NOTES AND COMMENTS

BUSINESS COURTS AND PRIVATE TRIBUNALS: IS INDIA READY FOR GLOBAL COMMERCE?

Abstract

Indian economy began to blossom exploiting its full potential only after the 1991 liberalisation. We have travelled quite far since then. In the past three decades, India has undergone a huge transformation. Our trade and commerce has expanded immensely beyond Indian shores. Foreign investors began to invest in Indian projects and partner with State agencies for infrastructural and other developments. In order to compliment this, the legal regime of India also underwent a sharp evolution. By adopting UNCITRAL Model Laws for settling legal disputes through arbitration, we modernised our municipal law and repealed pre-independent legislation. However, given India's sharp rising global trade and commerce, we needed more sophisticated normative legal order. This is essential to protect the commercial interests of foreign investors who would choose India as their business partner and Indian land to channelize their economic strength. The 'Make in India' call of the present day Union Government gave India that very opportunity to create a pitch of new legal order which is both investor friendly yet rooted in local culture of amicable dispute resolution. Commercial Courts Act and amended provisions of the Arbitration law are reflections of India's that very objective. With this, India hopefully will emerge as vital global player of international commerce, promising effective enforcement of contracts in the homeland and being ready to be an investors' paradise. Hence, in order to discuss and assess the vitality of the legal pitch prepared by commercial courts and arbitration law, this paper is divided in five parts namely- Introduction; Business Courts & Benches: Establishment and Jurisdiction; Vitality of Commercial Courts; State of the Art - Arbitration Regime and Conclusion.

I INTRODUCTION

What ails India's ambition of leading the global commerce? What repels foreign investors from investing in India? Has anything changed on the ground in the Indian legal system to ease the tensions raised by these annoying questions? Perhaps it is the right time to ask these questions. This is because India has been consistently doing well in terms of scaling up internationally in its wider acceptability as the investor friendly destination. The 'Doing Business 2017'[1] and 'Doing Business 2018'[2] reports

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1 World Bank, Doing Business 2017: Equal Opportunity for All *available at* <http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Chapters/DB17-Mini-Book.pdf?la=en>. (last visted on October 25, 2017)

2 World Bank, Doing Business 2018: Reforming to Create Jobs *available at* <http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf >.(last visted on December 10, 2017).

are testimony to the progress India has made in this regard and these reports provide us clear markers that how on various parameters, India has done well by investing in appropriate measures. These measures do not relate exclusively to easing tax payments and enabling easy clearance of projects but also include strengthening of legal institutions for speedy and effective disposal of disputes.

The Doing Business Reports of 2017 and 2018 provide sufficient evidence of concrete steps taken by the Indian government towards reforming Indian policy framework to attract foreign investors and strengthen the trade ties with partnering countries across wide spectrum of commerce. According to the Doing Business Report of 2018, some of the key areas where India has made tremendous progress include, grant of exemptions to secured creditors from automatic stay in insolvency proceedings[3]; simplification of tax compliance processes or decreased number of tax filings or payments towards making it easier to pay taxes[4]. Similarly, India has registered enhanced performance in other areas like strengthening minority investor protections, making it easier to trade across borders, making it easier to resolve insolvency, reforming labour regulation regulating worker protection and social benefits, making it easier to start business, making it easier to deal with construction permits[5]. Similarly, the Doing Business Report of 2017 reflect various measures taken by India to provide necessary boost to the foreign investors and making them feel secure to start and operate business in India.

However, mere development of infrastructure, ease of payment of taxes, promotion of efficient bankruptcy regime is not sufficient to build confidence of a foreign investor. An independent, speedy and effective legal system which includes improved judicial mechanism is also essential. This is primarily because with the rise in trade and commerce and with greater number of contracts of various kinds being entered into between Indian and foreign parties, disputes are bound to arise. Such grand expansion of commerce cannot be immune to non-compliance of contractual terms in one form or another. In such circumstances, a robust legal system becomes most critical and necessary need for any State to win confidence of foreign parties and its judicial system shall be seen to be independent of State's influence, cost effective, procedurally hassle free and speedy in disposal. This is the primary reference

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3 *Supra* note 2 at 36.

4 *Id.* at 37. India introduced the Income Computation and Disclosure Standards (ICDS) in 2016 to standardize the methods of computing taxable income and other tax accounting standards. Data gathering became more automated in India due to the use of modern enterprise resource planning (ERP) software.

5 *Id.* at 35-38.

point which would be explored in this paper.

So to say, in the course of several measures taken to improve Indian ranking in Doing Business report published by the World Bank, in last three years, India also worked towards strengthening the legal institutions for effective enforcement of contracts. The Doing Business Report 2017 provides a clear evidence of it. India was the only country other than Niger which introduced and expanded specialised commercial court.[6] This is followed by another initiative recorded in Doing Business Report 2018, that is, introduction or expansion of the electronic case management system[7]. Both the initiatives taken in 2017 and 2018 had an underlying objective of making it easier to enforce contracts and providing efficiency in resolving a commerce dispute. Time and cost involved in resolving a commercial dispute along with the quality of judicial process is one of the cornerstones of a vibrant and investor friendly destination, hence, it becomes relevant to explore the progress made by India so far in strengthening legal mechanism for ensuring speedy and cost-effective settlement of commercial disputes.

Exploration of India's investment in legal system is, therefore, most crucial because if the legally binding contracts remain toothless tiger on paper and cannot be effectively enforced, then all the above measures taken to attract foreign investors would become meaningless and infructuous. In this backdrop, this paper will examine the establishment of Commercial Courts in India along with an add-on feature of amended arbitration law, which is equally vital and finds its relevance also in the Doing Business report under the title of 'Alternative Dispute Resolution Index'[8].

II BUSINESS COURTS & BENCHES: ESTABLISHMENT AND JURISDICTION

In a progressive move, couple of years ago two leading legislative decisions infused new energy in the legal institutions towards making the settlement of high value commercial claims speedy and effective. This was done by enactment of 'The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015[9] and 'The Arbitration and Conciliation (Amendment) Act, 2015'.[10] Two years have passed since then and such initiatives have also been recorded

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6 Both India and Niger have established dedicated venues to resolve commercial disputes through 'Commercial Courts'. See, *Supra* note 1 at 26, 37 & 43.

7 *Supra* note 2 at 38.

8 *Supra* note 2 at 110 & *Supra* note 1 at 155.

9 Hereinafter referred to 'Commercial Courts Act'.

as creditworthy even by the Doing Business Reports in past two years. Hence, it becomes imperative to evaluate these measures. Accordingly, this section will deal only with the Commercial Courts and the next section will evaluate the amended arbitration law *vis-à-vis* providing ease of resolving commercial disputes.

The Commercial Courts Act was brought well in time to foster a new lease of confidence in the business community who want to invest in India by exploiting economies of scale. Before this, India had already witnessed serious repercussions of judicial delays and uncertainty in deciding on the arbitration petitions. This can be recalled from the history of *White Industries Australia Ltd.* v. *Union of India*[11]. The conceptualisation of commercial courts can thus be read as a calculated move to facilitate timely disposal of commercial disputes including arbitration petitions and avoid any embarrassment like White Industries case in future. Hence, the newly enacted legislation seems to be well thought out and is also based on international experiences. This is evident from the fact that the Law Commission of India conducted a detailed study of the similar kind of commercial courts established and working in other parts of the world.[12] For instance, the Law Commission studied about the Queens Bench Division of the High Court in England which was established as a

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10 Both the legislations were enacted on December 31, 2015 and notified by the Gazette of India. These acts repealed- implementing 'The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015 and The Arbitration and Conciliation (Amendment) Ordinance, 2015, both of which were passed by the Indian Government on October 23, 2015.

11 Final Arbitration Award, 'In the Matter of UNCITRAL Arbitration in Singapore under the Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments' (London, November 30, 2011) *available at* <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>. (last visited on 30th Dec. 2017).

12 The Commercial Courts Act is based on 120th Law Commission of India, 188th Report on Proposale for Constituting of Hi-Tech Fast Track Commercial Divisions in High Courts (2003).

13 The Court of Chancery in Delaware is one of the oldest, best known and most respected for having specialised to handle complex business litigation. *Delaware's case* is a peculiar one. It did not make efforts to specialise in resolving commercial matters. Instead, its traditional equitable jurisdiction which it had enjoyed for the last 200 years laid the foundation for commercial courts. Also, the favourable State laws attracted many companies to this State. Further, wide use of the principles of equity to many disputes in which the companies were involved by the Court of Chancery in Delaware made it a natural breeder of specialised courts. Officially, it was 1994 that the special court to handle business litigation was created by the Delaware judiciary. See, Ad Hoc Committee on Business Courts, "Business Courts: Towards A More Efficient Judiciary" 52 (3) *The Business Lawyer* 956 (1997) *available at* <http://www.jstor.org/stable/40687733>. (last visted on November 30th, 2017)

14 In New York the foundation for the establishment of commercial courts was laid in January 1993. During this time, the New York County established four specialised 'Commercial Courts' on an experimental basis. Incidentally, after the 'Commercial Courts' movement in Delaware,

'Commercial Court' since more than a century ago. The Law Commission also studied the specific commercial courts of the Delaware[13], New York[14], Philadelphia[15] and Maryland[16] in the United States.[17] The commercial courts of France[18], Ireland[19], Singapore[20], Scotland[21], Philippines[22] and Poland[23] were also studied. Furthermore,

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New York was the second State to follow for faster settlement of business disputes by specialised judges. *Id.* at 957.

15 'Commerce Court' was established in the State of Philadelphia quite recently as compared to the States of Delaware and New York. This is known in the name of 'The Philadelphia Commerce Court Case Management Program, popularly known as - Commerce Court. This court came into existence in January 2000 to settle commercial and business to business disputes.

16 In the State of Maryland, USA, such specialised are called the 'Business and Technology Court. According to the Maryland Business and Technology Court Task Force, such commercial courts, would function within Maryland's Circuit Courts to adjudicate business and technology disputes.

17 Eight other States in the US have established business courts and have been made operational. These include - Illinois, Massachusetts, Wisconsin, Nevada, New Jersey, North Caroline, Pennsylvania and Virginia. See, *Supra* note 12.

18 Yves Merlat, 'Commercial Courts of Justice in France' *available at* < https://www.iiiglobal.org/sites/default/files/media/2_Didier_Commercial.PDF>. (last visited on Januart 15, 2018). See also, Brigitte Daille-Duclos, 'Civil and Commercial Proceedings in France' *available at* <http://www.fieldfisher.com/publications/2016/07/civil-and-commercial-proceedings-in-france#sthash.jaxL7SgF.dpbs>; (last visited on February 18, 2018) *Supra* note 12 at 42-44.

19 Commercial Courts were established as division of the High Courts in Ireland since January 2004. See generally, McFann Fitzgerald, 'Ireland's Commercial Court: A Decade of Innovation in Commercial Litigation' *available at* <http://www.mccannfitzgerald.com/McfgFiles/knowledge/6374-Ireland%E2%80%99s%20Commercial%20Court%20-%20A%20Decade%20of%20 Innovation%20in%20Commercial%20Litigation.pdf>.; see also *Supra* note 12 at 44-49.

20 When the Law Commission of India gave its first report on the subject of 'Commercial Courts' in the Report no. 188 of December 2003, there was merely a proposal to introduce specialised commercial courts in Singapore. The proposed model and recommendations were studied by the Law Commission of India. More than a decade later in January 2015, Singapore launched its Singapore International Commercial Court (SICC). SICC is a division of the Singapore High Court. This is not merely a commercial court for domestic disputes but truly transnational in character and approach. SICC offers settlement of commercial disputes even by the parties whose cause of action might not arisen in Singapore or Singapore's law may not have direct application. See, Overview of SICC, Singapore International Commercial Court <http://www.sicc.gov.sg/About.aspx?id=22>; (last visited on December 14, 2017) also see *Supra* note 12 at 49-50.

21 *Supra* note 12 at 50-53.

22 *Id.* at 53-55.

23 *Id.* at 57.

the Law Commission in its188th Report laid down a firm foundation for India to follow the footsteps of many other countries like Pakistan, United Arab Emirates, Russia, Romania, Ukraine, Kenya and Ghana[24], all of whom have been ahead of us in facilitating faster and effective settlement of high value claims of the foreign as well as domestic companies. Therefore, the global movement of shaping business courts as exclusive venues to settle commercial high value disputes at a relatively faster rate than the regular civil disputes convinced the Indian Government to establish commercial courts across the country, through the Commercial Courts Act, 2015. However, whether the Indian version of commercial courts is compatible with the need of the business disputes must be ascertained by a closer section wise scrutiny of the law.

Range of Commercial Disputes

Generally speaking business disputes or commercial disputes can have wide connotation. But no court can function and exercise its jurisdiction on any subject matter unless the statute specifically empowers the court to decide claims on such particular subject matter. Resultantly, in order to make commercial courts effective, the Commercial Courts Act in India provides for a comprehensive definition of the term 'commercial disputes'.[25] The definition is virtually exhaustive though technically only illustrative in nature. Despite as many as twenty one kinds of disputes having been identified under this category[26], the law provides scope for the Central Government to notify any other disputes under this definition.[27]

Specialised Business Courts and Specialist Judges

Today the legal profession is becoming increasingly specialised in operation. We know them as Human Rights Lawyers, Tax Lawyers, Constitutional Law expert lawyers, Intellectual Property Rights lawyers and so forth. Corporate and Commercial Law lawyers are just another specialised fleet in this league. Likewise, and based on the need as discussed above, even judiciary is positively responding and evolving from a generalist courts to specialised courts with regard to particular category of disputes.[28] This can be seen from the constitution of commercial courts, commercial divisions and commercial appellate divisions in India. Pursuant to the Commercial Courts Act

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24 *Supra* note 12 at 55-63.

25 The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 s. 2 (1) (c).

26 *Id.* s. 2 (1) (c) (i)-(xxi).

27 *Id.* s. 2 (1) (c) (xxii).

28 R. Franklin Balotti and Roland E. Brandel, "Business Bench: Are Special Courts the Future?" 4 (3) *Business Law Today* 24-29 (1995).

and the repealed Ordinance concerning the same, State Government has been entrusted with a duty that by notification it shall constitute 'Commercial Courts' at District level.[29] In order to further ease the working of the specialised business courts, the law also provides that such courts shall be constituted in the States where the High Courts do not enjoy the ordinary original civil jurisdiction.[30] On the other hand, in the States which have ordinary original civil jurisdiction, the law stipulates constitution of 'Commercial Division' in the High Courts.[31] The Chief Justice of the High Court is empowered in this regard to nominate one or more benches as 'Commercial Division' and each bench shall be presided over by a single judge.[32] As on date, five High Courts in the country enjoy the ordinary original civil jurisdiction. These are namely- the High Court of Judicature at Bombay, the High Court of Judicature at Calcutta, the Delhi High Court, the Himachal Pradesh High Court and the High Court of Judicature at Madras.[33]

It is well understood that mere constitution of the specialised business courts and the benches would not suffice. Because till the generalist judges would continue to man these courts or the benches, effective disposal of complex commercial cases cannot be expected. Hence, much like the case of lawyers wherein an arbitration law expert is above average than his colleagues who may be expert lawyers of tax law or environment law, etc. even judges who would preside over the commercial court need to be specially skilled in that regard.[34] This will not only raise the potential of the commercial courts to perform efficiently but will also enhance the chances of more accuracy in application of relevant legal doctrine and principles; greater degree of precision in decision making, and therefore overall satisfaction of the clients who would know that the presiding judge possesses necessary knowledge, skills and

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29 The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 s 3 (1).

30 *Id.* proviso.

31 *Id.* S. 4 (1)

32 *Ibid.*

33 Law Commission of India, 253th Report on 'Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015' (January 2015) 11.

34 This does not mean that the judges who are nominated for the commercial courts or commercial division or the commercial appellate division would be superior to the other judges of the courts. The only differential factor to be considered in such case is that judges who have relevant experience of appreciating the complex commercial disputes either by way of their practice in that field of law or having decided similar nature of cases over the years shall be entrusted with a duty to preside over such special business benches.

35 *Supra* note 13.

experience to settle high value claims.[35] In accordance with such an approach, the Indian law, provides that at the district level, the judges from the cadre of Higher Judicial Service having requisite experience of settling commercial disputes shall be appointed to a the Judge of the Commercial Court.[36] Similarly, at the High Court level, judges who would enjoy both knowledge and skills to handle commercial disputes shall be nominated to the Commercial Division.[37] Likewise, the law provides that experienced High Court judges shall only be nominated to the Commercial Appellate Division, which shall be a division bench.[38] As discussed, the specialist characteristics of judges are both essential as well as desirable for being appointed to the Commercial Court or Commercial Division or Commercial Appellate Division. To achieve better results in this regard, the Law Commission of India recommended that such judges shall be trained for a period of six months.[39] It was further suggested that special program and syllabus could be developed for such training[40]. The actual print of the enacted law appears to have does merely a lip service to the Law Commission's recommendation and does not provide a detailed training mechanism. Instead, the leaves a wide scope of discretion for both the State Government and the High Courts to decide about the training facilities.[41]

Claims of Specified Value- Jurisdiction Compatibility

With regard to jurisdiction, the law empowers the Commercial Courts to try all suits and applications concerning commercial disputes of a 'Specified Value'. Further, the law clearly provides that 'Specified Value' would 'mean the value of the subject-matter' which in any case can be higher but not less than 'One Crore Rupees'. For

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36 *Supra* note 29 s. 3 (4).

37 *Id.* at 4 (2).

38 *Id.* at 5 (2).

39 *Supra* note 33 at 41-44.

40 The Law Commission also recommended that such training could be conducted either by the National Judicial Academy or the State Judicial Academies as would be feasible for the judges to attend. However, the Law Commission's recommendation did not stress upon making such training mandatory for the judges of the High Court who would be appointed to the Commercial Division and Commercial Appellate Division. Rather, the Law Commission indicated that should the High Court judges see value in such training towards continuing legal education, they may choose to avail it. The enacted law on the other side clearly brought all three categories of judges (under the Commercial Courts Act) in the ambit of training and continuous education. But the provision seems to be merely a suggestive one without any mandate for compulsory compliance by both the State Government and the High Court.

41 *Supra* note 29 s. 20.

42 *Supra* note 10.

instance, The Delhi High Court (Amendment) Act 2015 enhanced the pecuniary jurisdiction of the District Courts in Delhi to civil suits of value up to 'Two Crore Rupees' and in case of the Delhi High Court, it is now empowered to try civil suits of the value exceeding 'Two Crore Rupees'.[42] However, in case of commercial disputes, this pecuniary jurisdiction of the Delhi High Court[43] would get automatically bypassed by the Commercial Courts Act which stipulates that Commercial Court, Commercial Division and Commercial Appellate Division can hear and try civil suits of the value Rupees One Crore and above.

III VITALITY OF COMMERCIAL COURTS

Commercial Courts in theory is certainly a progressive concept. The established normative order in other parts of the world testifies this also in implementation. However, does India have vibrant mechanism for the effective implementation of such business courts can be ascertained only by the critical appraisal of the law per se? This section of the paper finds out answer to such apprehension about the working of the commercial courts. The vitality of the Indian Commercial Courts can therefore be seen from the legal and procedural compliances which are inbuilt in the law, as examined below.

Simplified Procedure Grid

In order to try any suit concerning a commercial dispute of a 'specified value' as determined by the Commercial Courts Act, this law further provides that the provisions of Civil Procedure Code, 1908[44] shall apply.[45] To bring greater clarity and efficiency in the functioning of the Commercial Courts, this law has customised the provisions of CPC for their specific application in the trial of a suit concerning a commercial dispute of a 'specified value'.[46] This must be read and understood as the intention of the legislature to simplify the procedure grid of CPC so that the

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43 The Delhi High Court is one of the five High Courts which enjoy ordinary original jurisdiction. Hence, despite its pecuniary jurisdiction of above 'Rupees Two Crore', it can hear and try all civil suits of value 'Rupees One Crore' and above under the Commercial Courts Act.

44 Hereinafter referred to as 'CPC'.

45 Chapter VI of the Commercial Court Act amends the provisions of CPC for their specific application to the commercial disputes of a specified value.

46 *Supra* note 25; s. 16 (2).

47 Under normal circumstances, delays are very usual in civil cases tried in the civil courts. These are mostly due to the complex network of Civil Procedure Code and the dilatory tactics used by the lawyers and the parties by way of excessive delay in filing the relevant application and documents. This often frustrates the cause of action and certainly prolongs the proceedings in the courts. Both the judicial time and the parties interest therefore gets jeopardised due to such defeating practices and culture.

commercial disputes do not undergo the same fate as regular civil suits in the trial courts.[47] Hence, the Schedule in the Commercial Courts amends 'Order XI' of CPC entitled – 'Disclosure, Discovery and Inspection of Documents in Suits before the Commercial Division of a High Court or a Commercial Court'. To ease the process of disclosure and discovery of documents, this amendment casts an obligation on both the plaintiff and the defendant to separately file proper list of relevant documents along with their plaint and written statement respectively.[48] Such advance filing of relevant documents would reduce the fresh filing of new documents at a later stage thereby will save court's time and prevent from unnecessary delays.

The aforesaid said 'Order XI' of CPC is further amended to ensure timely completion of the inspection of the documents by both the parties within thirty days from the date of filing of the written statement or written statement to the counter-claim, whichever is later.[49] An extension can be granted by the court but only for next thirty days.[50] Admission and denial of documents is another crucial stage in the civil suit. This usually leads to frequent delays for parties' not submitting statements to that effect within a reasonable time. In order to ensure that this stage of the civil suit does not stall the proceedings, the amended provision of CPC provides that in the usual circumstances, both the parties should file statement of admission and denials within fifteen days of the completion of inspection.[51] The legislature has also been sensitive to the digital era. Resultantly, the amendment categorically provides for admissibility of 'Electronic Records' with detailed prescription for compliance by the parties to the suit.[52]

Case Management Techniques

Undeniably, disciplined litigation is one of the cornerstones of 'Commercial Courts Act'. It is entrenched in the entire scheme of 'Commercial Courts'. It was therefore most imperative for the legislature to provide a detailed structure for managing the proceedings of the case. Simply put, the life cycle of a commercial dispute case needs to be carefully guarded against any attempt to sabotage the timely disposal of the case. Significance of 'Case Management Hearing'[53] was categorically

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48 *Supra* note 25; Sch. Or. XI, R. 1.

49 *Supra* note 25; Sch, Or. XI, R. 3.

50 *Ibid.*

51 *Supra* note 25; Sch. Or. XI, R. 4.

52 *Supra* note 25; Sch. Or. XI, R. 6.

53 Hereinafter referred to as 'CMH'.

54 (2011) 8 SCC 249.

observed by the Supreme Court of India, in the case of – '*Rameshwari Devi* v. *Nirmala Devi*'.[54] In this case the Apex Court was had an occasion to critically examine the vexed issue of delay in civil litigation. While recommending several measures to drastically improve the collapsing system, the Supreme Court observed that-

> *At the time of filing of 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.*[55]

Pursuant to this guideline of the Supreme Court, the Law Commission of India in its 253rd Report made specific recommendation to incorporate the 'Case Management Hearing' technique in the Commercial Courts Act.[56] Accordingly, the Schedule, in the said law, empowers the Judge of the Commercial Court, Commercial Division and the Commercial Appellate Division to pass necessary orders drawing timelines for the disciplined completion of the suit. These timelines are called 'Case Management Hearing'. The Schedule to the Commercial Courts Act, therefore, provides for the Court to hold first CMH within four weeks once the affidavit of admission or denial of documents is filed by the parties. The court is empowered to fix timelines for various stages of the proceedings such as- when issues are to be framed, examination of the listing witnesses; recording of evidence, filing of written arguments and oral argument, etc.[57] This is not just a decorative provision. Instead, carries measures wherein the Court can impose cost on the parties and may also foreclose the non-complaint party's right to file certain documents including affidavits, written submissions, etc., in the event of failure to comply with orders of the Court concerning CMH.[58]

Time-effective Schedule

In the beginning of this paper, a fundamental premise was laid down that the functioning of the Indian justice delivery has been antithetical to the investor's vision of business prospects in India. Alike, CMH, even timeliness is the bedrock of the Commercial Courts scheme. To make this legal infrastructure full proof, cutting down on virtually all possibilities of delay in proceedings on behalf of the parties

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55 *Rameshwari Devi* v. *Nirmala Devi* (2011) 8 SCC 249 para 52.

56 *Supra* note 33 at 43-45.

57 *Supra* note 25, Sch. Or. XV-A, R. 1-2. See also, *Telefonktiebolaget LM Ericsson* v. *Lava International Ltd.* 2016 SCC OnLine Del 2978 para 63-65.

58 *Id.* at 5 Sch. Or. XV-A, R. 8.

who mat resort to various tricks. The law this time has made attempt to play down dilatory tactics, by installing a timer at every stage of the case. These time-checks operate in the following way. Firstly, the new law provides that beyond a time period of 120 days from the date of service of summons, defendant shall not be allowed to file written statement and would thereafter forfeit his right in that regard. Court would also not allow the written statement afterwards to be taken on record.[59] Secondly, arguments are stipulated to be closed within six months from the date of the first Case Management Hearing.[60] Thirdly, under the scheme of CMH, written arguments shall be submitted within four weeks before the oral arguments begin[61] and revised version of such arguments is permitted to be filed within a period of one week from the date of conclusion of arguments.[62] Fourthly, recording of evidence is prescribed to be done on a day-to-day basis.[63] Fifthly, the judgment has to be pronounced within ninety days after the conclusion of the arguments.[64] Sixthly, an appeal can be made against the decision of the Commercial Court or Commercial Division in the Commercial Appellate Division of the High Court within a period of sixty days after the pronouncement of the judgment.[65] Seventhly, the Commercial Appellate Division is duty bound to dispose of appeal made before it within a period of six months from the filing of such appeal.[66]

These timeline appear to be fairly strict according to the spirit of the law. However, given the Commercial Courts Act is yet in a nascent stage of its implementation, it is difficult to determine whether the specialist judges would use their powers wisely to ensure a strict compliance of such time lines as stipulated by the law.

Costs to Follow Event Regime

As a matter of general practice, courts order payment of costs. In such routine process, often, an unsuccessful party is made to bear the cost of litigation of the

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59 Amendment to Order V, Rule 1, sub-rule (1), second proviso in The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 .

60 *Supra* note 26, Sch. Or. XV-A R. 3.

61 *Id.* at Sch. Or. XVIII R. 2 sub-rule 3A.

62 *Id.* at Sch. Or. XVIII R. 2 sub-rule 3D.

63 *Id.* at Sch. Or. XV-A R. 4.

64 Amendment to Order XX, Rule 1 in The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 sch point 11.

65 *Supra* note 25 s. 13 (1).

66 *Id.* s. 14.

successful party. But there can be instances when a winning party might have actually filed a frivolous claim yet managing success in the civil suit. However, in this case, in an unprecedented approach, the commercial court is empowered to impose costs[67] on the successful party if found that the claim was frivolous one. This approach is to curb the meritless petitions being filed for high value claims in the commercial courts. Now when the law prescribes that a specified value of the subject matter shall not be less than 'rupees one crore', it becomes all the more necessary to have a safety valve in the law to create deterrence against false and vexatious claims or counter claims. This provision is much in tune with the observation of the Supreme Court in the case of Subrata Roy Sahara v Union of India[68] wherein the court suggested that the legislature should consider introducing a provision of – 'Code of Compulsory Costs' so that the litigants who file incorrect, unfair and illegitimate claims can be made liable to pay the costs for suffering of the innocent litigant. This would discourage senseless litigation contested meaninglessly wasting the valuable resource of the judiciary.

Summary Judgment

Speedy settlement of high value commercial claims is also a fundamental principle on which the Commercial Courts scheme is based. In fact, amid the entire discourse of disturbing trends of civil litigation in India, cumbersome procedure is often discovered one of the main reasons for slow pace of disposal of cases. As discussed above path-breaking efforts have been made under this law to put check and balance at every stage of proceeding in the commercial court to prevent unreasonable delay in disposal of a case. Similarly, the issue of complex web of civil procedure code is also appropriately dealt with to ease the proceedings in the court. Since, simplification of legal process is the premise of his legislation, a concept of 'Summary Judgment' has been introduced in CPC by way of an amendment through Commercial Court Act. Under this provision, much like the 'Summary Suit' process followed in regular civil suit, case can be resolved through 'Summary Judgment'. In the new scheme of things, a wide leeway has been provided to the applicant to file an application for summary disposal of the case anytime after the summons are served but essentially before the framing of the issues. Before the hearing for the 'summary judgment' respondent is prescribed to be given at least thirty days to prepare and file

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67 The legislature has enlarged the scope of such costs under the Commercial Courts Act by including- the fees and expenses of the witnesses and also the legal fees incurred by the other party. This is plausibly another way to discourage frivolous claims and plaints because in such cases the winning party (who filed false claim) may have to pay heavy costs to the innocent party.

68 (2014) 8 SCC 470

its reply. This amply reflects that despite condensed forms of trial is envisaged by the law, yet the principles of natural justice have been duly incorporated in keeping with the fundamental objectives of the rule of law. The process of summary judgment appears to be quite helpful and easy but is a careful task to be discharged by a judge. For instance, a judge will have to judiciously weigh the real prospects of success between the plaintiff and the respondent. The court is also empowered to safeguard the cause of action during such process. For example, alike regular civil courts, commercial court and commercial division is also empowered to make conditional order wherein party can also be asked to deposit a sum of money in the court. A fundamental objective is to protect the best interest of both the parties until the claim is finally settled.

Narrow Right to Appeal or Revision

With an intention to plug in all gaps in the law which could provide a leakage to the envisaged disciplined proceedings, the Commercial Court Act has orchestrated a narrow right to appeal or revision. Such as, an interlocutory order by the commercial court is not open to civil revision midway during the course of the main proceedings before the commercial court.[69] Even the contention against the order on the jurisdiction can be taken up only while challenging the final judgement or decree of the commercial court. The scheme of this law further limits the right to appeal. This is done by allowing appeal only against certain orders of a Commercial Court or a Commercial Division. Beyond such prescription appeal is barred even under the Letters Patent of a High Court.[70]

In this backdrop, arguably, the Commercial Courts in India present a very progressive and robust approach in dealing with commercial disputes at a faster pace and effectively. The actually translation of these legal images on the ground will remain the major reality check. But, in the given scope of this paper such reality check is beyond the purview. Also presently reliable data is not easily available about the establishment of the exact number of Commercial Courts in the country including the pendency of cases before them and disposal rate, etc. However, such study is due and much needed to make an actual critical appraisal of the implementation and operation of the law on the ground. Perhaps sometimes a reasonable wait is necessary and yield better results. Hence, given the scope of this paper till the empirical data is available the analysis of the black letter law still makes a meaningful contribution in developing the discourse on 'Business Courts and Benches' in India. The next section

69 *Supra* note 25, s. 8.

70 *Supra* note 25, s. 13 (1) proviso.

of this paper will examine the arbitration landscape in India which has witnessed fresh changes lately in 2015 alongside the creation of 'Commercial Courts'.

IV STATE OF THE ART - ARBITRATION REGIME

Since the majority government took over the central government in 2014 and launched its 'Make in India' campaign opening Indian business corridors for foreign investors, we have seen number of spin-offs in several forms including legislative action, executive order, diplomatic progress, etc. Among them, an enactment of 'The Arbitration and Conciliation (Amendment) Act, 2015' was one of the most bold and well received legislative actions. This law revised the parent law in order to meet international standards. Impartiality of arbitrators is the fundamental challenge globally. The amended law has made categorical provision for identification of an arbitrator's bias and substitution of the arbitrator thereafter. The amended law casts an obligation on the person who is approached to be appointed as an arbitrator to disclose any kind of circumstances which can taint his impartial character as an arbitrator.[71] In furtherance of the same aspect, the law also provides for grounds that may aid in declaring a candidate ineligible as an arbitrator in a particular case.[72] These grounds mainly relate to the person's relationship with the parties or counsel or the subject-matter of the dispute.[73]

Speedy and Timely Arbitration

Timeliness is another crucial world-wide expectation in matters of international commercial arbitration. Meeting global standards, the Indian law has made strict times for declaration of an award as well as final timeline for setting aside or enforcement of an award. Accordingly, the amended law provides a timeline of twelve months for the arbitral tribunal to declare its award once the arbitral tribunal enters upon the reference.[74] It is further provided that in the event of failure to deliver an award within twelve months, the parties are empowered by this law to extend the period for making the award. But law provides a further limitation on this and such extension cannot be given for more than six months.[75] As the amendment

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71 The Fifth Schedule is inserted the in amended Arbitration and Conciliation Act which lays down various grounds to ascertain independence and impartiality of arbitrators. See, The Arbitration and Conciliation (Amendment) Act, 2015 sch fifth and s 12 (1) (b).

72 The Arbitration and Conciliation (Amendment) Act, 2015 s 12 (5)s.

73 *Ibid.* Sch. 7.

74 *Id.* s. 29 (A).

75 *Id.* s. 29 (A) (3).

76 S. 29 (B) (4) prescribes this timeline. As evident this is exactly half the time regular arbitration proceedings would take to declare the award.

also brought an incorporation of the scheme of 'Fast Track Procedure' to be followed by the arbitral tribunal, the law mandates that such fast tracked arbitration shall be completed within a period of six months.[76] The law further tightens the loop of time check on the parties to take arbitration process seriously, whereby, when a party seeks interim measure from the court prior to the commencement of the arbitration, normally arbitral proceedings shall begin within a period of ninety days.[77]

Cost-Effective Arbitration Regime

The arbitrator's fee is often a major concern. This is especially true in India. Such concern was very candidly and appropriately raised by the Supreme Court in the matter of *Union of India* v. *Singh Builders Syndicate*[78]. The Apex Court observed that the problem of unreasonableness in the fees of an arbitrator is often seen in the matter of ad-hoc arbitration. Whereas in the case of institutional arbitration, it is the institutions which regulate the fee structure and the same is not left open to the discretion of an arbitrator. The Supreme Court categorically observed that -

> *It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost*[79]*……..It is unfortunate that delays, high cost, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process.*[80]

In order to rectify the same concern, the legislature has introduced a Schedule of Fees.[81] According to the new legal position, this Schedule of Fees would guide the High Court while appointing an arbitrator and fixing the fees.[82] However, this provision is restrictive in its approach. It is clarified that it shall not be applicable in case of international commercial arbitration and also in case where the parties would resort to institutional arbitration.[83] Given that this proposed fee structure would be applicable only to the ad-hoc arbitrations, an incentive is provided for a sole arbitrator. The law especially provides that in case of sole arbitrator, such arbitrator would be entitled to an additional fee of twenty-five percent on the fee payable according to the Fourth Schedule.[84]

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77 *Id.* s. 9 (2).

78 (2009) 4 SCC 523.

79 *Union of India* v. *Singh Builders Syndicate* (2009) 4 SCC 523 para 23.

80 *Id.* para 24.

81 *Supra* note 72; sch fourth.

82 *Id.* s. 11 (14).

83 *Id.* s. 11 (14) explanation.

84 *Ibid.*

Costs to Follow Event Regime

Much like what we saw in the case of Commercial Courts Act, a new provision has been inserted in the arbitration law in 2015, empowering both the court and the arbitral tribunal to impose costs on the parties in various circumstances. The intention of the legislature is same as in the case of Commercial Courts Act to create deterrence mechanism against filing of frivolous arbitration case and prolonging it by hiring an inexpensive lawyer who may seek series of adjournments and the subject matter may remain pending. In order to streamline the arbitration practice in India, this surely must be seen as a very innovative step of the legislature.

V CONCLUSION

We have travelled a long way since economic liberalisation era of 1991. We have been constantly revisiting our policy framework to partner with foreign companies and developed States in order to improve our trade and commerce. At the same time, we have also been opening up Indian markets to foreign investors and lately have been attracting them more generously by allowing foreign direct investment in many key sectors for production, manufacturing and delivery of goods and services. All these efforts have been in a singular direction of strengthen our economy and expand as well as nurture our trade relation with partnering States. Despite several of these economic and international trade measures put in place, a long standing need was felt to invest in the legal institutions which can provide a simplified, timely and cost-effective dispute settlement even to foreign entities engaged in business with Indian companies and bound by the Indian laws in force. The conceptualisation of the Commercial Courts Act matches with such initiative of our law and policy makers. The recent amendment made to the Arbitration and Conciliation law of 1996 is also a step in that direction.

However, no legislative action can be applauded simply for its enactment and the pre-assigned value of public good and social welfare attached to it by the law makers. Hence, an academic surgery performed on the statue of commercial courts and amendments made to the arbitration law, by way of a critical assessment of these legislations was essential to decipher its actual efficacy. We have accordingly tested the fundamental hypothesis of this paper, that whether India is ready for global commerce with the rise of business benches and private tribunals, against the establishment of commercial courts and the arbitration law amendments. As a result, we have found that progressive provisions envisioned in these statues are welcome

steps in bringing foreign investors onboard by promising a great degree of contract compliance and dispute resolution safety. No doubt constant endeavours shall be made in further improving the working of legal institutions for faster, cost-effective and effective settlement of commercial disputes; however, at present the picture appears to be satisfactory. To conclude, the new generation of business benches and private tribunals carry a clear message for the global audience that our legal institutions have come of age and the Indian legal pitch is all set and prepared to be investor's paradise.

*Nachiketa Mittal**

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* Author is an Assistant Professor of Law, National Law University Odisha. The views expressed are purely personal.