

Dispute Resolution Hotline

October 29, 2015

INTRODUCTION OF COMMERCIAL COURTS: END OF ENDLESS LITIGATION!

- Establishment of specialized commercial courts for speedy and effective dispute resolution
- Total time from filing of Suit till final decree prescribed to be approximately 16 months
- 'Cost to follow event' concept introduced
- Arbitration matters to go before specialized commercial courts

I. INTRODUCTION

India is infamous for having an overburdened legal system that leads to indefinite delays in the disposal of cases. Inefficiencies in its legal infrastructure have made it all the more difficult for foreign as well as domestic investors to protect their investments in India. In fact, as seen in the famous case of *White Industries Australia Ltd. vs Union of India*¹, inordinate delays in the legal process was viewed as breach of investment treaty obligation by India.

Thus, there has always been a long standing requirement for a stable and efficient dispute resolution system ensuring quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered, all of which are critical in encouraging investment and economic activity.

After more than a decade of extended deliberations, and given a fresh impetus by the current Government's mission to improve India's image as an investment destination, the *Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015* ("Ordinance") was recently cleared by the Cabinet and received Presidential assent on October 23, 2015. The Ordinance is in line with international trends, aided by the in-depth study of Commercial Courts of the United Kingdom, the United States of America, Singapore, France etc. carried out by the Law Commission of India ("Commission") in their 188th report² and 253rd report³.

II. CONSTITUTION OF COMMERCIAL COURTS, COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION ("SPECIAL COURTS"):

The Ordinance provides that the Commercial Courts are to be established by notification by the State Government, in consultation with the concerned High Court. For territories where the High Court itself is vested with the original jurisdiction⁴ i.e. where particular suits may directly be filed before the High Court, the Chief Justice of such High Court may constitute a Commercial Division within such High Court. Once the Commercial Division/Commercial Court is established, the Chief Justice of the High Court would be required to constitute the Commercial Appellate Division.

In order to ensure that commercial matters are dealt with by persons with the requisite skillsets, the Ordinance specifically requires that judges of such courts/divisions be experienced in dealing with Commercial Disputes.

III. JURISDICTION

The Ordinance provides that the Commercial Courts shall have the jurisdiction to try all suits and applications relating to a *Commercial Dispute*⁵ of a *Specified Value*.⁶ Suits and applications filed in the High Court having original civil jurisdiction would be brought before the Commercial Division of the said High Court.

The definition of "*Commercial Disputes*" as defined in section 2(c) of the Ordinance is very wide and essentially covers every commercial transaction including general commercial contracts, shareholder & joint venture agreements, intellectual property rights, contracts relating to movable and immovable property, natural resources etc..

"*Specified Value*" as defined in section 2(j) the Ordinance pertains to the value of the subject matter in respect of the suit which shall not be less than **ten (10) million rupees [about USD 150,000] or such higher value**, as may be notified by the Central Government. The purpose of such segregation of Commercial Disputes of the given Specified Value from other disputes is to ensure that the selected disputes are speedily and efficiently resolved by the Special Courts.

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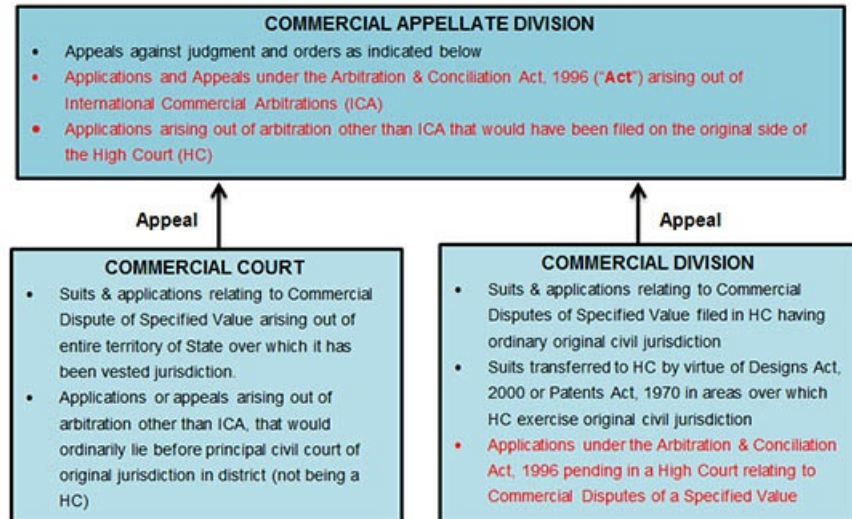
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IV. LIMITED RIGHT TO APPEAL/REVISION

The Ordinance in section 13 provides that appeals against decisions of the Commercial Courts/Commercial Division can only be brought before the Commercial Appellate Division of the concerned High Court **within sixty (60) days** from the date of decision and that Commercial Appellate Division should endeavor to **dispose it within six (6) months**.

A number of interlocutory/interim orders of a court are currently subject to an appeal or revision petition leading to delay in adjudication of principal dispute. The Ordinance has reduced the ability of defaulting parties to use such appeal/revision provisions as delaying tactics. It is now specifically provided that:

1. An appeal would lie against only certain identified orders⁷ of the Commercial Court/Division and that no other appeal under any law including the Letters Patent of a High Court could be preferred against the orders of Commercial Court/Division.⁸
2. No civil revision application/petition shall lie against any interlocutory order of a Commercial Court and any such grievance against the order may only be raised in appeal against the final decree.⁹

V. FRESH PROCEDURE FOR HEARING SUITS

The Code of Civil Procedure, 1908 ("CPC") has been amended by the Ordinance, with a view to streamline the processes and completely alter the prevalent litigation culture. Global practices such as holding of case management hearing have been introduced. Indicative timelines have been prescribed such as a six (6) month period for completion of trial post first case management hearing to bring about efficient and faster dispute resolution.

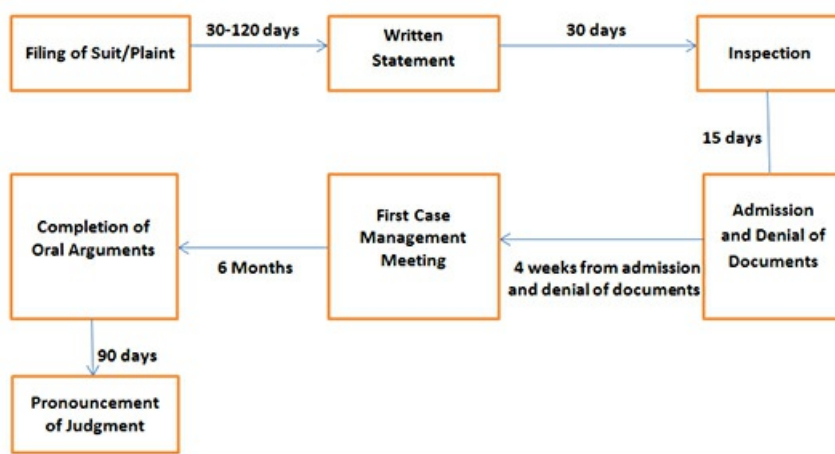
The amendments to the CPC are a welcome change. However, the government may need to provide clarifications on various practical difficulties which may arise in its application to ongoing proceedings. Further, based on section 16(1) of the Ordinance, arguments may be raised to apply such amended provisions to ongoing suits before various courts till such time the Commercial Court/Division are constituted and the suits are transferred.

A. Strict Timelines

The Ordinance features a number of amendments to the CPC which should result in expediting proceedings. Litigants often fail or deliberately refuse to file pleadings in matters during the time period prescribed and thereafter approach the Court to condone their delay, which is more often than not granted by the Courts to avoid miscarriage of justice. In order to discourage such practices it is now prescribed that if the defendant fails to file the written statement within one hundred and twenty days (120) from the date of having been served with the summons, then he would abdicate his right to file a written statement and the Court would be bound to not take such a delayed submission on record.

Other indicative timelines/measures have been prescribed to ensure that speedy resolution such as:

1. Closure of arguments not later than six (6) months from the date of first case management hearing;
2. Written arguments to be submitted before four (4) weeks of the oral hearing following revised written arguments, if any post oral hearing within one (1) week.
3. Judgment to be pronounced within ninety (90) days of the conclusion of arguments;
4. Recording of evidence on a day to day basis;
5. Six (6) month period for disposal of appeals;
6. Adjournments not permitted on account of appearing advocate not being present;



B. Cost to follow event

One of the biggest contributors to the endemic delays of our legal system are the litigants themselves. More often than not, parties resort to dilatory tactics like false and vexatious counter claims, frivolous applications and meritless appeals to delay and effectively deny due process of law. Litigants indulge in such behavior as courts would normally not impose the burden of costs on unsuccessful parties and lacked flexibility to impose costs of a quantum which may act as a deterrent. The Ordinance has sought to correct this, by incorporating a cost to follow event regime¹⁰.

Several important parameters have been incorporated for the court to take into consideration while awarding costs. One of the key parameters is an *unreasonable refusal of a reasonable offer for settlement made by a party*. This clearly is aimed at promoting settlement of disputes and encouraging a reasonable approach by parties towards such discussions.

The Ordinance also provides an illustration by which it states that even an unsuccessful party can be awarded costs if it comes to light that the successful party had made frivolous and vexatious claims. Therefore the intention of the legislature has been to ensure that litigants come to court with clean hands and that Courts have the requisite statutory power to impose costs on erring litigants. It is important to note that the legislature has also taken into account the fact that Courts had in the past imposed a *nominal cost* on litigants which were not commensurate with *actual costs*. However, the Ordinance has specifically mentioned that "*legal fees*" and "*fees and expenses of witnesses*" are to be taken into consideration while awarding costs to the successful party.

C. Streamlined process

The Ordinance has provided new and detailed procedures regarding disclosure, discovery¹¹, inspection¹², admission and denial of documents¹³ and nature of verification of pleadings, with a view to bring forth greater clarity, objectivity and efficiency in the proceedings. Such procedures should end the delays occasioned due to prevalent practices such as bald denials without proper reasoning, introduction of fresh documents and amendment of pleadings during the course of the proceedings which were not disclosed at the outset. Care must be taken to meet the prescribed timelines for disclosure failing which a party may not be permitted to rely upon the same. Further, it may be practically difficult to comply with the extensive filing requirements contemplated under the Ordinance.

D. Case Management

The Supreme Court in *Rameshwari Devi v Nirmala Devi*¹⁴ had observed that at the time of filing of a suit the trial court should finalize a timeline for all filings and pleadings and all parties should adhere to these timelines. The observations of the Supreme Court follow the best practices from different jurisdictions like United States and Australia where Case Management is an essential and integral part of the legal system.

The Ordinance has in Section 7 of its Schedule inserted Order XV in the CPC, providing for the concept of Case Management whereby the Court would mandatorily have to hold a meeting between the parties where the Court will decide upon a timeline for most important stages in a proceeding like recording of evidence, filing of written arguments, commencement and conclusion of oral arguments. The court is further authorized to pass a wide variety of orders at such case management hearing to ensure smooth and effective disposal of the suit.

The Court is further empowered to dismiss a petition, foreclose the right to make certain pleadings or submissions or order payment of costs in the event of non-compliance of the orders passed in a Case Management Hearing.

E Summary Judgment

On many occasions certain disputes linger on in courts without there being any substance in them as the entire process envisaged in the CPC has to be followed by the Court and all stages need to be completed before a judgment can be passed. Courts are duty bound to follow the principles of natural justice and afford to the defendants all kinds of statutory remedies available. The process envisaged by the Ordinance for a summary judgment is akin to the existing procedure of Summary Suits¹⁵ in the CPC. Principal difference being the ability of parties to request for summary judgments in all commercial disputes of Specified Value irrespective of the nature of relief sought and ability to request for such summary judgment at any stage prior to framing of issues.

Ordinance has inserted Order XIII-A in the CPC according to which, if a party approaches the Court before the issues have been framed, then the Court would consider the other party's real prospect of succeeding. On this basis, it has the discretion to pass a summary judgment. There are various considerations which are to be taken into account by the Court to decide as to whether a summary judgment can be passed. However the Ordinance has struck a balance in providing equal opportunity and protection for litigants. The Ordinance has ensured that all facets of natural justice are met with, wherein both litigants are asked to provide their individual explanations including documentary evidence as to why a summary judgment should or should not be passed. The Ordinance has also empowered Courts to pass conditional orders which are akin to interim measures. When a Court believes that a particular entity may succeed but

it is improbable for it to do so, it can pass a conditional order against that litigant including but not limited to deposit of a sum of money. Practically, putting a party to such terms will work to bring about an amicable resolution of many disputes.

VI. ARBITRATION V/S COMMERCIAL COURTS

A crucial question arises in context of whether parties should select Commercial Courts over arbitration.

The Arbitration and Conciliation (Amendment) Ordinance, 2015 ("**Arbitration Ordinance**") has brought in changes such as a twelve (12) month deadline for completion of arbitration, deeming interim orders passed by arbitral tribunals as orders of court, ability to involve third parties in arbitrations seated in India, which have in fact taken India beyond the global standards.

(For detailed analysis of the Arbitration Ordinance please click [here](#) (*October 27 hotline*) and [here](#) (*September 1 hotline*))

Further, Section 10 of the Ordinance prescribes that applications and appeals arising out of arbitration are to be heard by Commercial Court/Commercial Appellate Division. Thus, the intent is to look at the two regimes as complementing each other.

Section 10(1) and 10 (2), provide that applications and appeals arising out an International Commercial Arbitration and any other arbitration proceedings which would have been filed in the original side of the High Court shall be heard by the Commercial Appellate Division i.e. a division bench (2 judge bench) of the High Court. Appeals under Section 37 of the Arbitration and Conciliation Act, 1996 against an order passed by the Commercial Appellate Division may then directly lie before the Supreme Court. Further, Section 15 of the Ordinance provides that applications under the Act that are pending before the High Court where a Commercial Division has been constituted shall be transferred to the Commercial Division and not the Commercial Appellate Division.

However, in scenarios where party may not have preferred opting for arbitration such as in case of back to back transactions, but still opted to do so, deterred by delays prevalent in the Indian courts, would now be bolstered to adopt a pure court process over arbitration.

VII. CONCLUSION

The promulgation of the ordinance reflects tangible measures being taken by the government to ease doing of business in India.

Only time will tell how quickly the State Governments and High Courts act on the provisions of this Ordinance and 'notify' and 'order' the constitution of the said courts. Considering that 11 states have the same political party as the center in majority and that the passage of the Ordinance would be an opportunity for states to demonstrate their willingness to add to ease of doing business in the region, it is likely that states would soon constitute such Commercial Courts in the region. With regard to the High Courts exercising original jurisdiction, it is likely that the current benches which hear commercial matters, may be constituted as Commercial Division and Commercial Appellate Division.

However, considering that the Ordinance would automatically lapse upon expiry of six weeks from the reassembly of Parliament and that the winter session¹⁶ of the Parliament is on the horizon, the State Governments and High Courts may wait for the Ordinance to be approved by the Parliament before constituting the Commercial Court/Division. Such an introduction of Commercial Courts would mark a landmark legal reform for the nation.

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¹ Available at <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>

² Available at <http://lawcommissionofindia.nic.in/reports/188th%20report.pdf>

³ Available at http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and_Commercial_Courts_Bill_2015.pdf

⁴ High Courts exercising ordinary original jurisdiction are those of Himachal Pradesh, Delhi, Bombay, Calcutta and Chennai

⁵ Refer to Section 2(1)(c) of the Ordinance

⁶ Refer to Section 2(1)(i) and Section 12 of the Ordinance

⁷ Appealable orders as identified under Order XLIII of the Code of Civil Procedure, 1908 and Section 37 of the Arbitration & Conciliation Act, 1996

⁸ Refer to Section 13 of the Ordinance

⁹ Refer to Section 8 of the Ordinance

¹⁰ Refer to Section 2 of the Schedule to the Ordinance

¹¹ Order XI, Rule 1 of the CPC (Discovery by interrogatories: Rule 2)

¹² Order XI, Rule 3 of the CPC

¹³ Order XI, Rule 4 of the CPC

¹⁴ (2011) 8 SCC 249, at para 52

¹⁵ Refer to Order 37 of the CPC

¹⁶ Traditionally commences in the third week of November

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