossibility.

Submissions by the Adani Group

- The 2010 rise in Indonesian coal prices constitutes a Force Majeure event, giving rise to the frustration of contract under Section 56 of the Indian Contract Act.
- The 2010 Indonesian Regulations amount to change in the law within the meaning of Article 13 of the Power Purchase Agreement.
- Forcing Adani to supply coal at the new price of Indonesian Coal will result in the erosion of net worth of the Company and subsequent closure of the Mundra Project.
- Clarification by the Director-General of Coal, Ministry of Energy and Mineral resources of the Government of Indonesia, inter alia, stating that coal sales in Indonesia are now regulated by the Ministry of Energy and Mineral Resources Regulation of September 2010 and the contracts negotiated earlier before the enactment is required to be adjusted within 12 months.
- The rise in fuel prices was communicated to GUVNL and Haryana Utilities repeatedly to find an amicable solution for the same.
- Sections 61, 62, 63, 64, and 79 of the Electricity Act, 2000 provide power to the CERC for the grant of compensatory tariff.
- The Use of "all laws" in the PPA includes the 2010 Law made by Indonesia.
- Re-negotiation of commercial contracts is a widely accepted principle.
- Impossibility under Section 56 includes even commercial impossibility.

Submissions by the Respondents

- "Force Majeure" in the PPA cannot be invoked in the present case as there is no prohibition of any nature, either wholly or partly, on the export of coal from Indonesia, or otherwise on the implementation of the fuel supply agreement between Adani Enterprises and Indonesian Supplier of coal.
- Increase in the prices making the performance of a contract difficult cannot be considered Force Majeure event under Article 12.3 of the PPA.
- Use of "all laws" in Article 13 of the PPA is restricted to Indian law, and does not include foreign law.
- Price increase by way of the Indonesian Regulation does not prevent the petitioner from the generation of electricity and from meeting their obligation to supply electricity, but simply makes the performance of such obligation more difficult.
- Risk and responsibility for arranging fuel are that of the petitioner as the project developer and the petitioner was obligated to supply power to the respondents at the agreed tariffs.

Ruling by the Central Electricity Regulatory Commission (2013)

The CERC held that the term "all laws" refers to the laws of India. It further noted that the laws governing various provisions of the PPA have been defined in the PPA itself as the laws

of India. Asserting that if the interpretation by the petitioner is allowed it would be absurd and change the rights and liabilities of each party under the contract. It held that foreign laws will be applicable only if the Force Majeure clause explicitly stated so.[6]

Regarding the question of a Force Majeure event, the CERC held that the 2010 rise in the price of Indonesian Coal did not constitute a Force Majeure event and that it did not render the contract impossible to be performed.[7]

The CERC found enough means to compensate the petitioner for the loss of the additional expenditure incurred by it, on account of the procurement of coal from Indonesia at the international benchmark price as it was never in the contemplation of the petitioner.[8]

The CERC relied upon a plethora of precedents[9] and derived its power for the grant of compensatory tariff. It gave directions to the petitioner, respondents, and the respective State Governments for the constitution of a Committee for the speedy resolution of the matter and calculation of compensatory tariff. It also gave guidelines for the calculation of the tariff and the composition of the Committee.[10]

Ruling by the Appellate Tribunal (2016)

The ruling of the CERC led to huge furor among electricity suppliers who, along with the Adani group, decided to file an appeal against the CERC mandate to the Appellate Tribunal for Electricity, hereinafter referred to as the Appellate Tribunal. The Appellate Tribunal passed an order on 7th April 2016.[11]

The Tribunal held, agreeing with the Commission, that the generation and sale of power by the Adani Power to GUVNL and Haryana Utilities was a composite scheme within the meaning of Section 79(1) (b) of the Act and that, therefore, the Central Commission would have jurisdiction to proceed further in the matter. [12]

The Tribunal held, agreeing with the Commission, that the term "all laws" included only Indian law and not foreign law, and that consideration of the latter would only lead to inherent ambiguity and absurdity.[13]

The Appellate Tribunal, however, differed with the Commission and held the instant case to be a Force Majeure event, after a careful perusal of the doctrine of frustration in India.[14] This was in contradiction with the ruling of the CERC.

The Tribunal did not agree with the grant of compensatory tariff under Section 79 of the Electricity Act, 2000, and held that the Commission did not have the power under Section

[6] Adani Power Limited v. UHBVN Ltd, Petition No.155/MP/2012, at ¶68 (The CERC Ruling).
[7] The CERC Ruling, at ¶63.
[8] The CERC Ruling, at ¶83.
[9] Tarapore and Company v. Cochin Shipyard, Cochin (1984)2 SCC 680; Continental Construction Company Limited v. State of Madhya Pradesh, AIR 1988 SC 1166.
[10] The CERC Ruling, at ¶88-89.
[11] APPEAL NO.100 OF 2013 & I.A. No.116 OF 2013 (The Aptel Ruling).
[12] The Aptel Ruling, at ¶118.
[13] The Aptel Ruling, at ¶171-190.
[14] The Aptel Ruling, at ¶276-300.

79, as Section 63 mandates that it is the contract which governs the rights and liabilities of the parties.[15] It also agreed that the 2010 rise in Indonesian Coal prices does not fall under the ambit of "all laws", as mentioned in the PPA.[16]

Ruling by the Supreme Court (2017)

The Supreme Court held that the ruling of the Appellate Tribunal was correct in law. It stated that the Adani group's argument of claiming Force Majeure to escape from the performance of the PPA altogether did not stand. The Supreme Court thus held that:

> "Force Majeure is governed by the Indian Contract Act, 1872. In so far as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with contingent contracts, and more particularly, Section 32 thereof. In so far as a Force Majeure event occurs outside the contract, it is dealt with by a rule of positive law under Section 56 of the Contract."[17]

Regarding impossibility of contractual performance, the Court referred to the case of *Taylor v. Caldwell*[18] in which it was held that if any event occurs that is beyond the control of the parties and this event effects the fundamental basis of the contract, then it would be unjust to ask for the performance of the contract. To further investigate the ambit and scope of impossibility in the present case, the Court referred to a multitude of Supreme Court precedents on the same.

Deriving from the case of *Satyabrata Ghose v. Mugneeram Bangur & Co*,[19] in which Section 32 of the Indian Contract Act was held to apply to cases where circumstances for dissolution of the contract were present in the contract itself, but if frustration occurs outside the scope the contract, then Section 56 dealing with impossibility was applicable.

It asserted from *M/s Alopi Parshad and Sons Ltd v. Union of India*[20] that Section 56 of the Indian Contract Act that even though parties are faced with events that they did not comprehend while drafting the contract, even a wholly abnormal rise or fall in prices could not be used to get rid of the bargain made. Thus, the Court explicitly rejected Adani's submission that the 2010 rise in the price of Indonesian Coal constitutes a Force Majeure event.

It further held that the applicability of the doctrine of frustration must only be under narrow circumstances. Reliance in this regard was placed upon *Tsakiroglou and Co v. Noblee Thori GmbH*,[21] to hold that there is a difference between the mandate of a contract becoming onerous to perform versus impossibility of its performance. In the above case, despite a two-time increase in freight fares for the journey of the ship and a threefold increase in the distance due to the closure of the Suez Canal, the contract was held to be valid, as there was no change in the fundamental nature of the contract.

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[15]The Aptel Ruling, at ¶131-162.
[16]The Aptel Ruling, at ¶178.
[17] Energy Watchdog v. Central Electricity Regulatory Commission, Civil Appeal Nos.5399-5400 of 2016 at ¶32 (The Supreme Court Ruling).
[18] Taylor v. Havdvel, [1863] EWHC QB J1.
[19] Satyabrata Ghose v. Mugneeram Bangur & Co, 1954 SCR 310.
[20] M/s Alopi Parshad and Sons Ltd v. Union of India, 1960 (2) SCR 793.
[21] Tsakiroglou and Co v. Noblee Thori GmbH, 1961 (2) All ER 179.

Thus, the Supreme Court held that the fundamental nature of the PPA had not changed and it, therefore, mandated the following:

> "It is clear…that the doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere do the PPAs state that coal is to be procured only from Indonesia at a particular price. In fact, it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. The fact that the fuel supply agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order. It is clear that an unexpected rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took. We are of the view that the mere fact that the bid may be non-scalable does not mean that the respondents are precluded from raising the plea of frustration if otherwise it is available in law and can be pleaded by them."[22]

The above paragraph is of substantive importance as the Court held that the fundamental nature of the PPA in the present case was not altered and therefore the claim for impossibility under Section 56 did not arise. It is noteworthy that the Force Majeure Clause in the Agreements excluded any increase in the cost of the plant, machinery, equipment, materials, spare parts, fuel, or consumables for the Project from the ambit of Force Majeure.[23]

The Court also relied upon *Tennants (Lancashire) Ltd. v. G.S. Wilson* and Co.[24] and *Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd.*[25] to hold that the rise in prices constitutes a mere hindrance to the performance of the contract.

Regarding the interpretation of "all laws" in Article 13 of the PPA, the Court held that the term "all laws" include the laws of India. To support this interpretation, the Court observed that Article 13.1.2 clearly defines a competent court only with reference to the judicial system of India. If any reference to foreign law was intended by the parties, then it would have been included by the parties during the drafting of the Contract.[26]

The Court also rejected the argument of business efficacy, holding it to be completely untenable in the present case.[27]

Thus, the Supreme Court set aside both the orders of the Central Electricity Regulatory Commission (CERC) and the Appellate Tribunal for Electricity and directed the Central Electricity Regulatory Commission to hear the matter afresh.[28]

[22] The Supreme Court Ruling, at ¶40.
[23] The Supreme Court Ruling, at ¶43.
[24] Tennants (Lancashire) Ltd. v. G.S. Wilson and Co, [1971] A.C. 495.
[25] Peter Dixon & Sons Ltd. v. Henderson, Craig & Co. Ltd., 1919(2) KB 778.
[26] The Supreme Court Ruling, at ¶46-51.
[27] The Supreme Court Ruling, at ¶52.
[28] The Supreme Court Ruling, at ¶56.

CRITICISM OF THE ADANI CASE RULING

The outright rejection of hardship as a ground for impossibility is a major drawback of the Supreme Court judgment. This outright rejection of hardship is an anathema to grant of justice and is violative of both domestic and international jurisprudence on the same issue.

Domestic Jurisprudence

The Supreme Court itself in the case of *Satyabrata Ghose v. Mugneeram Bangur & Co*[29] held that "when a contract contains a Force Majeure clause which on construction by the Court is held attracted to facts of the case, Section 56 shall have no application".[30]

A viable interpretation would be to ensure that the parties can avail the benefit of Section 56 and therefore it should remain as an alternate basis for avoidance of performance of the contract. Furthermore, there is nothing in the Indian Contractual law or the PPA to suggest that the mere inclusion of a Force Majeure clause shall prohibit the parties from taking judicial recourse under Section 56.

International Jurisprudence

In the Adani judgment, the Court out rightly rejected the applicability of hardship as a ground for non-performance of the contract. This is in complete violation of the existing international jurisprudence that allows commercial hardship as a major ground for non-performance.

Mandate of the CISG Advisory Council

Article 79 of the CISG Convention[31] reads as follows:

> "(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
> (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
> (a) He is exempt under the preceding paragraph; and
> (b) The person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
> (3) The exemption provided by this article has effect for the period during which the impediment exists.
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

[29] Satyabrata Ghose v. Mugneeram Bangur & Co, 1954 SCR 310.
[30] Satyabrata Ghose v. Mugneeram Bangur & Co, 1954 SCR 310 .
[31] 1489 U.N.T.S.3, art. 79.

Article 79 of the CISG Convention is similar to that of a Force Majeure clause in Indian contracts.[32] Myriad comments on the same have interpreted that it should cover onerous performance and commercial hardship. In the Adani case ruling in 2017, the Supreme Court rejected both commercial hardship and onerous performance as grounds for non-performance of the contract. This outright rejection of relief is a bad precedent in law and will directly affect other small companies who, unlike the Adani group, do not have the money and resources to fight long legal battles.

The UNDROIT principle of Hardship

Article 6.2.2 of the UNDROIT Principles 2016[33] provides the following definition of hardship,

> "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
> (a) The events occur or become known to the disadvantaged party after the conclusion of the contract;
> (b) The events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
> (c) The events are beyond the control of the disadvantaged party; and
> (d) The risk of the events was not assumed by the disadvantaged party."

A careful perusal of the article provides for the ground of commercial hardship as a ground for non-performance of the contract. This also includes the increase in the cost of performance of the contract, in such a way that the fundamental nature of the contract is changed. In the present case, the fundamental nature of the contract, that is to supply power, was not performable due to the unforeseen event that was beyond the control of the party. Thus, Article 6.2.2 (b) and (c) are satisfied in the present case and therefore Adani should have been allowed to rely on the claim of commercial hardship for non-performance of the contract.

United States Uniform Civil Code

Section 2-165 of the Uniform Civil Code (UCC)[34] of the US deals with excuses by the failure of presupposed conditions. This is similar to the use of the Force Majeure clause in Indian contracts. Note 4 of the Official Comment to the said Section 2-165 of the Uniform Civil Code reads as follows:

> "4. Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or supplies due to a contingency such as war, embargo, local crop failure, an unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from

[32] CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007.
[33] International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (1994).
[34] Uniform Civil Code, § 2-615 (Excuse by Failure of Presupposed Conditions).

> securing supplies necessary to his performance, is within the contemplation of this section."[35]

A mere reading of the above provision justifies that an unforeseen event that alters the nature of the performance of the contract constitutes a valid ground for non-performance of the contract. In the instant case, Adani could not foresee the policy change brought about by the Indonesian Government in 2010 that led to a massive increase in the price of Indonesian coal. Similar is the view taken by the US Judiciary through various contractual disputes that arose for adjudication.[36] This shows that the judgment of the Indian Supreme Court in 2017 relied upon a narrow understanding of impossibility in contractual law without any adherence or reference to the global mandate on the same.

CONCLUSION

Thus, the paper first provides an insight into the nature of commercial contracts and highlights its importance. Deriving from the nature of commercial contracts, it looks into the Force Majeure clause and provides a brief but elucidative insight upon its applicability. The paper investigates the interrelationship between the Force Majeure clause and liquidated damages and elaborates upon the same. Focusing mainly on the Adani case, this paper provides a substantive overview of the case and the various submissions made by both the parties, while also providing a succinct summary and analysis of the rulings given by the regulatory agencies in this regard. It further provides a critique of the Adani judgment, regarding the complete rejection of commercial impossibility by the Supreme Court as a ground for non-performance of the contract.

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[35] *Id.*, note 4.

[36] York Corp. v. Henry Leetham & Sons Ltd., [1924] i Ch. 557; Ford & Sons, Ltd. v. Henry Leetham & Sons Ltd., 21 Com. Cas. 55 (1915, KBD).

RECENT AMENDMENTS TO THE COMMERCIAL COURTS ACT, 2015: AN INDIAN PERSPECTIVE

By: *Dr. Misha Bahmani & Yashdeep Lakra*[*]

Abstract

There has been a surge in the number of reported commercial disputes in India. Due to the rise in FDI and overseas transactions the business sector has been facing many challenges because of which the Commercial Courts Act, 2015 was introduced. At present, it has been observed that India has been ranked among 190 nations in the World Bank's Report on the Ease of Business. This Report has motivated the Indian lawmakers to encourage the practice of having a regulatory framework that could be beneficial in maintaining a peaceful atmosphere for conducting business activities. The Cabinet has approved the Bill of 2018 and the laws have been amended to further uplift India's performance in the coming years.

The authors in this paper highlight the recent changes that have been brought under the 2018 Amendment to have a speedy trial. To maintain transparency and independence in the judicial system as well as to gain international acceptance, the Act must be properly implemented. For instance, the article elaborates on the significance of having Section 17 and the Statistical Data Rules, 2018. Moreover, the authors illustrate the legislative history of the Act to understand its scope and limitations. The article also focuses on how the Commercial Courts are working in India and reflect on the difficulties which they are facing presently. Further, suggestions are provided by the authors which could help make India an investment friendly destination.

INTRODUCTION

Nowadays, many economies are facing difficulties while dealing with the resolution of commercial matters. In a developing country like India, there is a need to have a legal framework which can enhance the Indian economy by providing a specialized judicial framework for dealing with commercial matters.[1] The Indian Cabinet has allowed some changes in the laws confining to Commercial Courts with an object to make this nation business-friendly. For instance, the amendments have been made in the Commercial Courts Act in 2018 to improve the performance of the Indian courts while addressing commercial matters.[2] It has been observed that before the 2018 Amendment, the Act of 2015 had focused on establishing a Commercial Division in the High Courts and Commercial Courts were set up at the District level. To attract more investors, it became essential for the

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* Dr. Misha Bahmani, Former Phd. Scholar, USLLS, GGSIPU, New Delhi; Yashdeep Lakra, Student B.A. LL.B., USLLS, GGSIPU, New Delhi.

[1] Pranab Dhal Samanta & Bodhisatva Ganguli, *Will Make India a Better Place to do Business, Says PM Modi*, THE ECONOMIC TIMES, https://economictimes.indiatimes.com/news/politics-and-nation/et-exclusive-pm-modi-says-he-will-leave-no-stone-unturned-to-make-india-a-better-business-destination/articleshow/70636196.cms?from=mdr (last visited Aug. 12, 2019).

[2] *Parliament Passes Bill to Amend Law for Speedy Disposal of Commercial Dispute*, THE ECONOMIC TIMES (Aug. 10, 2018), https://economictimes.indiatimes.com/news/economy/policy/parliament-passes-bill-for-speedy-disposal-of-commercial-disputes/articleshow/65358168.cms?from=mdr.

lawmakers in India to make the judicial system more efficient. The Commercial Courts Act, 2015 has been introduced and amended to surge the participation in economic activities in India.[3]

India has been given the 163rd position among 190 nations for contract enforcement by the World Bank, which shows that India needs to improve its contract enforcement laws, rules, and regulations to make this nation more investment-friendly.[4] It is to be noted that the number of commercial disputes in India has risen, drawing the attention of lawmakers to make necessary changes in the laws to improve the business environment. In this regard, due to judicial backlog, changes have been brought under the Commercial Courts Act through the 2018 Amendment.[5] Keeping this perspective in mind, the Indian economy needs to be improved which can only be made possible through favorable legislative enactments. India can gain its strength by focusing on governmental schemes that are beneficial in developing its infrastructure in the coming years.[6]

The Indian judicial system should encourage healthy surroundings for setting up, running business activities properly, and fostering innovation.[7] With the use of better technology as well as resources, the clients would be able to arrive at a better outcome. By making the dispute resolution process stable, the legal framework would be able to encourage the proper functioning of Commercial Courts.[8] There is a need to have proper enforcement of contracts, better infrastructure, and maintenance of financial resources to make the economy secure. With the support of business-oriented laws, the financial markets can be improved with time.[9] Before tackling the recent changes which have been brought about in 2018 in the Commercial Courts Act of 2015, it is essential to highlight the objective behind the Act of 2015. Further, the authors in this article will reflect on the challenges which the judicial system and the parties have come across, motivating Indian lawmakers to make changes in the Act. With the establishment of Commercial Courts and Commercial Division in the High Courts, the focus is on having a better civil justice system in India.[10]

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[3] *Cabinet Approves the Commercial Courts, Commercial Division and Commercial Division of High Court (Amendment) Bill, 2018*, PRESS INFORMATION BUREAU (Mar. 7, 2018), http://pib.gov.in/newsite/PrintRelease.aspx?relid=177126.

[4] *Enforcing Contracts*, THE WORLD BANK, https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts (last visited Aug. 12, 2019).

[5] Krishnadas Rajagopal, *Getting Down to Business*, THE HINDU (May 11, 2018) https://www.thehindu.com/opinion/op-ed/getting-down-to-business/article23840778.ece.

[6] Rohit Lalwani & Kamya Shah, *The Commercial Court, Commercial Division and Commercial Division of High Courts (Amendment) Bill, 2018*, LEXOLOGY (Apr. 24, 2018), https://www.lexology.com/library/detail.aspx?g=7a8e8cf4-f7d8-44d9-af96-998661746c0d.

[7] LAW COMM'N OF INDIA, REP. NO. 253, COMMERCIAL COURTS, COMMERCIAL DIVISION AND COMMERCIAL DIVISION OF HIGH COURT (AMENDMENT) BILL, 2015 (2015), http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf.

[8] *Amendments to Commercial Courts Act- A Snapshot*, TRILEGAL (May 25, 2018), https://www.trilegal.com/pdf/create.php?publication_id=15&publication_title=amendments-to-the-commercial-courts-act-a-snapshot.

[9] *India Amends its Commercial Courts Act, 2015-to Reduce Flooding Litigations*, US INDIA (Aug. 11, 2018), https://www.usispf.org/blog-detail/india-amends-its-commercial-courts-act-2015---to-reduce-flooding-litigations.

[10] LAW COMM'N OF INDIA, *supra* note 7.

LEGISLATIVE HISTORY OF COMMERCIAL COURTS IN INDIA

To properly understand the significant role of the Commercial Courts and Commercial Divisions, it becomes essential to address the reasons behind the enactment of these laws since its inception. The authors have elaborated on the objectives set by the lawmakers concerning the Commercial Division of High Courts Bill, 2009 as well as the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 to understand the awakening of the Indian legal system in this regard.

The Commercial Division of High Courts Bill, 2009

To bring reforms in the Indian civil justice system, the 17th Indian Law Commission in 2003 highlighted the need to have a Commercial Division in the High Courts. This suggestion was submitted in the Law Commission's 188th Report. In 2009, the Indian Cabinet approved this proposal, which resulted in the introduction of the Bill of 2009 in the Indian Parliament.[11] This Report has valued setting up of Commercial Courts in India.[12] To gain the confidence of the investors, it was considered that there should be a fast track procedure along with high tech facilities to reduce the burden of the courts. There was a large number of high-value commercial disputes in the Indian courts during that time, because of which there was an urgent need to have speedy disposal of these matters. It was found that commercial cases were taken care of by the foreign courts instead of the Indian courts. For instance, the United States and United Kingdom courts, on the ground of *forum non-conveniens*, have addressed these disputes which should have been dealt with by the Indian courts. To practice equal as well as fair justice in India, it became necessary to have an independent and well-accommodated Indian judicial system. It became the responsibility of the Indian authorities to make the foreign courts aware that they should not draw general observations about the Indian legal system while addressing such matters in their courts.[13]

To change the mindset of the foreign courts and to provide quick relief to the parties, the Commercial Division in the High Courts was set up.[14] The Bill of 2009 was passed in the Lok Sabha but was challenged in the Rajya Sabha.[15] It was argued that this Bill had only focused on high stake commercial litigation, due to which the poor litigants will suffer. Sadly, the High Courts were not able to perform well because of inadequate infrastructure as well as resources. The Bill was later referred to the Raj Sabha's Select Committee to examine these arguments.[16] This Report was submitted in 2010 and it was highly criticized and the specialized courts were termed as five-star courts as they were considered as favoring the

[11] *Id.*
[12] LAW COMM'N OF INDIA, REP. NO. 188, PROPOSALS FOR CONSTITUTION OF HI-TECH FAST-TRACK COMMERCIAL DIVISION IN HIGH COURT, http://lawcommissionofindia.nic.in/reports/188th%20report.pdf (last visited Aug. 11, 2019).
[13] *Id.*
[14] *Id.*
[15] *Report of the Select Committee on the Commercial Division of High Courts Bill, 2009*, PRS INDIA, http://www.prsindia.org/uploads/media/Division%20High%20Courts/Select%20Committee%20Report.pdf (last visited Aug. 11, 2019).
[16] *Id.*

rich litigants.[17] The 20th Law Commission evaluated the same provisions and inquired into its scope. This Bill was referred to the Indian Law Commission and its Report was published after two years in 2015.[18] The Commercial Courts Bill was the result of the second paper which was prepared by the Expert Committee and resulted in the 253rd Report of the Indian Law Commission. This Report had analyzed the challenges which the system had come across during that tenure. The 253rd Report had addressed all the issues which the stakeholders, as well as lawmakers, were facing at the time. It also illustrated the necessity to have Courts and Division as well as Appellate Division for commercial matters in High Courts to provide quick relief to parties.[19]

The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015

One needs to keep in mind that the Indian Government's attention was drawn towards making India an investment hub to gain the trust and confidence of foreign investors. This became relevant when India was ranked 186th out of 189 nations under the World Bank's Report on Ease of Doing Business, reflecting on the enforcement of contracts in 2013 and 2014.[20] The figures of this Report motivated the Indian authorities to make changes in the laws to upgrade India's ranking which resulted in a draft of the Bill of 2015. It became crucial to have a makeover of the Indian legal framework to improve the growth of the Indian economy. It became necessary for the country to have proper enforcement of contracts and have active participation in trade and commerce activities. Subsequently, practices involving financial risks were required to be handled with care and caution. It was suggested that there is a need to have an efficient mechanism that can be beneficial in upturning India's ranking. India, at that time, required a cost and time-saving mechanism which could promote good practices.[21]

The Bill of 2015 was introduced in the Rajya Sabha by the Finance Minister to create Commercial Divisions in High Courts and the district level establishment of Commercial Courts was proposed.[22] The 253rd Report had encouraged reforms in civil litigation as a whole. It was criticized for making changes in the civil procedure laws. Although these changes were very minimal, they were not welcomed by legal scholars in India and abroad because they indulged in research related to the poor status of the litigation culture in India.[23]

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[17] *Id.*
[18] LAW COMM'N OF INDIA, *supra* note 7.
[19] *Id.*
[20] *Id.*
[21] AMEEN JAUHAR & VAIDEHI MISRA, REPORT - COMMERCIAL COURTS ACT: AN EMPIRICAL EVALUATION, VIDHI CENTRE FOR LEGAL POLICY https://vidhilegalpolicy.in/wpcontent/uploads/2019/07/CoC_Digital_10June_noon.pdf (last visited Aug. 12, 2019).
[22] *The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015*, PRS LEGISLATIVE RESEARCH, http://www.prsindia.org/billtrack/the-commercial-courts-commercial-division-and-commercial-appellate-division-of-high-courts-bill-2015-3770/ (last visited Aug. 12, 2019).
[23] Robert Moong, *Indian Litigiousness and the litigation explosion: Challenging the legend*, 33 ASIAN SURVEY 1136, 1137-38 (1993).

The Bill also focused on improving the economic growth of the country. It has not been an easy task for lawmakers as their efforts are seldom appreciated.[24] For instance, in an IIM's Report, it was observed that to improve the performance of the Indian courts, it is fundamental to have proper budgeting and case management system. It further stated that there was a possibility that indicators of foreign measurement were ill-equipped to reflect India's status in that regard.[25] Secondly, the World Bank had reviewed commercial litigation in only two cities in the country and was thus limited in its perspective. One cannot generalize these findings and make it as a ground to introduce and implement a nationwide legislation. The formation of this Act thus underwent high criticism before its implementation.[26]

The Indian Government was concerned about improving its performance at the international level, to achieve financial growth. The Government has been dedicated toward making India a preferable nation for conducting business activities. Programs such as Make in India as well as the Ease of Doing Business Report played a remarkable role in improving the flow of the Indian economy.[27]

The Commercial Courts, Commercial Division and Commercial Appellant Division of High Courts Act of 2015

On the recommendation of the 253rd Report, the Bill was revised and on 29 April it was introduced in the Rajya Sabha as the Bill of 2015.[28] It is to be noted that there existed certain differences between the earlier Bill of 2009 and the 2015 Bill. For instance, the specified value has been lowered to 1 crore from 5 crores, thereby broadening the ambit of commercial cases that could be brought before the Courts in the 2015 Bill.[29] Commercial Courts at the District level and Commercial Appellant Divisions were suggested to be set up in the High Courts and the direct appeal to Supreme Court was removed, which was earlier in practice. On 30 April, the Bill was referred to the Standing Committee for review, although after the Presidential Ordinance, this Bill was presented later in the winter session.[30] It highlighted aspects such as recruitment of the judges in the Commercial Courts, the importance of good infrastructure, and the need to raise the specified value to 2 crores, which was earlier changed to 1 crore.[31] As a result, the efforts that were made to lighten the

[24] AMEEN JAUHAR & VAIDEHI MISRA, *supra* note 21.
[25] PERFORMANCE INDICATORS FOR SUBORDINATE COURTS AND SUGGESTIVE POLICY/PROCEDURAL CHANGES FOR REDUCING CIVIL CASES PENDENCY, 2017, DEPARTMENT OF JUSTICE https://doj.gov.in/sites/default/files/Final%20Report%20IIM%20Kashipur.pdf (last visited Aug. 13, 2019).
[26] AMEEN JAUHAR & VAIDEHI MISRA, *supra* note 21.
[27] Devesh Juvekar, Mayur Shetty, et al., *What does Commercial Courts Act,2015 do?,* LEGALLY INDIA https://www.legallyindia.com/views/entry/commercial-courts-act-2015f. (last visited Aug. 12, 2019).
[28] Prianka Rao, *Bill Summary: The Commercial Courts, Commercial Division and Appellant Division of High Courts Bill, 2015*, PRS LEGISLATIVE RESEARCH, http://www.prsindia.org/sites/default/files/bill_files/Bill_Summary-Commercial_Courts_Bill_0.pdf. (last visited Aug. 13, 2019).
[29] LAW COMM'N OF INDIA, *supra* note 7.
[30] *The Commercial Courts, Commercial Division and Appellant Division of High Courts Ordinance, 2015,* PRS LEGISLATIVE RESEARCH, http://www.prsindia.org/billtrack/the-commercial-courts-commercial-division-and-commercial-appellate-division-of-high-courts-ordinance-2015-4041 (last visited Aug. 14, 2019).
[31] *Id*.

work of the courts, in reality, seemed to remain only on paper. The Bill of 2015 was passed in December of the same year and came into effect on the first day of 2016.[32]

The Commercial Courts, Commercial Divisions and Commercial Appellant Division of High Courts (Amendment) Act, 2018

It must be noted that the effectiveness of the judicial system plays a primary role in the proper enforcement of commercial contracts. It has been observed that almost 1420 days are taken to settle commercial disputes under the Indian legal system.[33] Due to the existence of this time-consuming process, Indian courts have a massive amount of pending cases. The litigation procedures are complex in reality because of which the process of resolution becomes time-consuming. The figure shows that in 2013 there were 32,656 civil cases which were pending in many High Courts and unfortunately among them, 52 percent of cases belonged to commercial disputes.[34] As earlier stated by the authors, with the active participation of expert bodies in the of 78th and 188th Report of the Law Commission, it seems that there should be a fast track process to settle the commercial matters in India. It is evident that high-value commercial matters are at stake and there exists an obligation to dispose of these matters within a reasonable period. The economy and participation of the investors are influenced by these circumstances as a high value is involved.[35] The 253rd Report encouraged the creation of an independent mechanism that is helpful in the speedy disposal of commercial disputes.[36]

The Act of 2015 emphasized the importance of establishing Commercial Courts and Divisions. The District level, Commercial Divisions, and Commercial Appellate Divisions are included under this Act.[37] Currently, there are 247 Commercial Courts in India.[38] Thus, the observations made in the Work Bank Report about the country's ranking have drawn the attention of lawmakers and caused a huge impact on the Indian legal system. This was through the lessening of judicial burden and reduction of the pecuniary jurisdiction of these Courts under the Ordinance of 2018, which later came into existence in the form of the Amendment of 2018.[39]

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[32] AMEEN JAUHAR & VAIDEHI MISRA, *supra* note 21.
[33] EASE OF DOING BUSINESS, 122ND REPORT OF THE DEPARTMENT RELATED STANDING COMMITTEE ON COMMERCE, 2015, RAJYA SABHA, http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Commerce/122.pdf. (last visited Aug. 13, 2019).
[34] LAW COMM'N OF INDIA, *supra* note 7.
[35] *The Commercial Courts, Commercial Division and Appellant Division of High Courts (Amendment) Bill, 2018,* PRS LEGISLATIVE RESEARCH, http://www.prsindia.org/billtrack/commercial-courts-commercial-division-and-commercial-appellate-division-high-courts-0. (last visited Aug. 14, 2019).
[36] LAW COMM'N OF INDIA, *supra* note 7.
[37] The Commercial Courts, Commercial Division and Commercial Appellant Division of High Courts Act, 2015.
[38] *Starred Questions No. 14, Setting up of Commercial Courts in India, Answered on 15 December* 2017, RAJYA SABHA, http://164.100.47.5/qsearch/QResult.aspx. (last visited Aug. 15, 2019).
[39] PRS India, *supra* note 35.

RECENT AMENDMENTS TO COMMERCIAL COURTS ACT, 2015

The amendments have been introduced to expand the scope of Commercial Courts. The Government's prime concern while making changes in the Act of 2015 was to make India a better place for investment, where parties from around the world would show an interest in investing in India. It has been observed, post the 2018 Amendment, that there should be proper implementation of these new laws and subsequent changes need to be brought about to overcome the challenges within the Act. The Act of 2015 can be addressed as the Commercial Courts Act of 2015 to highlight the existence of separate courts that follow different procedures to resolve these disputes.[40]

Widened Pecuniary Jurisdiction

The Amendment has widened the pecuniary jurisdiction of the Commercial Courts by lowering the specified value to 3 Lakhs from the previously specified value of 1 Crore.[41] It is to be noted that by bringing down the amount, the courts have opened their doors to decide commercial disputes. Previously, the Act permitted high stake matters only, but now it comprises mid and small-value disputes as well.[42] With the creation of Commercial Courts and Commercial Appellate Courts, the focus is on understanding the complex nature of commercial transactions. The executive must perform its functions properly to avoid delays in the disposal of a large number of commercial matters.[43]

The Commercial Courts are established at the District level which includes Himachal Pradesh, Bombay, Chennai, Delhi, and where the High Court has ordinary original civil litigation, the State Government, by notification, can mention the pecuniary amount which will be adjudicated at this level.[44] The specified value should be not less than 3 Lakhs and it should cross the pecuniary limit under the District court. The provision states that there are two kinds of jurisdictions under Commercial Courts where the High Court does not make use of its ordinary original civil jurisdiction- where the Commercial Courts are below and are at the District judge level.[45] Under the 2018 Amendment, the Commercial Appellate Courts are established where these courts will address those matters where the High Courts did not have ordinary original civil jurisdiction. With this new change, the appeal would be carried from the Commercial Court which is below the level of the District judge and will lie before this court.[46] It is to be noted that no transfer of suit is now possible on account of counterclaims.[47]

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[40] The Commercial Courts, Commercial Division and Commercial Appellant Division of High Courts (Amendment) Act, 2018, §1(1).
[41] *Id.* §2.
[42] TRILEGAL, *supra* note 8.
[43] *Id.*
[44] The Commercial Courts, Commercial Division and Commercial Appellant Division of High Courts (Amendment) Act, 2018, §3.
[45] Ashish Kabra & Mohamaad Kamran, *Amendments to the Commercial Courts Act*, BAR & BENCH (May 15, 2018), https://barandbench.com/amendments-commercial-courts-act/.
[46] The Commercial Courts Act, 2015, §3A.
[47] *Id.*

Pre-Institution Mediation

A new Chapter has been inserted in the Act which introduced the Pre-Institution Mediation process in those cases where no urgent interim relief is contemplated. The parties will be provided an opportunity to resolve their commercial dispute outside the court with the help of authorities, under the direction of the Central Government, formed under the Legal Services Authorities Act, 1987. This process has to be completed within 3 months from the day the plaintiff makes this application. Although this tenure can be extended to 2 months after gaining the consent of the parties on this aspect, it will not be considered under the Limitation Act, 1963. This is a huge step made under the Act to gain the confidence of investors in the Indian legal system while resolving commercial disputes and reducing the judicial backlog.[48] In a situation where the parties come to a settlement, it will be signed by the mediator as well as the parties and will have equal status as that of an arbitral award as per Section 30(4) of the Arbitration Act of 1996.[49] Importantly, now the Central Government has the power to make laws and procedures meant governing the Pre-Institution Mediation.[50] The Central Government would make rules in any other matters such as the appointment of Commercial Court's judges and the modification and annulment of any rule would be done with the approval of both the Houses.[51]

Appeal

An appeal can be filed against the order or judgment of the Commercial Court and it would lie before the Commercial Appellate Court.[52] At the level of the District judge, any appeal from Commercial Courts will lie before the Commercial Appellate Division.[53] The appeal can be made within 60 days from the date of the order or judgment delivered by the Commercial Court.

Section 17 and Statistical Data Rules, 2018

The Act of 2015 has provided that Commercial Courts and Divisions, as well as Commercial Appellate Division, have to maintain the collection and disclosure of its data, and such information has to be updated on their respective websites.[54] Recently, it has been supplemented by the new rules which are known as the Statistic Data Rules, 2018. It is now mandatory for the High Courts to maintain as well as publish the data confined to several suits, applications, and appeals filed.[55]

It is essential that, on the 10th date of each month, the data concerning such aspects should be published on the concerned High Court's website. It is a unique way to encourage the practice of transparency and reduce corruption by encouraging them to disclose their

[48] *Id.* §12 A.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*, at §13(1).
[53] *Id.*, at §13(1A).
[54] *Id.*, at §17.
[55] AMEEN JAUHAR & VAIDEHI MISRA, *supra* note 21.

performance level through statistical data.[56] It has been observed that most of the High Courts have not made any disclosure; although only 8 High Courts- Bombay, Delhi, Chhattisgarh, Guwahati, Himachal Pradesh, Meghalaya, Orissa, and Punjab & Haryana- have provided their partial data on their respective websites. The High Courts are required to maintain the records as per the direction of the Statistical Data Rules. Unfortunately, till now, only the Delhi and Himachal Pradesh High Courts have even maintained data about the average number of the days which were taken by the Court for disposing of the cases and the data is confined to a few months only. Due to inactive participation by the High Courts, it has become difficult for lawmakers and researchers to understand the effectiveness of this Act in reality.[57]

Statement of Truth.

To give prospective effect to these amendments, the authority of the judicial forum should not be disturbed which is, at present, adjudicating these disputes according to the provisions of this Act.[58] The Act has inserted Appendix I, which is a template of the Statement of Truth, where the party assures that all the documents confined to their commercial dispute are correctly disclosed and the statements are made by the party after legal consultation.[59]

CHALLENGES: COMMERCIAL COURTS ACT OF 2015

The authors have discussed how the Commercial Courts and Commercial Divisions are functioning at present and have attempted to suggest solutions for their existing problems.

Higher Pendency of Cases

It seems that post the Amendment, the Commercial Courts in Delhi have 1608 cases on average, however, in Bombay, only 157 cases were reported. The High Court of Punjab & Haryana has 146 cases, whereas Karnataka and Gujarat have 59 and 51 cases respectively. On the other hand, the High Court of Guwahati and Orissa had either less than 1 or an average of 1 commercial dispute.[60]

Impact of Lower Pecuniary Jurisdiction

Since the 2018 Amendment, it has been observed that there has been a rise in the figures of reported commercial cases. It is due to the reduction of the pecuniary jurisdiction of the Courts to 3 Lakhs. The data shows that there has been a surge in the number of reported cases to 121, from 101, from July to August of 2018 in the Punjab & Haryana High Court.[61] However, after the enactment of the Amendment, the number of cases fell from 354 to 136, from August to September of 2018 at the Commercial Division level in Bombay and from 305 to 212 in Delhi. This depicts that there has not been much change after the Amendment. The data shows that between April 2017 and October 2018, the Commercial Courts have disposed of few cases and the number of pending cases has increased. However, the

[56] *Id.*
[57] AMEEN JAUHAR & VAIDEHI MISRA, *supra* note 21.
[58] Press Information Bureau, *supra* note 3.
[59] The Commercial Courts Act, 2015, Sched., Order.VI rule 15A, Order XI rule 3.
[60] AMEEN JAUHAR & VAIDEHI MISRA, *supra* note 21.
[61] *Id.*

Amendment was only introduced during that time, which is why it would not be fair or accurate to judge the credibility of this Amendment on this basis. We would be able to understand the impact of the changes brought under the Act only gradually, as more time passes.[62]

Increase in the workload

The data illustrates that 3739 cases were pending at the Commercial Division of Delhi in April 2018, and the numbers have increased to 3762 in May of the same year. It seems that the pendency rate in many states has shot up.[63] The judges must be well trained when they are head the Commercial Courts and Divisions under Section 20. There has been a jump in the number of commercial cases and the responsibility falls on the existing judges to consider these cases, as a result, they find themselves overburdened with pending cases.[64]

Learning from the legal systems of the United Kingdom and the United States

It was earlier assumed in the United Kingdom and the United States that the parties in India would suffer more as the Indian court system was not sufficient or efficient for the increasing commercial disputes in the country. It was further believed that due to the higher pendency of cases, the parties would not be able to claim their rights and duties in a country like India. A need was felt to change such a mindset of the authorities during that time, because of which the Act was introduced in the country. The Commercial Division was set up in some High Courts during that time to deal with commercial disputes.[65] At present, we can agree that these Courts deal with cases of high pecuniary value and, in many nations, are manned by experienced judges, and their procedures are accepted as they facilitate the speedy resolution of disputes.[66]

CONCLUSION

Nowadays, commercial matters are heard by the same set of judges in many states despite the 2018 Amendment. There is a need to appoint more trained judges to deal with commercial cases in the coming future to have speedy disposal and maintain consistency. Recently, the Delhi Cabinet has allowed the establishment of 22 Commercial Courts. Improving the standards of Delhi's Courts would help make the city a more business-friendly capital.[67]

India's ranking in the Ease of Doing Business has climbed and reached to the 77th rank in 2019, which will favor foreign direct investment. In order to maintain such standards, there is a need to have a better court system.[68] Dr. Oetker has stated that it is not an easy task to

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] LAW COMM'N OF INDIA, *supra* note 12.
[66] *Id.*
[67] Alok K. N. Mishra, *Cabinet nod for 22 Commercial Courts, 18 Fast-Track Courts in Delhi*, TIMES OF INDIA (June 26, 2019, 8: 40 PM), https://timesofindia.indiatimes.com/city/delhi/cabinet-nod-for-22-commercial-courts-18-fast-track-courts-in-delhi/articleshow/70399931.cms.
[68] Maijo Abraham, *Not that Easy*, THE WEEK (Aug. 18, 2019, 2:35 PM), https://www.theweek.in/theweek/cover/2019/08/17/not-that-easy.html.

do business in India despite having a change in its ranking in this Report.[69] In light of this view, we can say that with effective courts, the investor's interest will grow and it will be beneficial in diminishing the risks involved in investing in India. With the introduction of pre-institution mediation under the 2018 Amendment, settling disputes between the parties outside the Court has become easier. It encourages the practice of confidentiality and motivates the parties to negotiate in good faith.[70] There is a further need for a proper electronic case management system and improved court automation. By maintaining electronic records, the system can deliver speedier trials and minimize corruption. There is a need to maintain budgetary support to set new Commercial Courts. Such practice encourages fast track procedure in suits and utilizes ADR methods to settle these matters. Investors would freely invest without any fear of losing their capital.[71] As a result, enforcing commercial contracts would not take more time. However, there is a need to focus on the issues related to the Judiciary, including a reduction in the pendency of cases for making the system more transparent in the coming years.

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[69] Ratna Bhushan, *Doing Business in India is Not Easy Yet: Dr Oetkar executive*, THE ECONOMIC TIMES (Aug. 15, 2019, 8:38 PM), https://economictimes.indiatimes.com/industry/cons-products/food/doing-business-in-india-not-easy-yet-dr-oetker-executive/articleshow/70685614.cms.

[70] Aparana Gaur & Aarushi Jain, *India: Pre-Institution Mediation under the Indian Commercial Courts Act: A Strategic Advantage*, MONDAQ (May 27, 2019, 5: 15 PM), http://www.mondaq.com/india/x/808790/Arbitration+Dispute+Resolution/PreInstitution+Mediation+Under+The+Indian+Commercial+Courts+Act+A+Strategic+Advantage.

[71] LAW COMM'N OF INDIA, *supra* note 12.

About the Centre for Environmental Law, Education, Research and Advocacy

Centre for Environmental Law, Education, Research and Advocacy (CEERA) established in 1997 focuses primarily on research, policy advocacy and training in the field of environmental law. Effectively networking among all stakeholders, undertaking training and capacity development exercises, providing consultancy services, and building an environmental law community are few of our main objectives. CEERA is the first Research Centre in India to has been granted a World Bank Project and thereafter has been a steady choice for the Ministry of Environment, Forest and Climate Change, Government of India. CEERA has been entrusted with several research projects and workshops to impart training to Government Officers, Academicians, Industry personnel etc.

About the Project

CEERA under the aegis of the Ministry of Law and Justice conducted a two-year research project on "Strengthening Legal Provisions for the Enforcement of Contracts: Reassessing the Quality and Efficiency of Dispute Resolution of Commercial Matters in India". The project was aimed at exploring the possibility of reform in various avenues of contractual enforcement. Under the project thorough review of the existing laws on contractual enforcement in India was undertaken with the view to 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 goal of this project was to look into legal reforms to improve the ease of doing business ranking of India and making contracting environment in India suitable to the needs and requirements of business and commerce in a globalized economy.

Contact Us

Websites: www.nlsenlaw.org | www.nlspub.ac.in | www.nlsabs.com
e-mail: ceera@nls.ac.in

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