

# The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business?

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## Abstract

The liberal globalised order has brought increased focus on the regulation of international commerce, and especially dispute resolution. Enforcement of contracts has been a concern largely owing to the insufficiencies of the legal systems, especially relating to the institutional structure, and it holds true for India as well. The commercial courts mechanism – international and domestic – with innovative features aimed at providing expedited justice is witnessing much traction. India, similar to many other jurisdictions, legislated in favour of specialized dispute resolution mechanisms for commercial disputes that could help improve the procedures for enforcement of contracts. This research attempts to critique the comparable strengths and the reform spaces within the Indian legislation on commercial courts. It parses the status of commercial dispute resolution in India especially in the context of cross-border contracts and critiques India's attempt to have specialised courts to address commercial dispute resolution.

**Keywords:** Commercial contracts, Enforcement, Jurisdiction, Specialized courts, India

## 1 Introduction

Commercial dispute resolution in India is handled by the civil courts established in each of the 719 districts. The jurisdiction of these courts is founded upon territorial and pecuniary reasons. An empirical analysis of dispute resolution systems in two provincial units of Indian federation (reported in 2010) brought forth an important truism about the judicial system in India, albeit only in those two geographical regions – [increased] pendency in courts and the consequent delays could reduce the confidence of litigants in filing cases in courts.<sup>1</sup> Higher pendency of cases significantly

impacted the probability of rational selection to prefer litigation. Investment in human resources and infrastructural facilities resulted in a positive effect on the disposal of cases. The study also found that increased disposal rate increases filing rate, other things remaining constant. Availability of the number of judges has a decisive impact on disposal efficiency and pendency.<sup>2</sup> Given the similarity of the judicial system across the country, it is not farfetching to state that the scenario in other provinces is significantly the same. The country profile for India in the World Bank's 2016 edition on 'Ease of Doing Business'<sup>3</sup> summarised that a total of 1,420 days was invested in the resolution of a civil dispute, including commercial disputes, given that civil courts in India handled the commercial disputes also. This period is significantly higher than its partners in the BRICS like China, standing at 452 days and the Russian Federation at 307 days.

In 2015, the Government of India initiated efforts to overhaul the commercial dispute resolution procedures as part of its ambitious programme to incentivise foreign direct investment. Directed at improving the ease of doing business in India (and with India), the government embarked on a reform process to improve investor confidence and reduce delays by separating the commercial disputes from the civil disputes and prescribing a timeline for their resolution.

Court specialisation is perceived as being of utility to address broader developmental constraints, like effective access to contract enforcement and improvements in the investment climate.<sup>4</sup> Growing complexity of topics explaining the dispute apart, Finigen, Carey and Cox point out that specialisation ushers in benefits such as efficient processes and greater understanding of the law and the efficient mapping of the impact of the court's decision on the parties.<sup>5</sup>

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1. Empirical Research on Indian courts is sparse. See, generally, S. Rabiya and R. V. Ramanamurthy, 'Disposal Rates, Pendency, and Filing in Indian Courts: An Empirical Study of the Two States of Andhra Pradesh and Kerala', in P. G. Babu, T. Eger, A. V. Raja, Hans-Bernd Schäfer & T. S. Somashekar (eds.), *Economic Analysis of Law in India: Theory and Application* (2010); N. Robinson. 'A Quantitative Analysis of the Indian

Supreme Court's Workload' 10(3) *Journal of Empirical Legal Studies* 570 (2013).

2. Rabiya and Ramanamurthy, above n. 1.

3. World Bank's Report on 'Ease of Doing Business' (2016), available at: [www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf](http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf) (last visited 5 October 2018).

4. H. Gramckow and B. Walsh, 'Developing Specialized Courts Services: International Experiences and Lessons Learned', *WBJD Working Paper Series*, 2013:1.

5. M. W. Finigan, S. M. Carey & A. Cox, 'Impact of a Mature Drug Court over 10 Years of Operation: Recidivism and Costs (Final Report)', *NPC Research*, 2017.

While the early examples of commercial courts in England and elsewhere aimed ‘to provide a court staffed with a single Judge who was familiar with the subject-matter of commercial dispute’,<sup>6</sup> and efficient procedures for expeditious dispute resolution, contemporary examples of commercial courts are innovating to improve institutional functionality, especially in the wake of the success seen in the space of arbitration.<sup>7</sup> The English model, a domestic court structure, has emerged as a preferred choice for transnational commercial dispute resolution.<sup>8</sup> Elsewhere, there are international commercial courts, such as the Singapore-based International Commercial Court,<sup>9</sup> the Dubai-based Dubai International Financial Centre (DIFC) Courts,<sup>10</sup> the commercial court in the Abu Dhabi Global Market<sup>11</sup> and few others that were modelled upon the English Commercial Courts.<sup>12</sup> The Law Commission of India (hereafter, the Law Commission)<sup>13</sup> in its two reports<sup>14</sup> recommended the establishment of a commercial court to address the

concerns related to enforcement of contracts, and especially to reduce procedural delay concerns. This research analyses the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereafter, the Commercial Courts Act), and the amendments to evaluate and suggest ways to improve its efficacy to help improve the enforceability of contracts, and thereby further the ease of doing business in India.

The narrative would attempt to nuance its arguments from a comparative perspective of institutions in other jurisdictions. The first section of this research traces the importance of commercial courts, as specialised tribunals, for dispute resolution. Towards this purpose, the research follows the template of classifying the existing court models – domestic courts model and international courts model. Noting that national courts resort to private international law rules for cross-border dispute resolution, the second section of this research attempts to encapsulate the conflict of laws rules in India. This is followed by a summarisation of the regime for commercial claims resolution introduced by the Commercial Courts Act, 2015, and the amendments to the law. Section 4 critiques this regime for its strengths and flaws and further attempts to suggest the path to be travelled to ensure that businesses receive a robust regime upholding the rule of law.

## 2 Commercial Courts

The constitution of commercial courts in India has been in the discussion space for some time. The Law Commission’s 188th Report proposed establishment of fast-track courts with high-tech procedures for commercial disputes of high pecuniary value. The 253rd Report released in 2015 recommended establishment 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 noted that 51.4% of the civil disputes as of 2013 (32,656 cases) were commercial disputes. The Commission observed that this affected the investor confidence as expressed in the World Bank’s Doing Business Report.<sup>15</sup> The establishment of the commercial courts was seen as critical to encourage investment by, inter alia, ensuring the speedy enforcement of contracts. These Reports made suggestions after considering the experience of the working of commercial courts in other jurisdictions; hence, a brief narrative about the commercial courts in other jurisdictions is germane for appreci-

6. R. Southwell, ‘A Specialist Commercial Court in Singapore’, 2 *Singapore Academy Law Journal* 274 (1990).
7. International Arbitration continues to adapt to contemporary needs of dispute resolution ushering increased discussion about the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the ‘New York Convention’) on its 60th anniversary.
8. In 2015, more than two-thirds of the 1,100 claims (approximately) handled by the English Commercial Court were of international character. See, generally, *UK Legal Service Report* (2016), available at: <https://www.thecityuk.com/research/uk-legal-services-2016-report/> (last visited 20 October 2018).
9. Section 29A(1) of the Supreme Court of Judicature Act has provided the right to appeal against the judgement or order of the SICC to the Court of Appeal of the Singapore Supreme Court, although according to the Singapore International Commercial Court Practice Directions, 2017, parties could agree in writing to waive this right. See, A. Godwin, I. Ramsay & M. Webster, ‘International Commercial Courts: The Singapore Experience’, 18 *Melbourne Journal of International Law* 219 (2017).
10. International Commercial Court was established in the DIFC in 2004 based on English Common Law system. DIFC courts are administered by eleven judges from various common law jurisdictions. See, Standing International Forum of Commercial Courts, *Dubai International Financial Centre Courts*, available at: <https://www.sifocc.org/countries/dubai/> (last visited 20 October 2018).
11. The Abu Dhabi Global Market (ADGM) Courts were established by the Abu Dhabi Law No. (4) of 2013. In the Middle East, ADGM is the first jurisdiction that directly applied the common law of England and Wales. See, J. Gaffney, ‘Abu Dhabi Establishes English-Language Commercial Courts’, *Essam Al Tamimi & Co.* (2016).
12. For example, The Qatar International Court and Dispute Resolution Centre.
13. A statutory body established to suggest law reform measures either upon recommendation or *suo moto*. The commission’s membership includes practitioners and academics experienced in various disciplines and is chaired by a former member from the higher judiciary.
14. Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, *Report on the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015* (Report No. 78, 2015), available at: [www.prindia.org/uploads/media/Commercial%20Courts/SCR-%20Commercial%20Courts%20Bill.pdf](http://www.prindia.org/uploads/media/Commercial%20Courts/SCR-%20Commercial%20Courts%20Bill.pdf) (last visited 10 July 2018). Also see, Law Commission of India, *Proposals for Constitution of Hi-Tech Fast Track Commercial Divisions in High Courts* (188th Report, December, 2003), available at: <http://lawcommissionofindia.nic.in/reports/188th%20report.pdf> (last visited 10 July 2018) and Law Commission of India, *Commercial Division and Appellate Division of the High Courts and Commercial Courts Bill, 2015* (253rd Report, January 2015), available at: [http://lawcommissionofindia.nic.in/reports/Report\\_No.253\\_Commercial\\_Division\\_and\\_Commercial\\_Appellate\\_Division\\_of\\_High](http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High)

[h\\_Courts\\_and\\_\\_Commercial\\_Courts\\_Bill.\\_2015.pdf](#) (last visited 10 July 2018).

15. The World Bank’s 2015 “Ease of Doing Business” rankings in which of the 189 countries surveyed, India was given an overall rank of 142, available at: [www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf](http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf) (last visited 1 October 2018).

ating the Indian model for its comparable strengths and spaces for reform.

The Right Honourable the Lord Thomas of Cwmgiedd emphasised the importance of specialised dispute resolution to the economic prosperity of nations and exhorted the commercial courts to work together to uphold the rule of law and further international economic cooperation and prosperity.<sup>16</sup> The Lordship cited the 18th century example of juries comprised experts appointed by Lord Mansfield.<sup>17</sup> The Admiralty and Commercial Courts Guide<sup>18</sup> Part 58 includes an important feature – review and adapt the feedback about the working of the Commercial Courts generated through its users’ committees, constructive suggestions from the litigants before it and from professional advice.<sup>19</sup> The success of the London Commercial Court model has inspired the functioning of the recent international commercial courts.<sup>20</sup>

International court models at Dubai and Abu Dhabi in the United Arab Emirates and the State of Qatar, as well as the Singapore International Commercial Court (SICC), are a unique hybrid model that is neither arbitration nor litigation before a national court but aims to combine the benefits of both.<sup>21</sup> The DIFC Courts, located in the financial free zone in DIFC have been described as ‘a common law island in a civil law ocean’.<sup>22</sup> They are also the curial courts for all arbitrations seated in the DIFC.<sup>23</sup>

Established in 2015, the SICC<sup>24</sup> adapted from the arbitral model but underpinned by judicial control.<sup>25</sup> SICC’s jurisdiction can be invoked in disputes that are primarily ‘international’ and ‘commercial’, unlike the London Commercial Court that has general jurisdiction to hear international as well as domestic disputes<sup>26</sup> Additionally, subject to the forum non-conveniens rule,<sup>27</sup> parties could designate the SICC through a forum selection clause;<sup>28</sup> SICC could acquire jurisdiction through the transfer of a dispute to it by the Singapore High Court either on its own motion<sup>29</sup> or because of an agreement of the parties.<sup>30</sup> Parties could choose the IBA Rules of Evidence to the exclusion of the domestic rules of evidence.<sup>31</sup> As with the DIFC, the SICC provides a mix of local and international judges to adjudicate disputes. Twelve of the thirty-one judges at the SICC are international.<sup>32</sup> Foreign counsel is allowed to appear in ‘offshore cases’<sup>33</sup> before the SICC, and in DIFC Courts as well. In a first of its kind, the DIFC Courts have devised a novel process of ‘converting’<sup>34</sup> DIFC Court judgements into arbitral awards. Parties, in an arbitration clause, could agree to refer any dispute concerning a judgement rendered by the DIFC Courts to arbitration in the DIFC-LCIA Arbitration Centre; the LCIA tribunal will consequently render an award that a party may seek to enforce under the New York Convention.<sup>35</sup> While this novel procedure and the discussion surrounding it is outside the scope of this research paper, this experiment demonstrates the streamlining of the classic dispute resolution procedures to the advantage of international investors and commercial entities.

16. The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, ‘Giving Business What It Wants – A Well Run Court for Commercial and Business Disputes’, *Grand Court of the Cayman Islands Guest Lecture 2017*, available at: <https://www.judiciary.uk/wp-content/uploads/2017/03/grand-court-of-the-cayman-islands-guest-lecture-march-2017.pdf> (last visited 24 September 2018).
17. *Ibid.*, at 15.
18. The Judges of the Commercial Court of England & Wales (eds.), *The Commercial Courts Guide*, (10 edn. 2017), available at: <https://www.gov.uk/government/publications/admiralty-and-commercial-courts-guide> (last visited 25 September 2018).
19. *Ibid.*, at 9.
20. S. Menon, ‘International Commercial Courts: Towards a Transnational System of Dispute Resolution’, *DIFC Courts Lecture Series 2015*: 1, 42-43, available at: <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf> (last visited 12 September 2018).
21. Sir W. Blair, ‘Contemporary Trends in the Resolution of International Commercial and Financial Disputes’, *Institute of Commercial and Corporate Law Annual Lecture*, at 1, 9, & 13 (Durham University, 21 January 2016), available at: <https://www.judiciary.uk/wp-content/uploads/2016/01/blair-durham-iccl-lecture-2016.pdf> (last visited 12 September 2018).
22. M. Hwang, ‘Commercial Courts and International Arbitration – Competitors or Partners?’, 31(1) *Arbitration International*, at 193, 201 (2015). DIFC Courts follow the English common law tradition unlike the rest of the UAE that adopted the civil law tradition. DIFC courts are two-tiered, the Court of First Instance is presided by a single judge and a three-member Court of Appeal hears appeals. The Chief Justice of the DIFC Courts is the eminent Singapore arbitrator Michael Hwang SC.
23. Arbitration law of the DIFC Law No. 1 of 2008 (amended by DIFC Law No. 6 of 2013).
24. The Singapore Supreme Court consists of the Singapore High Court, which is the court of first instance, and the Court of Appeal, which is the court of final appeal. See, M. Yip, ‘The Resolution of Disputes Before the Singapore International Commercial Court’, 65 *International and Comparative Law Quarterly*, at 439-73 (2016); also see, M. Yip,

- ‘Navigating the Singapore’s Private International Rules in the Age of Innovative Cross-Border Commercial Litigation Framework’ in P. Sookripaisarnkit and S. R. Garimella (eds.), *China’s One Belt One Road Initiative and Private International Law* (2018).
25. See, Rules of Court, O 1.10, R 1(2) (a) and (b).
26. J. Landbrecht, ‘The Singapore International Commercial Court (SICC) – An Alternative to International Arbitration?’, 34 *ASA Bulletin*, at 112, 114 (2016); also see, D. Demeter and K. M. Smith, ‘The Implications of International Commercial Courts on Arbitration’, 33(5) *Journal of International Arbitration*, at 441-70, 452 (2016).
27. Rules of Court O 110, R 8.
28. Rules of Court O 110, R 12(3)(b) read with R 12(4)(a)(i).
29. Rules of Court O 110 R 12(3)(a)(ii).
30. SCJA Section 18J read with Rule of Court O 110, R 7(2).
31. Rules of Court O 110, R 23(1).
32. A list of the judges of the SICC is available at: <https://www.sicc.gov.sg/about-the-sicc/judges>.
33. The Singapore International Commercial Court Procedure Guide, paragraph 3.5.1, defines an offshore case as ‘an action which has no substantial connection with Singapore, but does not include an action in rem (against a ship or any other property) under the High Court (Admiralty Jurisdiction) Act (Cap 123);’ see ROC O 110 r 1(1). For more information on what constitutes no substantial connection with Singapore, see, O 110 r 1(2)(f); PD Part V [https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc\\_procedural\\_guide.pdf](https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc_procedural_guide.pdf) (last visited 10 September 2018).
34. For a suggested arbitration clause, see, DIFC Courts Practice Direction No. 2 of 2015 – Referral of Judgment Payment Disputes to Arbitration, 16 February 2015, available at: <https://www.difccourts.ae/2015/05/27/amended-difc-courts-practice-direction-no-2-of-2015-referral-of-judgment-payment-disputes-to-arbitration/> (last visited 10 August 2018).
35. S. Menon, above n. 20, at 37.



### 3 Cross-Border Commercial Dispute Resolution – The Conflicts of Laws Rules in India

National courts resolve much of the cross-border commercial disputes, as demonstrated by the robust, and often maze-like, normative content of private international law rules in most jurisdictions, India included. There is a little accession to harmonised law,<sup>36</sup> except to the immensely successful New York Convention on the Enforcement of Foreign Arbitral Awards, 1958. While arbitration has been a preferred mode of dispute resolution, few concerns came forth, especially with regard to costs and lack of sanctions during the arbitral process.<sup>37</sup> The default regime for resolution of cross-border disputes, including commercial disputes in India, is limited to colonial law and post-independence judicial development, with minimal accession to international conventions.<sup>38</sup> Per the Commercial Courts Act, 2015, the commercial court in the districts and the commercial divisions shall function as the courts of the first instance for commercial disputes that would have otherwise been heard in the civil court (the jurisdiction of the civil court is pecuniary and territorial). The Commercial Courts, hearing disputes involving a foreign element, will, therefore, apply the private international law rules that were hitherto applied by the civil court hearing cross-border commercial disputes. Interestingly while India adopted the *lex situs* principle in disputes related to

immovable property, the commercial courts will receive applications related to immovable property that is a part of the commercial dispute.<sup>39</sup> Apart from fidelity to the principle of autonomy in the matters of choice of law, Indian law also provided clarification with regard to the validity of forum selection clauses. In *ABC Laminart Pvt. Ltd. v. A.P. Agencies, Salem*,<sup>40</sup> the Court outlined the rules explaining the validity of such contractual clauses.

- a. Ousting the jurisdiction of a court, which otherwise would have jurisdiction, by a contract, is void.
- b. Conferring jurisdiction on a court, which otherwise does not have any jurisdiction, by a contract, is void.
- c. Where two or more courts have jurisdiction to try a matter, then limiting the jurisdiction to a particular court is valid. However, such contract should be clear, unambiguous and specific. Ouster clauses may use the words 'alone', 'exclusively' and 'only', and the same pose no difficulty in interpretation.<sup>41</sup> In a recent decision, the Delhi High Court ruled in favour of the validity of a forum selection clause where the contracting parties agreed to confer jurisdiction on the London Commercial Court.<sup>42</sup>

Party autonomy in the context of the choice of forum is also a feature of the Indian law, thus allowing Commercial Courts, as chosen forum, hear disputes. Jurisdictional clauses in the contract are valid, especially when the petitioner is a foreigner, and the parties have designated the law applicable to their contract and disputes.<sup>43</sup> However, as a non-chosen court, they could exercise jurisdiction if:

- a. the contracting parties being subject to the municipal law of the country with which the case has the connection or where the cause of action may have arisen;
- b. the governing law clause of the contract is violative of the public policy of the country, and such clause does not confer exclusive jurisdiction on the forum chosen or
- c. it is possible according to the chosen applicable law to override the chosen forum.<sup>44</sup>

Regarding applicable law, Indian courts<sup>45</sup> have shown favour to the principle of party autonomy and ruled that an express or implied choice of law by the parties trumps any presumption in favour of *lex loci solutionis*.

36. There is no policy statement on accession to the Convention on Contracts for the International Sale of Goods, 1980. India is a member of the Hague Conference on Private International Law and the International Institute for Unification of Private Law (UNIDROIT), but has a membership only to four Hague Conventions to date. These conventions are the Convention of Abolishing the Requirement of Legalization for Foreign Public Documents 1961; the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965; the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (not ratified as yet) and the Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption 1993.

37. F. Tiba, 'The Emergence of Hybrid International Commercial Courts and the Future of Cross-Border Commercial Dispute Resolution in Asia', 14 *Loyola University Chicago International Law Review* 31, at 38-39 (2016); Sai Ramani Garimella, 'Arbitral Reforms in India: The Case for Third Party Funding of Arbitral Claims' 15 *Transnational Dispute Management* (2018), available at: <https://www.transnational-dispute-management.com/article.asp?key=2558> (last visited 18 July 2018); approaching national courts is not concern-free either owing to the unfamiliarity with procedures and challenges related to inconsistent outcomes. See, generally, F. P. Phillips, 'The Challenges of International Commercial Dispute Resolution', *CPR: The Int'l Inst. for Conflict Prevention and Resolution*, available at: [www.businessconflictmanagement.com/pdf/BCMPressOI.pdf](http://www.businessconflictmanagement.com/pdf/BCMPressOI.pdf) (last visited 18 August 2018); also see, W. L. Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration', 50 *Texas International Law Journal* 699, at 700 (2016).

38. S. R. Garimella, 'OBOR and the Syncretic Private International Law Rules in India: Time for Accession to Harmonised Legal Regimes', in P. Sooksripaisarnkit and S. R. Garimella (eds.) *China's One Belt One Road Initiative and Private International Law* (2018).

39. Explanation (a) to Section 2(1)(c), Commercial Courts Act; see, generally, Sections 2(1)(c), 6 and 7, Commercial Courts Act r/w Section 20 of the Civil Procedure Code.

40. AIR [1989] SC 1239.

41. *Ibid.*, at 3.

42. *Bharat Heavy Electricals v. Electricity Generation Incorporations* [2017] Delhi High Court CS (COMM) 190/2017.

43. *Kumarina Investment Ltd. v. Digital Media Convergence Ltd. and Another* [2010] SCC Online TDSAT 641.

44. *Ibid.*, at 69.

45. See, generally, *National Thermal Power Corporation Ltd. v. the Singer Company* (1992) 3 SCC 551 [25] and [28]; *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.* (2003) 9 SCC 79 [7]; also see, Jan Neels, 'The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African Private International Law', 22(2) *Uniform Law Review* 443-451 (2017).

Recognition and enforcement of foreign judgements are primarily founded upon the principle of reciprocity.<sup>46</sup> Decrees from a non-reciprocating territory could be enforced through a civil suit<sup>47</sup> where the foreign court's order could be a cause of action.

The foregoing narrative shows that issues related to enforcement of contracts are addressed through rudimentary principles, with minimal participation in harmonised law. Added to this is the concern regarding costs-related orders, an achilles heel within the commercial dispute resolution system in India. There has been a general reluctance to issue and enforce costs-related orders in litigation as well as arbitration. A study of eighty-three judgements on Petitions for Special Leave to Appeal against orders made Section 11 of the Arbitration and Conciliation Act, 1996, reveal that costs were ordered in about 1.2% of the petitions.<sup>48</sup>

## 4 Commercial Courts Act, 2015 – Access to Justice Reset

Following extensive analysis of the commercial courts mechanism in the United Kingdom, the United States (Delaware, New York and Maryland), Singapore, Ireland, France, Kenya and nine other countries and, on two occasions, in 2009 and in 2015, the Law Commission recommended the establishment of an extensive commercial dispute resolution mechanism.<sup>49</sup>

### 4.1 Commercial Courts in India – The Wherewithal of Innovation in Dispute Resolution

A vibrant legal system is of utmost necessity in ensuring investor confidence; courts and dispute resolution institutions are of vital importance as they help in enforcing contracts and ensuring compliance with the rule of law. As observed by India's Prime Minister:

Businesses seek assurance of the prevalence of the rule of law in the Indian market. They need to be assured that [...] commercial disputes will be resolved efficiently.<sup>50</sup>

46. Section 44A, Code of Civil Procedure – Decrees from the following territories are executed as similar to a decree from a domestic court. United Kingdom, Singapore, Bangladesh, UAE, Malaysia, Trinidad & Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea, Fiji, Aden.

47. *Moloji Nar Singh Rao v. Shankar Saran* AIR [1962] SC 1737.

48. See, B. Sreenivasan, 'Appeal Against the Order of the Chief Justice Under Section 11 of the Arbitration and Conciliation Act, 1996: An Empirical Analysis', 1 *Indian Journal of Arbitration Law* 21 (2012). See, Garimella, above, n. 37, at 20.

49. M. V. D. Prasad, *Commentary on the Commercial Courts Act 2015* (2018), at 3.

50. Valedictory address by Prime Minister Narendra Modi at the National Conclave for Strengthening Arbitration and Enforcement, 23 October 2016, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=151887> (last visited 10 July 2018).

India's tryst with commercial courts began in 2003 – the Law Commission in its 188th Report<sup>51</sup> recommended the establishment of fast-track commercial divisions in the High Courts.<sup>52</sup> However, the recommendations were not acted upon. The Commission further deliberated on the issue and submitted another report calling for the immediate establishment of commercial courts. The 253rd Report contained a draft commercial courts bill as an annexe outlining a structure for constituting specialist courts for commercial claims.<sup>53</sup> Pending consideration by the Indian Parliament, and realising the immediate necessity<sup>54</sup> for the constitution of commercial courts, the President of India promulgated the Commercial Courts, Commercial Division and Commercial Appellate Division Ordinance, which was subsequently replaced by Commercial Courts Act, 2015.<sup>55</sup>

The legislation established a multi-tiered court structure for commercial disputes resolution

- State governments (India is a federal country, the constituent units are referred to as States) shall establish Commercial Courts at the district level (the district is an important geographical unit within the States, and the district administration is largely supervised by the State government) in all territories where a High Court does not exercise original civil jurisdiction<sup>56</sup> (where a High Court is not the court of the first instance).
- Within territories where a High Court exercises original civil jurisdiction, the Chief Justice of the High Court may order constitution of Commercial Divisions with one or more benches presided by a Single Judge.<sup>57</sup>
- The Chief Justice of every High Court shall set up a Commercial Appellate Division within the High Court, consisting of one or more benches.<sup>58</sup>

Following the Law Commission's recommendation<sup>59</sup> the term 'commercial disputes' has been expansively worded, through indicative content given in a non-exhaustive list of twenty-two standard and non-specific commercial transactions that may form the subject-mat-

51. Law Commission of India (188th Report, December 2003), above, n. 14.

52. *Ibid.*, at 159-78. The report recommended that the fast-track courts adopt simplified procedures, including effective case management and requisite technology processes.

53. Law Commission of India (253rd Report, January 2015) above, n. 14.

54. See, the World Bank's *Doing Business* Reports. The 2016 Report discussing the position as of 2015, ranked India at 178 out of 189 countries. A key performance metric for the ranking is the ease of enforcement of contracts, available at: <http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf> (last visited 12 July 2018).

55. Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 (Act No. 4 of 2016). Notified in the Gazette of India as being effective from 23rd October 2015. The Act has since been amended and notified as effective from 3rd May 2018.

56. *Ibid.*, Section 3(1).

57. *Ibid.*, Section 4(1) as per the Amendment Act 2018.

58. *Ibid.*, Section 5. Section 5(2) specifies that the Chief Justice shall nominate judges experienced in handling commercial disputes to the Appellate Division.

59. Law Commission (253rd Report, January 2015), above n. 14, at 52.

ter of commercial disputes.<sup>60</sup> However, the judiciary seems less inclined to adopt a wider meaning to this term. The Delhi High Court in *Qatar Airways Q.C.S.C. v. Airports Authority of India & Anr*<sup>61</sup> was reluctant to hold damage to an aircraft, attributable to the defendants, as a commercial dispute within the scope of the legislation despite the enumerated provision classifying all transactions relating to aircraft, aircraft engines, equipment and helicopters, including sales, leasing and financing of the same as commercial transactions.<sup>62</sup>

Expansive meaning has been attributed to term commercial dispute in a few other instances. In *Great Eastern Energy Corporation Ltd. v. Union of India*,<sup>63</sup> the Court held that dispute regarding the agreement between the parties requiring the petitioner to make a one-time payment of signature bonus is a commercial dispute as defined under Clause 2(1)(c) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

Suits for the recovery of mesne profits against the tenant (the banking institution in this case) instituted by the landlord are categorised as commercial disputes within the enumerated list in Section 2(1)(c).<sup>64</sup>

Where a property has been notified as a commercial property, its non-utilisation for the said purpose would not affect its characterisation. In *Monika Arora v. Neeraj Kohli & Anr.*,<sup>65</sup> the Delhi High Court allowed a petition for transfer of the dispute to the Commercial Division as it involved an immovable property in a notified commercial location. The legislative provision is recalled here,

2. Definitions: (1) In this Act, unless the context otherwise requires:

(c) commercial dispute means a dispute arising out of (vii) agreements relating to immovable property used exclusively in trade or commerce;

Explanation: A commercial dispute shall not cease to be a commercial dispute merely because:

- a. it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;
- b. ....

The jurisprudence available from the commercial courts allows a few derivations regarding the classification of a commercial dispute.

1. Suits for specific performance of agreements related to the development of land are not classified as suits founded upon commercial dispute.<sup>66</sup>

2. The Delhi High Court in *Hindpal Singh v. Jabbar Singh*<sup>67</sup> held that the suit for cancellation of power of attorney, with respect to an immovable property used exclusively in trade and commerce and as part of the sale transaction of such property, would not constitute a commercial dispute within the meaning of Section 2(1)(c).

3. Suits for ejectment from the property, illegally used, exclusively for purposes of trade and commerce with the consent of the plaintiff, would still not entitled to be classified as a commercial dispute to be addressed within the commercial courts.<sup>68</sup>

It is hoped that the judiciary, as it works with the legislation, will take notice of the expansive nature of the definition of the commercial dispute and draw guidance from the Law Commission's recommendations. Allowing an application for correction of the valuation of the suit, the Delhi High Court observed that:

It is a commercial dispute and the Court dealing with the commercial matters should not have the narrow approach, as the Court has to examine the application from commercial angle, though the same is subject to the condition that a valid case for amendment is made out, once the said condition is fulfilled, the prayer has to be allowed.<sup>69</sup>

## 4.2 Improved Access to Justice

The legislation prescribed a pecuniary jurisdiction for the commercial courts, suits of a specified value,<sup>70</sup> and a detailed procedure for its calculation.<sup>71</sup> The Amendment Act, 2018, reduced the value from INR10,000,000 (approx. USD150,000) to INR300,000 (approx. USD4,500). It appears that the intent is to meet the parameters used to gauge enforceability of contracts in World Bank's Ease of Doing Business Report that include claims worth 200% of income per capita or \$5,000, whichever is greater. The change in the specified value would ensure that the work of commercial courts be considered for gauging enforceability of contracts, apart from furthering ease of dispute resolution. Suits or applications related to commercial disputes (as per the Act) shall be transferred to the commercial courts, except where the final judgement has been reserved by the court where such suit or application is pending.<sup>72</sup> Parties to the dispute could also make an application to the Commercial Appellate Division for such transfer.<sup>73</sup>

Appeals shall be presented only to the jurisdictional Commercial Appellate Division.<sup>74</sup> Filing of civil revision applications or petitions for an interlocutory order,

60. Section 2(1)(c).

61. [2017] 240 DLT 731.

62. Section 2(1)(c)(iv).

63. [2016] SCC Online Del. 5873.

64. *Jagmohan Behl v. State Bank of Indore* [2017] SCC Online Del 10706.

65. [2016] SCC Online Del 5259.

66. *Ujwala Raje Gaekwar v. Hemaben Achyut Shah and Others* [2017] SCC Online Guj 583.

67. 2016 SCC Online Del 4901.

68. *Soni Dave v. Trans Asian Industries Expositions Pvt. Ltd.* [2016] AIR, Del 186.

69. *Jasper Infotech Pvt. Ltd. v. Deepak Anand & Others* (2015) SCC Online Del 14399.

70. Section 2(1)(i).

71. Section 12.

72. Sections 15(1) and (2).

73. Section 15(5).

74. Section 13(1).

including an order on a jurisdictional challenge of a Commercial Court are prohibited,<sup>75</sup> to prevent the disruption to case management schedules by the frequent filing of revision applications and petitions. The Law Commission had recommended limiting of the right to approach other courts for revision applications or interlocutory orders. It observed that limiting the right to approach other courts for revision processes would help ensure expedited disposal of the dispute in the commercial court.<sup>76</sup>

### 4.3 Innovative Features for Effective Dispute Resolution

#### 4.3.1 Investing in Human Resources

The law specified constitution of commercial courts with judges experienced in commercial disputes resolution;<sup>77</sup> further State Governments shall invest in judicial training services for commercial courts.<sup>78</sup> Noting the importance of expeditious disposal of disputes to the businesses, the legislation streamlined the timetable for judges as well as litigants. For example, appeal from judgements and orders of the commercial court must be instituted within sixty days from the date of judgement.<sup>79</sup> The Commercial Appellate Division ‘shall endeavour’ to dispose of an appeal within six months from the date of its institution.<sup>80</sup>

#### 4.3.2 Cross-Referencing with the Law on Procedure

The legislation also ushered in changes to the Code of Civil Procedure, 1908. Litigating Parties appearing before the commercial courts are subject to stringent timelines such as an outer limit of 120 days for the defendant to file its written statement.<sup>81</sup> Further, all documents should be filed along with a party’s first pleadings, *i.e.* the plaint for the claimant, and the written statement or counterclaim for the defendant, except in situations of urgent filings when leave to rely on additional documents may be sought.<sup>82</sup> The legislation allowed for summary judgements, founded only on documentary evidence.<sup>83</sup> Sections 16(3) and 21, read together, ensure that the provisions of the Civil Procedure Code, as amended through the Commercial Courts Act, would prevail in cases of conflict in the procedures envisaged within any other law or jurisdictional rules introduced into the Code of Civil Procedure.<sup>84</sup>

#### 4.3.3 Costs

The Law Commission of India recommended<sup>85</sup> costs orders in civil suits/proceedings to prevent frivolous litigation and to discourage vexatious adjournments. It suggested that costs orders would help alleviate the loss for parties subjected to unjust dispute resolution and further contractual compliance.<sup>86</sup>

Taking a cue from the guidance provided by the Law Commission’s Report that costs should follow the event as a meaningful deterrent against frivolous litigation,<sup>87</sup> the legislation provided detailed costs follow the event regime<sup>88</sup> as well as comprehensive provisions on interest.<sup>89</sup>

#### 4.3.4 Remedies against State Entity

An interesting feature of this legislation is the availability of remedies against a State entity engaged in commercial activity. Sub-clause (b) to the Explanation within Section 2(1)(c) specified that the dispute shall not cease to be a commercial dispute merely because a contracting party happens to be a State or a State-owned/supported entity.

#### 4.3.5 Case Management

The legislation also introduced case management – a feature that was first articulated by the Supreme Court,

At the time of filing of the plaint, the trial court should prepare a 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 court should strictly adhere to the said dates and the said timetable 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.<sup>90</sup>

A new legislative provision was added to the Code of Civil Procedure, providing for a ‘Case Management Hearing’ for framing the issues involved in the dispute, listing the witness and scheduling a calendar for the proceedings.<sup>91</sup>

#### 4.3.6 Commercial Courts and Arbitration

The commercial courts also function as the courts of first instance for arbitration-related applications involving commercial dispute of specified value. Commercial Divisions within the High Courts exercising original civil jurisdiction have exclusive jurisdiction to hear applications related to international commercial arbitrations. Similarly, all applications and appeals relating to domestic arbitrations that have been filed on the original

75. Section 8.

76. See, Law Commission of India, above n. 53, at 48, para. 3.23.2.

77. Sections 3(3), 4(2) and 5(2).

78. Section 20.

79. Section 13(1).

80. Section 14.

81. Schedule, Commercial Courts Act, 2015.

82. *Ibid.*

83. *Ibid.*

84. See, for instance, *HPL (Ind) Limited & Ors. v. QRG Enterprises and Another* (2017) SCC Online Del 6955.

85. Law Commission of India, *Costs in Civil Litigation* (Report 240, 2012), available at: <http://lawcommissionofindia.nic.in/reports/report240.pdf> (last visited 18 July 2018).

86. *Ibid.*

87. Law Commission of India (253rd Report, January 2015), above n. 14, at 45, para. 3.21.1.

88. Schedule, Commercial Courts Act, 2015.

89. *Ibid.*

90. *Rameshwari Devi v. Nirmala Devi* (2011) 8 SCC 249, at para. 52.

91. Order XV-A – Case Management Hearing, Schedule, Commercial Courts Act, 2015.



side of the High Court shall be heard and disposed of by the Commercial Division, and applications and appeals that would ordinarily lie before any principal court of original jurisdiction in a district (that is not a High Court), shall be heard and disposed of by a Commercial Court. The Arbitration and Conciliation Act, 1996 (as amended in 2015), allows for applications to be made to the court<sup>92</sup> in the following areas:

- refer parties to arbitration<sup>93</sup> and appoint arbitrators on application by the parties<sup>94</sup>
- grant interim measures<sup>95</sup> when an arbitration tribunal has not yet been constituted<sup>96</sup>
- set aside arbitral awards (domestic arbitration)

The Report on the Commercial Courts Bill, 2015, noted that parties exercise their choice of forum for dispute resolution, *ab initio*, between commercial courts and arbitration.<sup>97</sup> However, there are instances that require parties to an arbitration agreement to resort to national courts – to the extent that national courts are accessed – the partnership between arbitration and the courts is not one of the equals, as national courts can exist and function without arbitration, but the converse is not a possibility.<sup>98</sup> The Commercial Courts Act and the amended Arbitration Act attempt to reduce judicial intervention in arbitration. The twin legislations<sup>99</sup> are expected to foster investor confidence and there has been interesting and encouraging response from institutions of governance and the business and legal communities.<sup>100</sup>

The twin legislations ushered important changes with regard to the forum that would hear applications related to International Commercial Arbitrations, including the enforcement of foreign arbitral awards. The amended Arbitration Act transferred the applications in support of international arbitration to be presented to the High Courts.<sup>101</sup> The Commercial Courts Act transferred the applications pending before the High Courts to the

Commercial Division.<sup>102</sup> The amendments do not affect the right of the parties to appeal to the Supreme Court. The Commercial Courts shall, on the application, provide judicial assistance to international arbitrations in the following areas:

- Interim relief – applications for interim relief in domestic and international arbitrations<sup>103</sup> may be made to the courts, until such time the tribunal is constituted; the tribunal-granted interim measures shall have the same effect as that of a civil court order under the Code of Civil Procedure, 1908.<sup>104</sup>
- Commercial courts could be approached for extension of time limits for completion of arbitral proceedings<sup>105</sup> – a twelve-month timeline has been statutorily fixed for completion of arbitrations seated in India. Parties could, at the completion of twelve months, agree for a six-month extension, and further extensions could be allowed based on application to the commercial court. Extensions are allowed based on a judicial appreciation of the existence of sufficient cause of the delay, else the mandate of the arbitral tribunal is terminated. The commercial court may also order reduction of tribunal's fees if the delay is attributable to the tribunal.
- The Arbitration Amendment Act, 2015, also imposed stringent timelines on the commercial courts – challenges to the arbitral award before the commercial court are to be decided within one year.<sup>106</sup>
- The new costs regime ushered in by the Arbitration Amendment Act, 2015, requires the commercial courts to take notice of parties conduct, especially with regard to applying to courts to delay arbitration proceedings, while deciding upon imposition of costs.<sup>107</sup>
- Concerns exist with regard to the judicial intervention in the enforcement of foreign arbitral awards via the route of public policy in India.<sup>108</sup> This, the literature<sup>109</sup> as well the reports of the Law Commission of India<sup>110</sup> noted, adversely effects contracts and their

92. Section 2(e), Arbitration and Conciliation Act, 1996.

93. Section 8, Arbitration and Conciliation Act, 1996.

94. *Ibid.*, Section 11(5) and (6).

95. *Ibid.*, Section 9(1).

96. *Ibid.*, Section 9(2) as per the Amendment Act, 2015.

97. Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice (Report No. 78, 2015), above, n. 14, at 27.

98. N. Blackaby, C. Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Arbitration* (6th edn, 2015), at 416.

99. Received Presidential assent on 31/12/2015, with retrospective effect from 23rd October 2015.

100. Among the interesting developments in the field of dispute resolution is the establishment of the Mumbai Centre for International Arbitration as a joint initiative of the government of the State of Maharashtra, domestic and international business and legal communities. The Maharashtra State Government has legislated that all government commercial contracts henceforth shall have a mandatory institutional arbitration clause. Further, the Government of India has formed a committee headed by a member of the Supreme Court to review the institutionalization of arbitration in India, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=155959> (last visited 12 July 2018).

101. Section 2(1)(e) as per Arbitration Amendment Act, 2015. The 1996 Arbitration Act vested the power to hear most applications related to international arbitrations in the district courts, which were by virtue of being courts of first instance in most disputes related to civil matters, burdened by a burgeoning caseload.

102. Section 15(1), Commercial Court Act, 2015.

103. Arbitration Act, Section 2(2) read with Section 9 of the Arbitration Amendment Act, 2015.

104. Section 17, Arbitration Amendment Act, 2015.

105. Section 29A, as per the Amendment of 2015, has fixed timelines for the completion of arbitral proceedings. It is inserted into Part I of the Arbitration Act, 1996, that is applicable to arbitrations seated in India.

106. Section 34(6), Arbitration Amendment Act, 2015.

107. Section 31A(3), Arbitration Amendment Act, 2015.

108. See, F. S. Nariman, 'Ten Steps to Salvage Arbitration in India: The First LCIA-India Arbitration Lecture', 27(2) *Arbitration International* 115, at 115-27 (2011); see, generally, D. Mathew, 'Situating Public Policy Within Indian Arbitration Paradigm', 3 *Journal of the National Law University* 106-41 (2015).

109. See, generally, P. Nair, 'Surveying a Decade of the "New" Law of Arbitration in India', 23(4) *Arbitration International* 699, at 728-30 (2007); A. C. Rendeiro, 'Indian Arbitration and Public Policy', 89 *Texas Law Review* 699, at 709 (2011); N. Darwazeh and R. Linnane, 'The Saw Pipes Decision: Two Steps Back for Indian Arbitration?', 19 (3) *Mealey's International Arbitration Report* 34 (2004); S. Kachwaha, 'The Arbitration Law in India: A Critical Analysis' 1(2) *Asian International Arbitration Journal* 105 (2005).

110. The Law Commission of India in 176th Report on the Arbitration and Conciliation (Amendment) Bill 2001 suggested an amendment to the 1996 Act to nullify the effect of the *ONGC v. Saw Pipes* [2003] 5 SCC



enforceability. The Arbitration Amendment Act, 2015, and the judicial opinion that followed the amendment set to rest the well-founded fears regarding the porous nature of ‘public policy’ challenge to enforcement of foreign arbitral awards. ‘Public policy’ remains as an important ground for challenging enforcement applications; however, its connotation is now subjected to limited content – to circumstances where there has been fraud or corruption, or contravention of ‘the fundamental policy of Indian law’ or ‘the most basic notions of morality or justice’, thus clarifying that patent illegality – as an element thereof only applies to domestic arbitration.<sup>111</sup> The process of enforcement is also improved upon by revoking the automatic stay on enforcement of awards due to the commencement of setting aside proceedings of international arbitral awards.<sup>112</sup> Two recent judgments of the Delhi High Court seem to reinforce the commitment of the law towards the enforceability of contracts. In *Cruz City I Mauritius Holdings v. Unitech Limited*,<sup>113</sup> the Court held that where the contracting parties intended to attribute enforceability to their contract, they would not be able to allege at a later stage that the agreement or an arbitral award therefrom was unenforceable for being in contravention of foreign exchange regulations that were in force. In *NTT Docomo v. Tata Sons Ltd.*,<sup>114</sup> the Court upheld a 1.8BN USD award, rejecting objections by Reserve Bank of India for violation of the regulatory framework on remittances. The Court adopted a restricted approach to public policy grounds and upheld the sanctity of the contracts.

#### 4.3.7 Introduction of Alternative Dispute Resolution Procedures

The Amendment Act, 2018, introduced a mandatory pre-institution mediation where a suit does not contemplate urgent interim relief; the plaintiff has to undergo pre-institution mediation.<sup>115</sup>

705 decision. It suggested that an explanation limiting the content of Section 34 to the three grounds mentioned in the ratio of *Renusagar Power Co. Ltd. v. General Electric Co.* [1994] AIR, S.C. 860, may be included in the amendment. The Justice B. P. Saraf Committee that was set up to inquire into the Recommendations of the Law Commission in its 176th Report regarding amendments of the Arbitration and Conciliation Act 1996 and the Amendments proposed by the Arbitration and Conciliation (Amendment) Bill, 1996, also supported the Law Commission suggestion.

111. A detailed explanation annexed to Section 34(2) in Arbitration Amendment Act, 2015, explicitly states that patent illegality as a ground for resisting enforcement shall not be available in international commercial arbitrations and when made available in arbitrations not international, such ground shall not be used to set aside awards merely for erroneous application of law or for a re-appreciation of the evidence by the court.

112. Section 36(2), Arbitration Amendment Act, 2015.

113. EX.P.132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, 11 April 2017.

114. O.M.P.(EFA)(COMM.) 7/2016 & IAs 14897/2016, 2585/2017, 28 April 2017.

115. Section 12 A, the Commercial Courts (Amendment) Act 2018.

## 5 Critique

An effective commercial dispute resolution mechanism, especially in the context of cross-border commerce, should effectively address the needs of its users while unflinchingly upholding its commitment to the rule of law. Sir William Blair identified a few pre-requisites for such an effective system:

1. the certainty, that is, the application of ascertainable legal principles to the underlying contractual or other dispute;
2. accessibility, being an absence of artificial barriers to bringing or defending claims;
3. predictability, in that the tribunal will apply known procedures;
4. transparency, so that the parties are aware of the whole process;
5. independence, underpinned by the transparency, so that there is no suspicion that the tribunal is other than independent;
6. experience and expertise in the tribunal;
7. efficient case management, so that the proceedings are properly handled; and
8. the effective outcome, including enforcement if necessary.<sup>116</sup>

As commercial dispute resolution went through a metamorphosis, questions continue to emerge requiring clarity and law reform. A significant concern related to the legislation is the level of cross-referencing that was attempted in the 2015 legislation when inter-linking with the arbitration law (including the arbitration amendment). In this context, the decision in *Kandla Export Corporation & Anr v. M/s OCI Corporation & Anr*<sup>117</sup> sheds light on the result from the cross-referencing of Section 50, Arbitration Act,<sup>118</sup> and Section 13(1), Commercial Courts Act. Avoiding an isolated reading of Section 13(1), the Supreme Court reaffirmed its commitment to the enforcement of foreign awards by reiterating that an appeal in cases of foreign awards would only apply on the grounds set out in Section 50 of the Act and specifically no appeal will proceed to the Commercial Appellate Division if it is against an order rejecting the objections to enforcement.

Commercial courts, across India, ruled differently in the context of the retrospective application of the Arbitration Amendment Act, 2015, thereby causing concern related to the uncertainty of the law. Contradicting decisions exist with regard to the applicability of the amendments to arbitration proceedings that commenced before October 2015.<sup>119</sup>

116. See, generally, W. Blair, above n. 21, at 4.

117. Civil Appeal No. 1661-1163 of 2018, 7 February 2018.

118. Section 50, Arbitration Act 1996 allows parties to appeal against two types of orders:

- an order refusing to refer parties to arbitration, and
- an order refusing to enforce a foreign award

119. A sample of the cases with contradictory opinion – *Electro Steel Casting Limited v. Reacon (India) Pvt. Ltd.*, Calcutta High Court, Application No. 1710/2015, 14 January 2016; *Tufan Chatterjee v. Sri Rangan Dhar*,

Interpretation of the provisions of the legislation, especially with regard to disputes pending before the courts and their transfer to the commercial courts, has presented interesting articulation. The Delhi High Court in *Guinness World Records v. Sababbi Mangal*<sup>120</sup> explained the law on transfer of suits pending in the civil courts as per Section 7, Commercial Courts Act.<sup>121</sup> The Court ruled in favour of the transfer of the dispute, related to intellectual property rights, by reading the entirety of Section 7 in the context of its object and the legislative history. It held that IPR matters would be decided by the Commercial Division of the High Court irrespective of the Specified Value of the dispute being less than 1 crore INR (152,000 USD).

While the legislation and the legislative history reiterate a commitment to usher in the specialist forum for commercial disputes resolution, the practice does not conform to this reiteration. A review of the roster on the Bombay High Court shows that the same judges are seen alternating between their civil court duties and duties on the commercial division/commercial appellate division.<sup>122</sup> Thus, instead of specialised courts with judges with expertise in commercial disputes resolution, it has only increased the workload on an over-burdened judiciary.

An ambitious specialised dispute resolution system for commercial disputes ought to take notice of the importance of expeditious resolution and enlist technology support to achieve that. The Commercial Courts Act in India needs to adopt competitive practices such as e-filing, cross-examination of witnesses through video-conferencing, digital transcription services and such. It is encouraging to note that few courts in India, on their own initiative, have adopted the e-filing procedures.<sup>123</sup> The discovery procedures, envisaged within the legislation<sup>124</sup> raise concern for dilatory and protracted procedures related to document production requests before the courts, thus not contributing to expeditious and efficacious dispute resolution.

## 6 Conclusion and Way Forward for Commercial Courts in India

Indian law and courts would need to evolve in their content and procedures before they could position themselves on the international dispute resolution hub. The road to that evolution is not a difficult tread although. Few important steps could help India's dispute resolution systems infuse confidence about its law and systems within the commercial world.

The law reform efforts need to factor the necessity of having Exclusive Commercial Courts. This would significantly impact the caseload of the commercial courts and thereby ensure speedy disposal of claims before it. Having a separate cadre of judges specialised in commercial disputes would impact the success of commercial courts, significantly. Going forward, India could also consider the segregation within the cadre-based on the specialisation of the judges within the categories of commercial disputes.

Similar to the UK's Commercial Courts, India would do well by adopting some of the best industry practices such as factoring the feedback gained through users' committees, industry associations and chambers of commerce through regular feedback procedures.

Integrating technological innovations into the dispute resolution process could further the cause of expeditious disposal of claims and ensure that case management procedure included in the legislation is adhered to. Whereas electronic records are admissible<sup>125</sup> before the courts and the Act described the details for their admissibility, the legislation does not allow electronic filing of applications related to commercial dispute and the electronic court proceedings.<sup>126</sup> The e-court service of India<sup>127</sup> portal has highly limited functionality with access restrictions. Appraising the performance of the courts with regard to the enforceability of contracts, specifically distance to finish, becomes very difficult. While the legislation mandated collection and disclosure of statistical information related to the number of suits, applications and appeals filed,<sup>128</sup> 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.

As mentioned in the Law Commission's 188th and the 253rd Reports, the civil procedure rules that are applied to the commercial courts need to be revisited for mandating stringent adherence to timelines.

Calcutta High Court, FMAT No. 47 [2016] 2 March 2016; *Board of Trustees of the Port of Mumbai v. Afcons Infrastructure Ltd.*, Bombay High Court, Arbitration Petition 868/2012, 23 December 2016; *Ardee Infrastructure Private Limited v. Ms. Anuradha Bhatia/Yashpal & Sons* Delhi High Court, 6 January 2017; also see, T. Shiroor & A. Rajan, 'India's Commercial Courts: An Examination Through Different Lenses', 15 *Transnational Dispute Management* (2018), available at: [www.transnational-dispute-management.com/article.asp?key=2549](http://www.transnational-dispute-management.com/article.asp?key=2549) (last visited 10 July 2018).

120. CS(OS) No. 1180/2011, I.A. No. 17748/2015, 15 February 2016.

121. Provided that all suits and applications relating to commercial disputes, stipulated by an Act to lie in a court not inferior to a District Court, and filed or pending on the original side of the High Court, shall be heard and disposed of by the Commercial Division of the High Court [...].

122. See, the roster list of the Bombay High Court, available at: <http://bombayhighcourt.nic.in/sittinglist/PDF/sitlistbomos20170605182929.pdf> (last visited 20 July 2018).

123. See, for instance, the statistics depicting the use of electronic services in the Delhi High Court, available at: <http://delhihighcourt.nic.in/statistics.pdf> (last visited 10 July 2018).

124. Commercial Courts Act, 2015 –Order XI Disclosure, Discovery and Inspection of Documents in Suits before the Commercial Division of a High Court or a Commercial Court.

125. Schedule 1, Order XI (6) of the Commercial Court Act (2) at the discretion of the parties or where required (when parties wish to rely on audio or video content), copies of electronic records may be furnished in electronic form either in addition to or in lieu of printouts.

126. e-filing is available in the Supreme Court of India and some High Courts, available at: [http://www.ecourts.gov.in/ecourts\\_home/](http://www.ecourts.gov.in/ecourts_home/) (last visited 2 November 2018).

127. Available at: [http://www.ecourts.gov.in/ecourts\\_home/](http://www.ecourts.gov.in/ecourts_home/) (last visited 2 November 2018).

128. Section 17, the Commercial Courts Act 2015.

The Bar Council of India could lay down specific guidelines as directed by the Supreme Court<sup>129</sup> to specify the role of foreign lawyers for being classified as casual advice to Indian clients on matters of foreign law.

Were India to position itself as a hub for dispute resolution, apart from improving its legal infrastructure – the law, the institutions and the procedures, it also needs to focus on best of the industry practices. It could consider, similar to SICC and the DIFC, adopting a hybrid arbitration-litigation model that offers the best of both – choice of forum, IBA Rules of Evidence and such from the world of arbitration could be fused with the benefits offered by litigation like the joinder of third parties, for instance. It could also ponder on ensuring structural neutrality by allowing international judges. All this would come in when India would look towards unschackling itself from procedural delays and adapt itself to the requirements of specialised dispute resolution system.

The Commercial Courts Act is but a small beginning in taking heads on the justice delivery mechanism and making it more accountable to its users while ensuring the rule of law. There are interesting signs that hold promise for the future of dispute resolution systems for commercial disputes in India. While an international commercial court may not be a possibility in the immediate future, there are incremental steps towards making the world look at India. The Ministry of Commerce has taken the first steps towards opening India's legal and accounting sector to foreign players by deleting just five words 'excluding legal services and accounting' – from Rule 76 of the Special Economic Zones Rules, 2006.<sup>130</sup> The Standing Forum for International Commercial Courts held in London in June 2017 emphasised the importance of shared information about the practices of commercial courts across jurisdictions and said that it could help appraise and improve practices in their own jurisdictions.<sup>131</sup> It helps to re-state the same, in the context of India.

129. *Bar Council of India v. A. K. Balaji* Civil Appeal Nos.7875-7879 of 2015, 13 March 2018.

130. The Gazette of India, Ministry of Commerce and Industry, available at: <http://sezindia.nic.in/upload/uploadfiles/files/1Rule76.pdf> (last visited 5 September 2018).

131. The Eastern Caribbean Supreme Court, 'Inaugural Meeting of the Standing International Forum of Commercial Courts' (4th and 5th May 2017), available at: <https://www.eccourts.org/inaugural-meeting-standing-international-forum-commercial-courts/> (last visited 10 September 2018).