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The Commercial Courts Act, 2015: Genesis, Benefits and Challenges

*Training Session on the Commercial Courts Act,
2015 for the National Judicial Academy, Assam*

Dr. Birendra Saraf, Senior Advocate, Bombay High Court
Jay Manoj Sanklecha, Advocate, Bombay High Court
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A. Introduction

1. The enactment of the Commercial Courts Act, 2015¹ (the “Act”) marked the culmination of more than a decade long discussion on the need to set up commercial courts in India to provide for speedy disposal of high value commercial disputes. It reflected the aspirations of the law makers to “ensure that commercial cases are disposed of expeditiously, fairly and at reasonable cost to the litigant” and it was envisaged that the Act would “accelerate economic growth, improve the image of the Indian justice delivery system; and improve the faith of the investor world in the legal culture of the nation”.² However, the last seven years of the operation of the Act, have perhaps not yielded the desired outcome.³ The Act has already been subject to a significant amendment which has marked a complete departure from the original objective of providing a mechanism for speedy disposal of “high-value” commercial disputes.⁴ Nevertheless, despite the challenges and difficulties, the Act has made some positive contributions to commercial disputes practice in the country. This research note seeks to briefly examine the legislative history of the Act (**Part B**); highlight the salient features of the Act, together with the jurisprudence of the Courts on the relevant provisions of the Act (**Part C**); and the effect and consequences of the Amendment to the Act in 2018.

¹ The short title of the Act, originally was, the “Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015”. The short title of the Act was *vide* the 2018 Amendment changed to the “Commercial Courts Act, 2015”.

² Statement of Objects and Reasons, “The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015” <<https://www.prsindia.org/uploads/media/Commercial%20courts/Commercial%20courts%20bill,%202015.pdf>> at Para 7 (last accessed 24th April, 2020).

³ For an excellent appraisal of the Act from an empirical perspective See Ameen Jauhar and Vaidehi Misra, Commercial Courts Act, 2015: An Empirical Impact Evaluation, Vidhi Centre for Legal Policy, at Pg. 9 <https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf> (last accessed 29th February, 2020) (“Vidhi Report”)

⁴ The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, <<http://legallaffairs.gov.in/sites/default/files/The%20Commercial%20Courts%2C%20Commercial%20Division%20and%20Commercial%20Appellate%20Division%20of%20High%20Courts%20%28Amendment%29%20Act%2C%202018.pdf>> (last accessed 24th April, 2020). (“2018 Amendment”)

B. The Legislative History of the Commercial Courts Act

2. The Act has a fairly long and somewhat chequered legislative history. Although the idea of the Act was first mooted as far back as in December 2003, there were rich, lengthy and diverse discussions and debates on the draft legislation during the intervening years, which ultimately shaped the enactment of the Act in 2015 and its subsequent amendment in 2018.

188th Report of the Law Commission of India

3. The idea of having a commercial division in each High Court in India for adjudicating commercial disputes on the lines of the commercial division in the High Courts in the United Kingdom (“UK”), United States of America (“US”) and other countries was first mooted in the seminal 188th report (*Proposal for constitution of Hi-tech fast track Commercial Divisions in High Courts*), of the 17th Law Commission of India (“Law Commission”) back in December 2003.
4. The Law Commission took up the issue *suo moto* in view of the vast changes in Indian economic policy from the year 1991, which ushered in a new era of privatisation, liberalisation and globalisation in India. In the changed environment, with increasing commercial disputes, the Law Commission felt that unless there was a new and effective mechanism for resolving disputes speedily and efficiently, progress would be retarded.⁵
5. The Law Commission felt that it was necessary to assure foreign investors that Indian Courts were as fast as those in the developed countries and that it was not marked by long judicial delays. The Law Commission was particularly influenced by the need to negate some recent judgements of the US & UK Courts⁶, which had

⁵ Law Commission of India, *188th Report on the Constitution of Hi-tech Fast Track Commercial Divisions in High Courts*, <<http://lawcommissionofindia.nic.in/reports/188th%20report.pdf>> (last accessed: 24th April, 2020) at Pg. 5, 164. (“188th Report”).

⁶ See e.g. the observations of the US courts in *Shin-estu Chemical v. ICICI Bank* (Supreme Court of New York, 2003); *Bhatnagar v. Surendra Overseas Ltd.* (1995) 52 F. 2.d 1220 (3rd Cir), and *Modi Enterprises v. ESPN Inc* and UK courts in *European Asian Bank v. Punjab & Sind Bank* (1982) 2 *Lloyds’ Report* (CA); and *The Vishva Abha* (1990) 2 *Lloyd’s Report* 312 on the long-judicial delays in India. Apart from the cases identified by the Law Commission above, in 2011 the arbitral tribunal in *White Industries v. Union of India* found India guilty of breaching the India-Australia BIT norms, since the Indian legal system took over nine years to adjudicate the Investors jurisdictional claim.

assumed jurisdiction over cases which were otherwise required to be filed in India, on the general assumption that the legal system in India has collapsed and that all cases in India took twenty-five years for disposal.⁷

6. The Law Commission carried out an in-depth study of the commercial courts in the UK, US (specifically states of New York, Delaware, Philadelphia and Maryland), France, Ireland Singapore, Scotland, Philippines, Pakistan, United Arab Emirates, Poland, Russia, Romania, Ukraine, Kenya, and Ghana. The Commission found that while there were differences in details, there were certain common underlying features across all these countries which had introduced a commercial division in their decision making process. They were typically set up within the existing legal system, dealt with cases of high pecuniary value, adopted fast procedures, hi-tech systems and were manned by judges with experience in commercial matters.⁸
7. The Law Commission accordingly recommended the setting up of a Commercial Division of 2 (two) judges in each of the High Courts in India having jurisdiction over 'commercial disputes' having pecuniary jurisdiction of Rs. 1 Crore or such higher amount determined by the High Court (not exceeding 5 Crore) with a fast track procedure (strict timelines for filing pleadings, recording of evidence, delivery of judgment etc). The Report recommended that appeals from such Commercial Divisions of the High Courts should only be preferred before the Supreme Court.⁹

2009 Conference of Chief Justices of the High Courts

8. The Law Commissions' proposal in the 188th Report was considered at the 'Conference of Chief Ministers of States & Chief Justices of the High Courts' held on 16th August, 2009 in New Delhi, wherein a decision was taken that Commercial

⁷188th Report, Pgs. 10-23.

⁸ 188th Report, Pgs 24-63.

⁹ For Salient Features of the recommendations made by the 17th Law Commission in the seminal 188th Report See Law Commission of India, 253rd Report on Commercial Division, Commercial Appellate Division and Commercial Courts Bill, 2015 http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and_Commercial_Courts_Bill_2015.pdf at Pr. 1.5 at Pg. 2-3 ("253rd Report").

Divisions would be constituted in the High Court's as and when legislation in this regard would be enacted by the Indian parliament.¹⁰

Commercial Division of High Courts Bill, 2009

9. Based on the recommendations of the 17th Law Commission, the United Progressive Alliance (“UPA”) government introduced the Commercial Division of High Courts Bill, 2009 (“2009 Bill”) in the Lok Sabha on 16th December, 2009 and the same was hastily passed on 18th December 2009 without any discussion or debate due to the ruckus in the Lok Sabha over Telangana.¹¹

10. However when the 2009 Bill was placed before the Rajya Sabha it was met with much resistance by the members. The resistance of the opposition primarily revolved around two aspects. *First*, that the 2009 Bill prioritised high stakes commercial litigation, thereby favouring privileged litigants over poorer ones. *Second*, lack of infrastructure and resources of the High Courts to deal with the additional work burden placed on them under the 2009 Bill.¹² In view of the opposition, the 2009 Bill was referred to the Select Committee on 22nd December 2009.

Select Committee on the 2009 Bill.

11. Pursuant to the motion in the Rajya Sabha, the Select Committee undertook detailed consideration of the 2009 Bill.¹³ In July 2010, the Select Committee presented its final report, where under it recommended a number of changes to the 2009 Bill including, (i) expansion of the definition of commercial disputes, (ii) reducing number of judges to 1 per division, (iii) reducing the pecuniary value from Rs. 5 Crore to Rs. 1 Crore, (iv) reducing the number of years of experience required for a commissioner

¹⁰ 253rd Report, Pr. 1.6 at Pg. 3.

¹¹ Prashant Reddy, 'How the Government used a flawed ordinance to Expedite Cases dealing with Rs. 1 Crores or more while other Cases remain pending', *The Caravan*, 6 November 2015 <<https://caravanmagazine.in/vantage/government-flawed-ordinance-expedite-cases-1-crore>> (last accessed 29th February, 2020). Reddy highlights how the 2009 Bill was amongst the 4 bills that were cleared in 5 minutes before the Lok Sabha.

¹² Vidhi Report, *Supra* at Pg. 9

¹³ Rajya Sabha Secretariat, Report of the Select Committee on the Commercial Division of High Courts Bill, 2009 as passed by the Lok Sabha, July 2010 <<https://www.prsindia.org/uploads/media/Division%20High%20Courts/Select%20Committee%20Report.pdf>> (last accessed 29th February, 2020) (“Report of the Select Committee”)

to record evidence, and (v) except where trial had begun, transfer all existing commercial disputes to the commercial division.¹⁴

12. Significantly, two members of the Select Committee i.e. Mr. P. Rajeev and Mr. D. Raja attached their notes of dissent to the final report raising concerns that the Bill created a privileged set of litigants disfavoured the poor, created additional burden on the high courts, and that no proper statistical analysis or study had preceded the introduction of the Bill.¹⁵

Further Debate in Rajya Sabha

13. Based on the recommendations of the Select Committee, the Bill was redrafted and introduced in the Rajya Sabha. However, the redrafted Bill continued to face stiff opposition amongst the members of the Upper House. In a particularly intense debate in December 2011, various concerns were advanced by the members of the opposition over the Bill, including (i) that there was no rationale for setting up commercial divisions in the High Court and further burdening them, particularly when they took longer to dispose of matters than the district courts; (ii) that the Bill privileged high value commercial disputes over other civil and criminal cases, reflecting 'elitist' motivations; (iii) vesting all high courts with original jurisdiction that did not have it, was contrary to recommendations by Malimath and Satish Chandra Committee which had recommended abolition of original jurisdiction of the High Court's; and (iv) the procedure prescribed under the Bill was not feasible and did not adhere to well established principles of civil procedure and natural justice.¹⁶ In view of the concerns expressed by the members, the UPA Government withdrew the Bill from the Rajya Sabha with the stated intention of introducing it later after amending the provisions of the Bill. However the redrafted Bill was never introduced by the UPA Government thereafter.

253rd Report of the Law Commission of India

14. In March 2013, in view of the shortcomings observed in the Bill, the Ministry of Law and Justice referred the Bill to the Law Commission for its consideration, including

¹⁴ 253rd Report, Pr 1.8 at Pg. 6.

¹⁵ Report of the Select Committee, Notes of Dissent, Pg. 9-15.

¹⁶ 253rd Report, Pr. 1.9 at Pg. 7.

but not limited to the scope and definition of commercial dispute. The Law Commission accordingly undertook a detailed study of the 2009 Bill and vide its 253rd Report ("*Commercial Division and Commercial Appellate Division of High Courts Bill, 2015*") published in January, 2015, made fresh recommendations in respect of establishment of Commercial Courts in India.

15. The Law Commission identified various drawbacks in the 2009 Bill. These drawbacks were broadly classified by the Law Commission into (i) Difficulties in Implementation of the Bill¹⁷, (ii) Difficulties in Procedural Provisions of the Bill¹⁸; (iii) Resistance to change the manner of conducting Litigation¹⁹, and (iv) No Emphasis on Specialisation in the Commercial Division²⁰.

16. The Law Commission reaffirmed the need for Commercial Courts in India since (i) a stable, efficient and certain dispute resolution mechanism is essential to economic development²¹; (ii) impression amongst foreign investors that India is a difficult place to do business in view of slowness and inefficiency of the judicial system²²; and (iii) Commercial Courts in India apart from being an end in themselves, would serve

¹⁷ The Report identified a number of difficulties in implementation of the Bill including (i) the lack of original jurisdiction of all High Courts, (ii) the difference in pecuniary jurisdiction of High Courts having original jurisdiction, (iii) already high pendency of cases before High Courts on their original side (iv) large percentage of cases pending disposal before the High Court for over five years and (v) difficulties arising from the transfer of pending commercial disputes to High Courts. See 253rd Report, Para 2.1-2.6 at Pg. 11-22.

¹⁸ The Report highlighted that the procedural provisions in Clause 9 of the 2009 Bill created certain difficulties, including (i) conflict between Bill and High Court Rules (ii) impracticality of expecting Plaintiff/Defendant to file affidavit of witness at the time of filing of the case and/or the reply, respectively. (iii) Impracticality of filing statement of issues prior to filing of reply; (iv) no sufficient particulars on how a case management conference should be conducted; (v) unfeasibility of appeals directly to the Supreme Court. See 253rd Reports, Para 2.8-2.9 at Pg. 23-24.

¹⁹ The Report noted that the Bill only brought about cosmetic changes and did not make any change in the legal culture which would require wider changes across the board. See Pr. 2.11-2.20 at Pg. 25-32.

²⁰ The Report noted that the 2009 Bill did not make any provision for any specialization of judges or require that the skills of judges be upgraded during the course of their tenure as a judge of the commercial division.; See 253rd Report, Pr. 2.21- 2.23 at Pg. 32-33.

²¹ A classic illustration provided by the Law Commission in its report was the substantial changes in corporate and bankruptcy laws during 92-98 which triggered a remarkable improvement in financial markets in the Country. See 253rd Report, Pr. 3.2.2 at Pg. 34.

²² The Law Commission averred to the fact that in the World Bank's Annual Business Report for 2014 India was ranked 186 among 189 countries in the category of enforcement of contracts. Contract enforcement in India reportedly takes nearly 4 years and the costs of enforcement aggregate to nearly 40% of the value claimed. See 253rd Report, Pg. 35-36.

as a pilot project to reform civil litigation across the country and the procedure followed in such Commercial Courts could be the basis for larger reforms in the Civil Procedure Code, 1908 (“CPC”) for the common man.

17. The Law Commission accordingly modified the Bill *inter alia* (i) to vest power in the Central Govt. to set up Commercial Divisions in High Courts (where original civil jurisdiction extends) and Commercial Courts elsewhere²³; (ii) set up Commercial Appellate Division of the High Court (to hear appeals²⁴ from the decisions of the Commercial Courts/ Commercial Divisions in the High Court);²⁵ (iii) substantive changes in the procedure to be followed before the Commercial Court/Division (clarifying that they prevail over the CPC, State amendments to CPC and High Court rules) including²⁶ (i) stricter timelines for filing of new pleadings, (ii) efficient disclosure and inspection norms, (iii) new and separate procedure for summary judgment, (iv) introduction of new regime of costs (costs to follow events)²⁷, (v) conduct a case management hearing to ensure proper conduct of trial²⁸; (vi) written submission mandatory and (vi) time bound delivery of judgment within 90 (ninety) days from conclusion of arguments. The normative procedural changes to the Act were to be supplemented through the issue of practice directions by the High Court to facilitate smooth functioning of Commercial Courts

²³ 253rd Report, Pr.3.9 at Pg. 39.

²⁴ No appeal however to be permitted from a finding of a commercial court/ division that the dispute in question is a commercial dispute, since there is no real prejudice caused to the parties with such finding. This recommendation appears in Section 12(3) of the Act; See 253rd Report, Para 3.23.3 at Pg. 48.

²⁵ 253rd Report, Para 3.12 at Pg. 40.

²⁶ 253rd Report, Para 3.20.3 at Pg. 44.

²⁷ Based on the recommendations of the Supreme Court in *Sanjeev Kumar Jain v. Raghbir Saran Charitable Trust* (2012) 1 SCC 455 and the 240th Report of the Law Commission (“*Costs in Civil Litigation*”); the Law Commission proposed a clause to ensure that costs necessarily follow the event. The Model of costs proposed in the amendment to the Arbitration Act, 1996 recommended in 246th Law Commission Report adopted in the proposed Bill. See 253rd Report, Pr. 3.21.3 at Pg. 46.

²⁸ This will include the power to inter alia, to fix the dates for hearing, decide which issues are to be tried and witnesses to be summoned. The Court will be empowered to impose costs and other penalties on parties for failure to follow the directions gibe during the case management hearing; 253rd Report, Para 3.20.3 (e) at Pg. 44. The Law Commissions recommendations on case management hearings were drawn from the direction of the Supreme Court in *Rameshwari Devi v. Nirmala Devi* (2011) 8 SCC 249 at Pr. 52.

18. The Law Commission also took note of the 246th Report of the Law Commission ("*Amendments to the Arbitration Act*"), and recommended that all application, appeals arising out of (i) international arbitration in relation to commercial dispute of Rs 1 Crore will be heard by the Commercial Division of the High Court; (ii) domestic arbitration in relation to commercial dispute of Rs 1 Crore would lie either to the High Court or a Civil Court (not being a High Court) depending upon pecuniary jurisdiction of the concerned Court and (iii) all arbitration appeals in relation to commercial dispute of over Rs, 1 Crore shall be heard and disposed of by the Commercial Appellate Division in the jurisdictional High Court.²⁹
19. The Law Commission also recommended that commercial disputes which are appealed to High Court from a tribunal, under a statute such as copyright act, etc. be heard and disposed of by the Commercial Appellate Division. Where order of the tribunal relates to commercial dispute and such order challenged by appeal or writ, should be heard and disposed by Commercial Appellate Division. However, as far as Public Interest Litigations are concerned caution must be exercised as issues involved are wider and different considerations apply.³⁰
20. Apart from modifications to the Bill, the Law Commission also recommended (i) that the Court Fee should be related to the time consumed by the litigants in the conduct of the case, like in Singapore and called upon State Governments to reconsider the existing Court Fee regime³¹; (ii) pecuniary jurisdiction to be raised uniformly across all High Courts with original jurisdiction to Rs. 1 Crore³² (iii) Institutional Arrangements should be made for Commercial Courts (proceedings should be digitised, e-filing, audio-visual recording, physical infrastructure should be updated, proper data management of number of cases filed, disposed, etc.); (iv) Judges nominated by to Commercial Division or Commercial Appellate Division by the Chief Justice shall have requisite experience and expertise in commercial laws; (iii) judges of commercial court should exclusively deal with commercial disputes for at least 2 (two) years; (iv) a higher pay scale and greater perquisites may be given to

²⁹ 253rd Report, Para 3.24.1 – 3.24.5, Pgs. 49-50.

³⁰ 253rd Report, Para 3.24.6 – 3.24.7, Pgs. 50-51..

³¹ 253rd Report, Para 3.22 at Pg. 47.

³² 253rd Report, Para 3.11 at Pg. 40.

commercial court judges; (v) all appointed judges of Commercial Court to undergo training for 6 (six) months in National Judicial Academy or the State Judicial Academy.

2015 Ordinance

21. In April, 2015, based largely on the recommendations of the Law Commission in its 253rd Report, the National Democratic Alliance (“NDA”) Government introduced the Commercial Courts, Commercial Divisions and Appellate Division of the High Court’s Bill, 2015 (“**2015 Bill**”) in the Rajya Sabha.
22. The 2015 Bill was then referred to the Standing Committee on Personnel, Public Grievances, and Law and Justice for its review and recommendations. However before the Standing Committee could give its recommendations on the Bill, the 2015 Bill was promulgated by the NDA government through a presidential ordinance made on 23rd October, 2015 (“**Ordinance**”)

Standing Committee

23. The Standing Committee submitted its report before the Parliament in December 2015.³³ The Standing Committee made a number of recommendations to the 2015 Bill including (i) revising the definition of commercial disputes by including, in the schedule a list of Acts, which deal with commercial transactions; (ii) establish commercial courts/divisions on a pilot basis for obtaining relevant data, etc.; (iii) litigants to be given choice if move to commercial court if pending dispute is of a commercial nature; (iv) specified value of commercial dispute to be increased to Rs. 2 Crore; (v) introduction of provision of fee/costs to be paid by party seeking adjournments beyond specified limit. Etc. In addition to revisions to the Bill, the Standing Committee also recommended to the Government to fill up the existing vacancies in the various High Courts in the Country before implementing the provisions of the Bill.

³³ Rajya Sabha Secretariat, 78th Report on the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Bill, 2015 < <https://www.prsindia.org/uploads/media/Commercial%20courts/SCR-%20Commercial%20Courts%20bill.pdf>> (last accessed 29th February, 2020).

2015 Act

24. After the report of the standing committee was tabled in Parliament, the same was considered and the Act was passed in both houses of Parliament. The Act received presidential assent on 31st December 2015. Significantly, most of the recommendations made by the Standing Committee were not adopted in the Act as finally enacted by Parliament.

2018 Amendment

25. On 3rd May, 2018 the Bhartiya Janta Party government promulgated an Ordinance (“**2018 Ordinance**”) amending the Act, with a view to expand the scope of commercial courts in India and improve India’s ranking on the Ease of Doing Business Report released by the World Bank. The 2018 Ordinance made certain key changes to the Act including (i) changing the short-title of the Act to the Commercial Courts Act, 2015;³⁴ (ii) reducing the specified value of a commercial dispute from Rs. 1 Crore to Rs. 3 Lakh³⁵; (iii) creation of commercial courts (where High Court had original jurisdiction) and commercial appellate courts at the district level;³⁶ (iv) requirement of concurrence with Chief Justice of the High Court for appointment of judge to Commercial Court made optional;³⁷ (v) provision for mandatory mediation where no urgent relief is being sought by the party to the dispute³⁸; and (vi) removal of provision in relation to transfer of suits where counterclaims filed over the specified value.³⁹

26. In August, 2018 (“**2018 Amendment Act**”) the Amendment Act was passed in both houses of Parliament. The 2018 Amendment Act repealed the 2018 Ordinance, while retaining its key changes. The changes to the Act, specifically reduction in specified value, marked a complete *volte face* from the rationale put forth at the introduction of the Act i.e. increasing the confidence of investors in the legal system’s ability to

³⁴ S. 3(1), 2018 Ordinance

³⁵ S. 4, 2018 Ordinance

³⁶ S. 6, 2018 Ordinance

³⁷ S. 6, 2018 Ordinance

³⁸ S. 11, 2018 Ordinance

³⁹ S. 9, 2018 Ordinance

adjudicate high value disputes. Although at the time the 2018 Amendment Act was introduced, it was suggested that the amendment in reduction of specified value, was motivated by the desire to extend the benefits of fast track adjudication to even less valued claims, analysis of the minutes of the special task force created by the central government, reveals that the amendment was principally motivated by a desire to create commercial courts at the district level to increase India's ranking in the Ease of Doing Business Report prepared by the World Bank.⁴⁰

C. Key Features of the Act

27. Before analysing the salient features of the Act, it would be useful to appreciate that the Act, creates a set up of commercial courts, within the existing civil court system, and empowers such Courts with necessary procedural powers (by appropriate amendments to the CPC) to efficiently and speedily resolve commercial disputes of specified value. Accordingly matters in respect of which the jurisdiction of the civil court itself are barred, by virtue of any special enactments (e.g. the SARFAESI Act) cannot be entertained by the Commercial Court under the Act. This is made explicit in Section 11 of the Act, which provides that notwithstanding anything contained in the Act a Commercial Court (or Division) cannot entertain any suit, application or proceedings relating to any commercial dispute in respect of which the jurisdiction of Civil Courts is either expressly or impliedly barred under any law for the time being in force.

Setting up of Courts and Jurisdiction

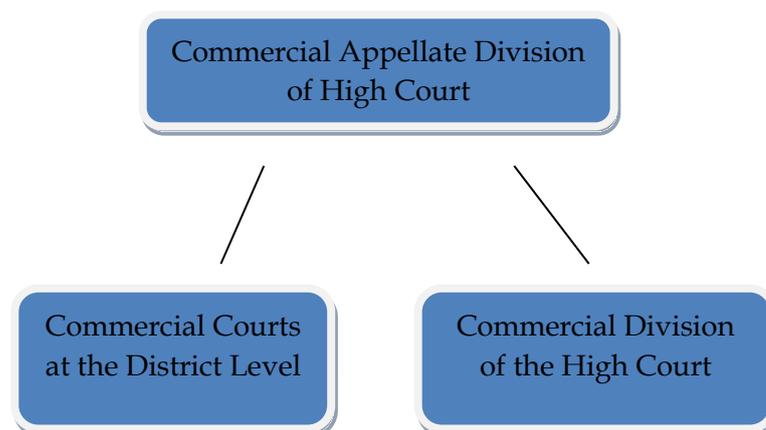
28. Prior to the 2018 Amendment, Section 3 of the Act authorised the State governments, in territories where the High Court had no ordinary original civil jurisdiction, to constitute by notification, Commercial Courts at the district level⁴¹ to hear "*commercial disputes*" of a "*specified value*" arising out of the "*territory of the State over which it has been vested jurisdiction*".⁴²

⁴⁰ Vidhi Report, *Supra* at Pg. 13-14.

⁴¹ S. 3 2015 Act

⁴² S. 6 2015 Act

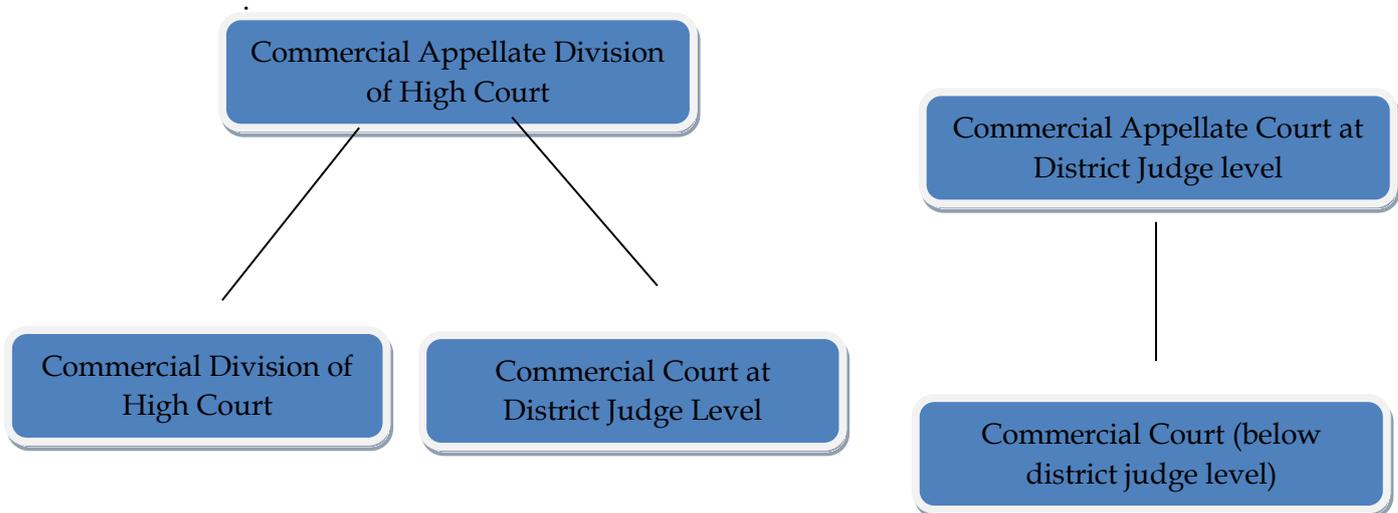
29. In States, where the High Court had ordinary original civil jurisdiction, Section 4 and 5 of the Act authorised the Chief Justice of the concerned High Court to, by administrative order, constitute multiple benches of Commercial Division (consisting of single judge) and Commercial Appellate Division (consisting of two judges). The Commercial Division of the High Court was empowered to hear “commercial disputes” of a “specified value” over which it had “ordinary original civil jurisdiction”. In this connection it may be noted, that Commercial Division of the High Court is also specifically empowered under the Act to hear and dispose of intellectual property rights matters including under the Trademark and Copyright Acts, even though such matters may fall below the “specified value” for commercial disputes.⁴³
30. Prior to the 2018 amendment specified value for commercial disputes was at least 1 Crore Rupees.
31. Under Section 13 of the Act, appeals from judgement and such orders, as specifically provided for, passed by a Commercial Court or Commercial Division of the High Court would lie before the Commercial Appellate Division of the High Court within a period of 60 (sixty) days from the date of judgement or order, as the case may be.
32. A graphical representation of the structure of the Courts Pre-2018 is provided hereunder:



⁴³ Proviso to S. 7 of the Act.

33. Pursuant to the 2018 amendment the specified value for commercial disputes was reduced to at least Rs. 3 lakh.
34. The 2018 Amendment amended Section 3 and 4 of the Act to create commercial courts and appellate fora at the district level. The Amended Section 3 of the Act authorised the State government, in respect of High Courts having original jurisdiction, to set up commercial courts at the district judge level. The State government was empowered to determine the pecuniary value of such commercial courts at the district judge level, which could not be less than Rs. 3 lakhs but not more than the pecuniary jurisdiction of the district court. In addition, in areas where the High Court did not exercise original civil jurisdiction, the State government can constitute commercial courts below the level of a district judge.
35. Section 3A of the Act authorised the State government, except in territories where the High Court exercised original civil jurisdiction to, set up Commercial Appellate Courts at the District level which would hear appeals from judgements or order of Commercial Courts below the level of a district judge. Moreover under amended Section 13 of the Act appeals from the judgment or order of the Commercial Court at the district level and Commercial Division of the High Court would continue to lie before the Commercial Appellate Division of the High Court. Accordingly the appeal provisions have been bifurcated.

36. A graphical representation of the structure of the Courts Post-2018 is provided hereunder:



37. It may be relevant to note that until 2019 not all State governments and High Courts have issued necessary notifications under the Act.⁴⁴ In many cases, the notifications issued by the State Government and/or the High Court are not publicly available. On 4th May 2016, the High Court of Judicature at Bombay issued Practice Note -48 in relation to Commercial Division and Commercial Appellate Division at the High Court.⁴⁵ On 30th June, 2016, the State of Maharashtra *vide* notification under Section 3 of the Act constituted Commercial Courts at District level, excluding territory where the High Court exercises original jurisdiction.⁴⁶ On 15 December 2018, after the 2018 Amendment the State of Maharashtra *vide* notification under Section 3(1) of the Act

⁴⁴ Vidhi Report, *Supra* at Pg. 19.

⁴⁵ Bombay High Court, Practice Note- 48 <available at: <https://bombayhighcourt.nic.in/writereaddata/practfiles/PDF/2016-05-07pnote-48.pdf>> (last accessed 26th April, 2020)

⁴⁶ Notification dated 30th June 2016 <available at https://districts.ecourts.gov.in/sites/default/files/commercial_court0001.pdf> (last accessed 26th April, 2020)

constituted commercial courts at the district judge level for the territory where the High Court exercises original jurisdiction.⁴⁷

38. Another significant change brought in by the 2018 amendment related to the appointment of judges to the Commercial Courts. Prior to the 2018 amendment, under Section 3(3) of the Act, the State government was mandatorily required to, as indicated by the use of the word “shall”, to seek the concurrence of the Chief Justice of High Court before appointing persons to be judges of a commercial court. However after the 2018 amendment, the word “shall” has been substituted by the word “may” indicating that it may no longer be mandatory for the State government to seek concurrence of the Chief Justice of High Court before the appointing persons as judges of the Commercial Court.
39. The Act does not only apply to suits or proceedings relating to “commercial disputes” of “specified value” filed after the enactment. Section 15 of the Act clarifies that all pending suits and applications, including applications under the Arbitration and Conciliation Act, 1996 relating to “commercial disputes” of “specified value” pending in the High Court or a civil court would be transferred to the Commercial Division or Commercial Court, as the case may be.
40. It may be apposite to note here that under the Act where the subject matter of an arbitration is a “*commercial dispute*” of “*specified value*” then in the case of
- (i) International commercial arbitrations, all applications or appeals arising out of such arbitration shall be heard and disposed of by the Commercial Division of the High Court;
 - (ii) Domestic arbitrations, all applications and appeals arising out of such arbitration, ordinarily lying on the original side of the High Court, shall be heard and disposed of by the Commercial Division of the High Court; and
 - (iii) Domestic arbitrations, all applications and appeals arising out of such arbitration, ordinarily lying before the principal court of original jurisdiction

⁴⁷Notification dated 15th December, 2018 <available at: <https://districts.ecourts.gov.in/sites/default/files/Notification%20of%20Hon%27ble%20High%20Court%20regarding%20Commercial%20Court>> (last accessed 26th April, 2020)

in a district, shall be heard and disposed of by the Commercial Court at the district level.⁴⁸

Accordingly the Bombay High Court has held that if the subject matter of arbitration is a “*commercial dispute*” of “*specified value*”, the Commercial Court alone will alone have jurisdiction to entertain the application seeking interim/ ad-interim relief under Section 9 of the Arbitration & Conciliation Act, 1996.⁴⁹

Meaning of Commercial Disputes

41. The legislative history of the Act reveals Act reveals that the definition of “*commercial disputes*” underwent some incremental changes. However, largely, following the recommendation of the 253rd Report of the Law Commission, the Act adopted an expansive definition of the term “*commercial dispute*” through an exhaustive list of 22 standard commercial transactions that may form the subject of commercial disputes.
42. We shall now analyse the definition in the Act through recourse to relevant case law. In this regard it may be useful to note that the Supreme Court has recommended that given the underlying object of the Act to ensure speedy disposal of high value disputes, the definition of commercial dispute under the Act has to be strictly interpreted.⁵⁰

2(1)(c) “Commercial dispute” means a dispute arising out of -....”

43. A number of decisions have recognised the exhaustive scope of the definition of “*commercial disputes*”. The Delhi High Court has noted that legislature did not intend to cover all disputes arising out of commercial transactions but only opted to specify 22 (twenty two) transactions, as transactions, disputes arising wherefrom will constitute commercial disputes.⁵¹ Accordingly, every dispute arising from a commercial transaction, unless falling within the 22 (twenty two) transactions identified, cannot be a commercial dispute within the meaning of the Act.

⁴⁸ Section 10, Act.

⁴⁹ *DM Corporation Pvt. Ltd. v. State of Maharashtra & Ors*, 2018 SCC Online Bom. 1112

⁵⁰ *Ambala Sarabhai Enterprises v. K.S. Infraspace LLP* (2020) 15 SCC 585

⁵¹ *Qatar Airways Q.C.S.C. v. Airports Authority of India*, 2017 SCC Online Del. 8088

44. In another decision, the Delhi High Court noted that the use of the words “means” in Section 2(1)(c) of the Act shows that the categories provided in the definition are exhaustive and not inclusive (although the Central Government may notify other categories).⁵²

45. The Calcutta High Court⁵³ has also reiterated that the categories of agreements specified in Section 2(1)(c)(i) –(xxii) of the Act are exhaustive. As per the Court the requirement of fixing the transaction within the ambit of the named category of agreements, can be construed as being in aid of what the Act aims to cut down viz. unnecessary wastage of time in determining whether the dispute is a commercial dispute.

46. In yet another decision, the Delhi High Court, relying upon the statement of objects and reasons of the Act has held that if the doors of the commercial courts are opened too wide they will be inundated and this would defeat the object of the enactment and therefore cautioned against giving a wide interpretation the definition of “commercial disputes” under the Act.⁵⁴

(i) *“Ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents...”*

47. Broadly speaking sub-clause (i) of Section 2(1)(c) of the Act pertains to the ordinary transactions of four identified classes of persons (viz. merchants, bankers, financiers and traders) including (use of “such as”) such ordinary transactions which have been formalised in mercantile documents. Although what constitutes “ordinary transactions” has not been clarified in the Act, it can be understood as comprising such activities which arise in the ordinary course of activities of the four identified classes of persons. Illustratively a dispute arising between a financier and his housekeeping staff may not constitute an “ordinary transaction” of a financier.

⁵²*Havells India Ltd. v. Advertising Standards Council of India*, (2016) 227 DLT 719.

⁵³*Ladymoon Towers Pvt Ltd. v. Mahendra Investment Advisors Pvt. Ltd.* MANU/WB/0547/2021

⁵⁴*Sanjeev Kumar v. Satish Mohan as cited in Qatar Airways Q.C.S.C. v. Airports Authority of India*, 2017 SCC Online Del. 8088

48. In understanding the various component elements of this sub-clause, Courts have frequently made reference to dictionaries and legal lexicons. It may therefore be apposite to understand the terms used from their ordinary meaning as explicated by the Courts:

- a. A 'merchant' is defined as 'one who buys and trades in anything and as merchandise includes all goods and wares exposed to sale in fairs or markets'.⁵⁵
- b. A 'banker' has been defined as 'one involved in the business of receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer'.⁵⁶
- c. A 'financier' has been defined as 'an administrator, collector or farmer of taxes or one who is skilled in levying and managing public money or as a capitalist concerned in financial operations'.⁵⁷
- d. Finally, a 'trader' is defined as one who sells goods substantially in the form in which they are brought or as a member of a stock exchange, buys and sells securities on the exchange floor or one who buys and sells commodities and commodity futures for others or for his/her own account in anticipation of speculative profit.⁵⁸
- e. A 'mercantile document' has been understood to be a document used in a transaction or in relation a transaction between merchants, bankers, financiers and traders.⁵⁹

49. The Delhi High Court has held that the plaintiff's grievance in the plaint that the defendant's circulation of notices through correspondence and other means, which allegedly constituted "*tortuous interference*" with the contractual relations of the plaintiff, on basis of which a decree of permanent injunction and damages was sought, would not be a dispute arising out of an '*ordinary transaction*' of a merchant

⁵⁵P. Ramantha Aiyar's *The Law Lexicon*, 2nd Edition, Reprint, 2010 quoted in *Ladymoon Towers (supra)*

⁵⁶ *Halsbury's Law of England*, fourth Edition, Volume 3 quoted in *Ladymoon Towers (supra)*; See Also Section 5(b) of the Banking Regulation Act, 1949

⁵⁷ *Oxford Universal Dictionary Illustrated* quoted in *Ladymoon Towers (supra)*;

⁵⁸ *Black's Law Dictionary*, Eight Edition quoted in *Ladymoon Towers (supra)*;

⁵⁹ *Ladymoon Towers (supra)*;

or trader within the meaning of Section 2(1)(c)(i) of the Act and therefore not a “commercial dispute”.⁶⁰

50. In another decision the Delhi High Court hearing a summary suit filed on the basis of admissions in the balance sheet of the defendant has clarified that all suits relating to recovery of monies cannot *ipso facto* fall within the meaning of Section 2(1)(c)(i) of the Act and a suit not based on any transaction relating to mercantile documents cannot be filed as a “commercial dispute”.⁶¹

51. The Calcutta High Court after analysing the component elements of Section 2(1)(c)(i) of the Act held that disputes between the plaintiff and defendant, arising out of a loan given by the plaintiff to defendant on the basis of personal relation of familiarity, cannot be brought within this definition.⁶² The Bombay High Court⁶³ has also adopted a similar position that a dispute arising out of a friendly loan, will not fall within the scope and ambit of a “commercial dispute” under the Act.

(iv) “arising out of transaction relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same”

52. The Delhi High Court has held that recovery for loss due to damage caused by the defendant to the plaintiff’s aircraft cannot be said to “arise out of transactions relating to aircrafts” and therefore not a commercial dispute within the meaning of the Act.⁶⁴

“(vi) construction and infrastructure contracts, including tenders”

53. The Andhra Pradesh High Court⁶⁵ in a suit filed by the plaintiff for recovery of extra amounts paid to the defendants for the construction of a residential villa, held that a

⁶⁰*Perpetuuiti Techmosoft Services Pvt. Ltd. v. Sanovi Technologies (India) Pvt. Ltd.*, 2016 SCC Online Del 6714.

⁶¹ *Kailash Devi Khanna v. DD Global Capital Ltd. & Ors.* 2019 SCC online Del. 9954

⁶² *Ladymoon Towers Pvt Ltd. v. Mahendra Investment Advisors Pvt. Ltd.* 2021 SCC Online Cal 2082

⁶³ *Glasswood Realty Pvt. Ltd. v. Chandravilas Kothari* 2021 SCC Online Bom 5032

⁶⁴ *Qatar Airways Q.C.S.C. v. Airports Authority of India*, 2017 SCC Online Del. 8088

⁶⁵ *Blue Nile Developers Pvt. Ltd. v. Movva Chandra Sekhar & Ors.* 2021 SCC Online AP 3964

dispute in relation to construction of a residential building (villa), would given the scope and objective of the Act (i.e. to encompass all types of commercial transactions which meet the specified value), fall within the category of “*construction and infrastructure contracts*” under clause (vi) of Section 2(1)(c) of the Act and would be a “*commercial dispute*”. However, it is respectfully submitted that the expansive reading of the definition of “commercial dispute” is not consistent with prior jurisprudence.

(vii) agreements relating to immoveable property used exclusively in trade or commerce”

54. The Gujarat High Court⁶⁶ hearing a suit for specific performance of an agreement for development of a plot of land as a biotech park, had occasions to interpret clause (vii) of Section 2(1)(c) of the Act. The High Court noted that the expression “used” exclusively in trade or commerce in the said sub-clause must mean “actually used” or “being used”. The Gujarat High Court further explained that if the intention of the legislature was to expand the scope of the clause, in that case the phraseology “likely to be used” or “to be used” would have been employed. As per the Gujarat High Court the word “used” denoted “actually used” and it cannot be said to be either “ready for use” or “likely to be used”. Accordingly, the Gujarat High Court has held that the said suit for specific performance of an agreement for development of a plot of land as a biotech park would not be a “commercial dispute” within the meaning of the Act.

55. The Delhi High Court hearing a suit for recovery of mense profit has held that sub-section (vii) has to be read together with explanation (a) to the Section 2(1)(c).⁶⁷ As per the Court the words “*arising out of*” and “*in relation to immoveable property*” in Section 2(1)(c) and sub-section (vii) of the Act have to read expansively and not narrowly. According to the Court, clause (vii) would include “*all matters relating to all agreements in connection with immoveable properties*”, provided that “*the immoveable property forms the dominant purpose of the agreement out of which the dispute arises*”.⁶⁸ Accordingly the Court held that when an action for recovery of immoveable property used exclusively for trade and commerce is regarded as a commercial

⁶⁶ *Vasu Healthcare Pvt. Ltd. v. Gujarat Akruiti TCG Biotech Ltd.* AIR 2017 Guj. 153

⁶⁷ *JagmohanBehl v. State Bank of Indore*, 2017 SCC Online Del 10706.

⁶⁸ *JagmohanBehl v. State Bank of Indore*, 2017 SCC Online Del 10706.

dispute, a claim for recovery of rent, mesne profit, security deposit, etc. in relation to such immovable property should also be a commercial dispute.⁶⁹ The Supreme Court has distinguished this decision of the Delhi High Court noting that the observations made in that case (to be read expansively) were reached in a circumstance where the immovable property in question was undoubtedly being used for trade or commerce.⁷⁰

56. The Supreme Court has expressed agreement with the view taken by the Gujarat High Court and held that the suit seeking specific performance of an agreement to execute a deed of mortgage of a plot of land would not be a dispute arising out of agreements relating to immovable property used exclusively in trade and commerce under the Act. The Supreme Court also noted that given the object of the Act i.e. so as to provide speedy disposal of high value commercial disputes so as to create positive image about the Indian legal system, an expansive interpretation would defeat the objective of the Act. Accordingly the Supreme Court endorsed a strict interpretation of the provisions of the Act.⁷¹

57. The Delhi High Court has clarified that immoveable property must be *legally* and not illegally or unauthorisedly used in trade and commerce.⁷² Hence, a dispute arising out of an agreement in relation to premises used for commercial purposes in an area designated for residential use is not considered a commercial dispute within the meaning of the Act.

58. The Delhi High Court in a suit for ejectment of the Defendant from different parts of the immovable property has held that the plaintiff must plead that the transaction from which the dispute arises relates to immoveable property that is used exclusively in trade or commerce⁷³ and in the absence therefore cannot maintain the action as a commercial suit in terms of sub-clause (vii) of Section 2(1)(c) of the Act.

⁶⁹JagmohanBehl v. State Bank of Indore, 2017 SCCOnline Del 10706.

⁷⁰ Ambalal Sarabhai Enterprises v. KS Infraspace LLP & Anr. 2019 SCC Online SC 1311 at Para 10.

⁷¹ Ambalal Sarabhai Enterprises v. KS Infraspace LLP & Anr. 2019 SCC Online SC 1311.

⁷²Soni Dave v. Trans Asian Industries Expositions Pvt. Ltd., AIR 2016 Del 186.

⁷³Soni Dave v. Trans Asian Industries Expositions Pvt. Ltd., AIR 2016 Del 186.

59. The Delhi High Court has also held that a suit seeking cancellation of powers of attorney and sale deeds and for recovery of possession of immoveable property is not a dispute arising out of an agreement relating to immoveable property, let alone immoveable property used exclusively in trade or commerce.⁷⁴ Similarly the Gujarat High Court has held that a suit seeking quashing of a sale deed on the basis of a succession certificate issued in favour of the plaintiff is not a “commercial dispute” within the meaning of the Act.⁷⁵

60. A suit for specific performance of an agreement to sell property to be used for commercial purposes in an area notified as a commercial area is a dispute pertaining to an agreement relating to immovable property to be used exclusively in trade and commerce.⁷⁶

61. The Delhi High Court has held that a dispute arising out of an agreement concerning the provision of consultancy and brokerage services in relation to the lease of premises for commercial purposes, is a commercial dispute in terms of Section 2(1)(c)(vii) of the Act, or alternatively, is so under Section 2(1)(c)(x) of the Act.⁷⁷

(xvii) “intellectual property rights relating to registered and unregistered trademark, copyright, patent, design, domain names, geographical indication ...”

62. Sub-section (xvii) of Section 2(1)(c) of the Act refers to rights relating to “*registered and unregistered trademarks*”. Hence, it would include common law actions for passing off. On the other hand, it does not mention actions in relation to trade secrets or confidential information, which would continue to be tried as ordinary suits outside the purview of the Act (unless arising out of any agreement which is otherwise covered under Section 2(1)(c) of the Act viz. licensing or distribution agreement, etc).

⁷⁴*Hindpal Singh Jabbal v. Jasbir Singh*, 2016 SCCOnline Del 4901; *Sumer Singh v. Om Prakash Gupta*, 2017 SCCOnline Del 6675.

⁷⁵*UjwalaRaje Gaekwar v. HemabenAchyut Shah*, 2017 SCC Online Guj 583.

⁷⁶*Monika Arora v. NeerajKohli*, 2016 SCCOnline Del 5259.

⁷⁷ *Realistic Realtors Pvt. Ltd. v. Karanpreet Singh Walia* 2021 SCC Online Del 5333

63. The Delhi High Court has held that a proceeding against the Advertising Standards Council of India challenging the direction to withdraw an advertisement on the ground that a particular advertising slogan or tagline is deceptive and/or misleading by exaggeration is not a dispute arising out of intellectual property rights within the meaning of the Act, even if the slogan or tagline is regarded as a trademark or subject matter of copyright.⁷⁸

(xviii) "agreements for sale of goods or provision of services..."

64. It is well known that e-commerce involves the regular buying and selling of goods and services over the internet. In e-commerce transactions, the agreement in question is executed over an electronic medium rather than in a physical space as with ordinary purchase/sale transactions. The definition under the Act is technology/medium neutral and encompasses electronic agreements as well. Accordingly, "e-commerce" transactions would normally qualify as "commercial disputes" under the aforesaid provision of the Act.

65. A suit filed by the Plaintiff for the enforcement of a compromise/consent decree, entered into between the parties in proceedings filed for realisation of monies arising from an agreement for sale of goods, has been held by the Calcutta High Court to not be a "commercial dispute" within the meaning of Section 2(1)(c)(xviii) of the Act.⁷⁹

Understanding Specified Value of Commercial Disputes

66. With the exception of specific disputes that lie before the High Court under any enactment, such as intellectual property disputes, Commercial courts have jurisdiction to try "commercial disputes" of a "specified value". Pursuant to the 2018 Amendment, the specified value of a suit, determined in accordance with Section 12 of the Act, has been reduced from Rs. 1 Crore to Rs. 3 lakh. The reduction in specified

⁷⁸*Havells India Ltd. v. Advertising Standards Council of India*, (2016) 227 DLT 719.

⁷⁹*Indian Media Services Pvt. Ltd. v. Indian Express Newspapers [Bombay] Ltd. & Ors.* 2022 SCC Online Cal. 273.

value has effectively expanded the jurisdiction of commercial courts, but marks a complete departure from the motivations underlying the enactment of the Act to provide an effective and efficient dispute resolution mechanism for “high-value” disputes.

67. Section 12 of the Act provides the mode and manner of determination of specified value of the subject matter of the commercial dispute in a suit, appeal or application. The determination of specified value is contingent on the nature of the relief that is sought. However there appears to be a distinction maintained between arbitration and non-arbitration matters. A tabular representation of the method for determining specified value insofar as non-arbitration matters is concerned, is as under:

Sr. No.	Nature of Relief	Relevant Factor to be considered
1.	relating to recovery of money	Money sought to be recovered including interest, computed up to date of filing of suit/application.
2.	Relating to movable property or rights therein	The market value of the movable property, as on date of filing suit/appeal or application.
3.	Relating to immovable property or rights therein	The market value of the immovable property, as on date of filing suit/appeal or application
4.	Relating to any other intangible right	The market value of the said rights as estimated by the Plaintiff

68. In relation to arbitration matters relating to a commercial dispute, the aggregate value of the claim and counter claim, if any, set out in the Statement of Claim and Counter-claim, is the basis for determining the whether such arbitration is subject to the jurisdiction of the commercial courts. The Delhi High Court in *National Seeds Corporation Ltd*⁸⁰ was recently faced with the question of whether since, the words

⁸⁰ *National Seeds Corporation Pvt Ltd. v. Ram Avtar Gupta* 2021 SCC Online Del. 5428

“inclusive of interest” is not explicitly mentioned in Section 12(2) of the Act, unlike Section 12(1)(a) of the Act, whilst calculating the aggregate claim under Section 12(2) of the Act for arbitration matters, interest until the date of filing the Statement of Claim ought to be included or not. The Hon’ble Court noted that although the words *“inclusive of interest”* were absent in Section 12(2) of the Act, full effect and meaning was required to be given the words *“value of the claim”* and accordingly held that interest till the date of invocation of arbitration had to be included, while determining the *“specified value”* under the Act even in respect of arbitration matters.⁸¹

69. An interesting question arose before the Delhi High Court⁸², prior to the 2018 amendment, on whether the Commercial Court Act prevails over the Court Fees Act, 1870 or the Suit Valuation Act, 1887. In that case, in a suit was filed for ejection of the defendants from the property before the Delhi High Court. The Court fee thereon was paid on basis of Section 7(iv) of the Court Fee Act, as on a suit between landlord and tenant, according to the amount of the rent payable for the year before filing the plaint. However pursuant to the Delhi High Court (Amendment) Act, 2015 the Chief Justice sought to transfer the suit to the concerned district judge. The Plaintiff tried to argue that although the valuation of the suit, is less than the minimum pecuniary jurisdiction of the Delhi High Court, it nevertheless remained a commercial suit within the meaning of the Act since, the specified value i.e. the market value of the said property qua which the relief of ejection was claimed was more than Rs. 1 crore in terms of Section 12(1)(c) of the Act. The Delhi High Court held that Section 12 of the Act was not intended to provide for a new mode of determining the valuation of the suit for the purpose of jurisdiction and court fees. As per the Court Section 12 of the Act was required to be read harmoniously with the Court Fees Act and the Suit Valuation Act, and read so, the specified value of a suit where the relief related to immovable property or to a right thereunder, had to be according to the market value of the immovable property only in such suits where the suit as per the Court Fees Act and/or the Suit Valuation Act has to be valued on the market value of the property, and not where some other mode of valuation is provided, as is the

⁸¹ Ibid at Para 8

⁸² *Soni Dave v. Trans Asian Industries Exposition Pvt. Ltd.* 2016 SCC Online Del 4282

case in a suit by a landlord for recovery of possession of immovable property from a tenant.

Pre-institution Mediation & Settlement

70. The 2018 Amendment added Chapter III-A (*Pre-Institution Mediation and Settlement*) to the Act, requiring a party to exhaust the remedy of mediation in accordance with the rules prescribed, before initiating proceedings under the Act, with the limited exception of cases where “urgent” interim relief has been sought. In terms of the said provision the government has notified the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 which sets out the detailed procedure for conducting mediation.
71. The Act provides that mediation must be completed within a period of three months (extendable to five months with consent of parties)⁸³, which time is not computed for the purpose of limitation⁸⁴. Under the Act the mediator, is required to reduce any settlement arrived at between the parties to writing and signed by the parties and the mediator. The Act clarifies that the settlement arrived at under this provision will have the same status and effect as if it is an arbitral award on agreed terms under Section 30(4) of the Arbitration Act.
72. Chapter III-A is part of the government’s efforts to institutionalise ADR mechanisms and reduce pendency in courts. It must be seen in light of the 2015 and particularly the 2018 Amendment to the Arbitration Act, which envisages the accreditation of arbitration institutions by a National Arbitration Council and the appointment of arbitrators in all cases under Section 11 of the Arbitration Act by such accredited arbitration institutions. Nevertheless the provision as it stands under the Act poses some interesting legal questions.
73. A question that arises is what are the consequence of not exhausting pre-mediation remedies before initiating proceedings under the Act, in cases where no “urgent” interim reliefs are sought. If the provision is held to be mandatory, the plaintiff

⁸³ S. 12A(3) First proviso, Act

⁸⁴ S. 12A (3) Second Proviso, Act

would stand non-suited. However, if the provision is held to be merely directory, the suit would survive. There seems a plethora of conflicting judicial opinions on the point as to whether the provision of Section 12A of the Act is mandatory or directory.

- a. The Division Bench of the Bombay High Court in *Vazirani*⁸⁵ overruled the decision of the Single Judge⁸⁶, holding that Section 12A of the Act is mandatory and not directory. Accordingly, the doctrine of substantial compliance or waiver cannot be invoked in the context of Section 12 of the Act.
- b. The Calcutta High Court⁸⁷, noting the use of the word “*shall*” has held that compliance with Section 12A of the Act is mandatory. The High Court distinguishing between “*filing*” and “*institution*” held that compliance with Section 12A is mandatory even in respect of suits that were filed prior to the requisite infrastructure for mediation being set up as contemplated under the Act. Another bench of the Calcutta High Court has also held that Section 12A of the Act is mandatory.⁸⁸
- c. The Madras High Court⁸⁹ has held that the provision of Section 12A of the Act is not mandatory since, in its view, the right to access justice is a constitutional right, which cannot be denied or deprived for not resorting to mediation.
- d. The Madhya Pradesh High Court⁹⁰ expressed agreement with the view taken by the single judge of the Bombay High Court in *Vazirani*⁹¹ that Section 12A of the Act is a procedural provision and set aside the order non-suiting the

⁸⁵ *Deepak Raheja v. Gango Taro Vazirani* 2021 SCC Online Bom 3124

⁸⁶ *Ganga Taro Vazirani v. Deepak Raheja* 2021 SCC Online Bom. 195

⁸⁷ *Dredging & Destiltation Company Pvt. Ltd. v Mackintosh Burn and Northern Consortium & Ors.* (2021) SCC Online Cal. 1458

⁸⁸ *Laxmi Polyfab Pvt. Ltd. v. Eden Realty Venture s Pvt. Ltd.* 2021 SCC Online Cal 1457

⁸⁹ *Shahi Exports Pvt. Ltd. v. Gold Star Line Ltd.* A No. 35 of 2021 in C.S. No. 669 of 2019 judgment dt. 09.08.2021

⁹⁰ *Curewin Pharmaceuticals Pvt. Ltd. v. Curewin Hylico Pharma Pvt. Ltd.* 2021 SCC Online MP 2496

⁹¹ *Deepak Raheja v. Gango Taro Vazirani* 2021 SCC Online Bom 3124

plaintiff for not complying with the requirement under Section 12A of the Act.

- e. The Allahabad High Court⁹² after gathering the intent of the legislature, including by way of reference to the prohibitive words used in Section 12-A of the Act, has held that the pre-institution mediation is mandatory.

74. Another interesting question that remains to be resolved by the Courts is the scope and extent of the words “urgent” immediately preceding interim relief. The accepted principles of statutory construction would dictate that merely filing of a suit seeking interim relief would not enable a party to avoid pre-mediation procedures, unless he can demonstrate that the relief sought is urgent. Unfortunately, this will open up another avenue of disputes between parties i.e. whether in a given case the interim relief sought is “urgent” or not. The Delhi High Court as a matter of procedure contemplates making an application of dispensation for mandatory mediation under Section 12A of the Act. However recently the Delhi High Court⁹³ has directed that in suit filed before the Intellectual Property Division, wherein application for interim injunctions are filed and urgent interim relief is sought, such application seeking dispensation would not be required and leave would be presumed in view of the language of Section 12A of the Act. The Telangana High Court has held that what is required to satisfy Section 12A is only contemplation of urgent relief and not entitlement to urgent relief. Accordingly, as per the Telangana High Court the court will not go into the question of whether the interim relief sought in the plaint is “urgent” or not.⁹⁴

75. It is notable that the Mediation Bill, 2021, pending in Parliament, which provides a general statutory framework for mediation in India, contemplates an amendment to Section 12-A of the Act, to bring the same in line with the provisions of the said Bill.⁹⁵

⁹² *Awasthi Motors v. M/s. Energy Electricals Vehicle & Anr.* 2021 SCC Online All 256.

⁹³ *Upgrad Education Pvt Ltd. v. Intellipaat Software Solutions Private Ltd.* 2022 SCC Online Del. 644.

⁹⁴ *M/s. MK Food Products v. M/s. S.H Food Products*, Telangana High Court <available at <https://indiankanoon.org/doc/111378565/>> (last accessed 26th April, 2020)

⁹⁵ Mediation Bill, 2021 (Bill No. 43 of 2021)

Handling Complex Commercial Disputes

76. A commercial dispute is typically considered complex if it involves multiple parties, often across different jurisdictions or requires professional analysis of technical information.⁹⁶ Such disputes can often emerge as ‘standard’ business disputes, but the parties, the professional assistance required and the legal issues involved may add a level of complexity. Complex disputes also frequently involve large monies at stake, lengthy trials, intricate legal issues and invite serious media scrutiny. Many commercial disputes involving multiple parties of individuals or entities are complex because they entail a variety of different interests to satisfy. Illustratively disputes relating to shareholders agreements⁹⁷ may often involve diverse interest groups i.e. the shareholders, the officers, the company, the board members, etc. which a commercial court will have to contend with. A commercial dispute can also often involve contesting parties across jurisdictions with different systems of law at play. Illustratively disputes arising out of joint venture agreements⁹⁸, distribution or licensing agreements⁹⁹ can involve parties across jurisdictions giving rise to complex private international law questions. International commercial arbitrations also often involve application of different systems of law to a dispute. In many commercial disputes, litigation may be required across jurisdictions involving the use of anti-suit or anti-arbitration injunctions. Finally complex commercial disputes can often require extensive analysis of highly technical information- which requires not only experienced representation but also experienced adjudicators. Illustratively, disputes arising out exploitation of natural resources such as telecom spectrum¹⁰⁰; intellectual property rights disputes pertaining to highly technical patents¹⁰¹; disputes arising out of technology development agreements¹⁰² would often require domain expertise to appreciate the technical nuances involved. As more particularly detailed hereinafter,

⁹⁶ “What makes a Business Dispute Complex? <<https://www.saverilawfirm.com/press/what-makes-a-business-disputes-complex>> (last accessed 9th March, 2022)

⁹⁷ Section 2(c)(xii) of the Act

⁹⁸ Section 2(c)(xi) of the Act

⁹⁹ Section 2(c)(ix) of the Act

¹⁰⁰ Section 2(c)(xix) of the Act

¹⁰¹ Section 2(c)(xvii) of the Act

¹⁰² Section 2(c)(xvi) of the Act

the Act introduces a series of legislative measures to ensure the speedy, efficient and effective disposal of such complex commercial disputes.

Amendments to the CPC

77. To ensure the streamlined, speedy and effective disposal of commercial disputes, Section 16 of the Act prescribes amendments to the CPC in its application to commercial disputes of a specified value. This provision has been interpreted strictly and the Bombay High Court has held that the provision would apply only to commercial disputes of a specified value and not commercial disputes not of a specified value.¹⁰³ Accordingly intellectual property disputes under the Trademark and Copyright Act below the specified value would not be required to adhere to the amended provisions of the CPC under the Act.

78. The amendments to the CPC under the Act contemplate time bound completion of pleadings, filing of evidence, trial and pronouncement of judgment. After the Plaintiff files the suit, it may seek leave to file additional documents within 30 days of filing the suit.¹⁰⁴ The Defendant is required to file its written statement within 30 days and not later 120 days from the date of service of summons.¹⁰⁵ The Parties are to then complete inspection of documents within 30 days from date of filing the Written Statement (or Written Statement to the Counterclaim), which can be extended by the Court to a maximum of 60 days.¹⁰⁶ The Statement of admission and denial of documents has to be filed within 15 days of the completion of inspection or any later date fixed by the Court.¹⁰⁷ The Court is required to hold the first case management hearing not later than 4 weeks from the admission/denial of documents by the parties.¹⁰⁸ At the Case management hearing the Court may pass orders framing issues between the parties, fixing dates for recording evidence, fixing dates by which written and oral arguments are to be made, setting time limits for parties and their

¹⁰³ *Bharat Bhogilal Patel v. Leitz Tooling Systems Pvt Ltd.* 2019 SCC Online Bom 890.

¹⁰⁴ Order XI R(4)

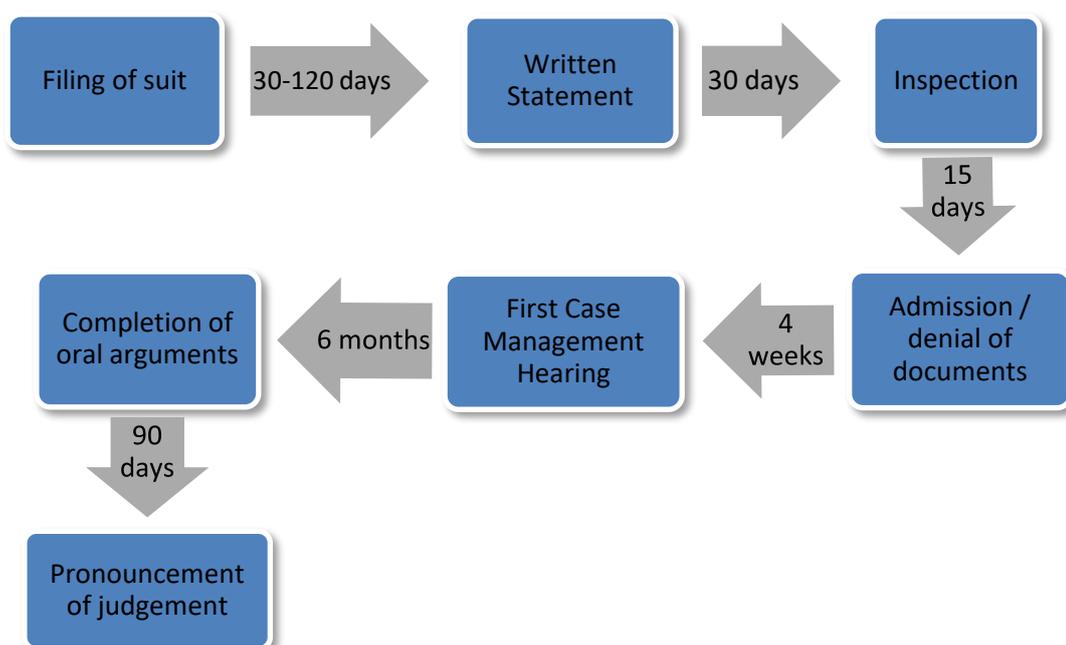
¹⁰⁵ Proviso to Order 5 Rule 1

¹⁰⁶ Order XI R(3)(1)

¹⁰⁷ Order XI R(4)(1)

¹⁰⁸ Order XV-A

advocates to address oral arguments etc.¹⁰⁹ In fixing such dates the Court is to be mindful that arguments should be closed not later than 6 months from the date of the first case management hearing.¹¹⁰ Parties are also required to submit their written arguments four weeks prior to commencing oral arguments.¹¹¹ The Court is then required to pronounce its judgment within 90 days of the conclusion of the arguments.¹¹² A graphical representation of the timelines prescribed under the Act is set out hereinafter:



79. In the context of timelines for filing written statement, the Supreme Court, noting the amendments to the CPC in the context of commercial disputes of a specified value, has held the amendment is mandatory and that a written statement cannot be taken on record after 120 days of the date of the service of the writ of summons, even in exercise of inherent powers under Section 151 of the CPC.¹¹³ The Bombay High Court noting the aforesaid decision of the Supreme Court clarified that in view of Section

¹⁰⁹ Order XV-A

¹¹⁰ Order XV-A (3)

¹¹¹ Order XVIII

¹¹² Order XX

¹¹³ *SGS Contracts (India) Pvt. Ltd. v. KS Chamankar Infrastructure Pvt. Ltd.* (2019) 12 SCC 210.; See Also *Gulf DTH v. Dish TV Limited* 2016 SCC Online Del. 5005; *Saregama India Ltd. v. Jai Manjit Singh* 2017 SCC Online Del. 12169; *AIS Glass Solutions v. Moser Baer Solar Limited* 2017 SCC Online Del. 11467

16(3) of the Act, the amendments to the CPC under the Act would prevail over the Bombay High Court (Original Side) Rules. Accordingly the Court held that it did not have the powers under the Bombay High Court (Original Side) Rules to condone delay in filing of written statement over and above the statutorily mandated period of 120 days.¹¹⁴ (except in the case of a suit filed as an ordinary suit and subsequently transferred to the commercial court / commercial division after the coming into force of the Act, where the court retains the power to extend the time for filing written statement beyond 120 days).¹¹⁵

80. The Bombay High Court¹¹⁶ was also faced with an interesting question when it noted that the Bombay High Court (Original Side) Rules, in contrast to the unamended provisions of the CPC, do not require a copy of the plaint to accompany the writ of summons. The relevant form of the writ of summons in the said rules has a note at its foot that says that the Defendant may seek a copy of the plaint from the Plaintiff or his advocate. Since the mandatory period for filing the written statement under the Act commences from the services of summons, the question arose whether summons served without accompanying copy of plaint is good and proper service of the summons. The High Court held that a summons served without an accompanying copy of the Plaint was not a summons at all, but only a notice about the institution of the suit. The High Court directed the registry to issue a practice note to ensure that any writ of summons in the commercial suit is now in the form required by the CPC (i.e. accompanied by the Plaint) and not as per the Rules.¹¹⁷ The High Court also directed the registry to consider framing appropriate guidelines to ensure that the Plaintiff cures any filing defects within a reasonable period of time to apply for a writ of summons, failing which the suit would be dismissed.

¹¹⁴ *Mera Gehani v. Axis Bank Ltd.* 2019 SCC Online Bom 358.

¹¹⁵ *Colonial Life Insurance Co. (Trinidad) Ltd. v. Reliance General Insurance Co. Ltd.*, 2019 SCC Online Bom 848 : (2019) 6 Bom CR 130; *Telefonaktiebolaget L.M. Ericsson v. Lava Intl. Ltd.*, 2015 SCC Online Del 13903 : (2016) 226 DLT 342

¹¹⁶ *Atlanta Limited v. Metso India Pvt. Ltd.* 2021 SCC Online Bom. 1594

¹¹⁷ Pursuant to the said Order, the Registry issued a practice directions dated 27th October, 2021 setting out the format of summons in a commercial suit under the Act. < <https://bombayhighcourt.nic.in/writereaddata/practfiles/PDF/20211027pranote60.pdf>> (last accessed 8th March, 2022)

81. With the Covid-19 outbreak, the Supreme Court passed a series of orders in a *suo moto* petition, extending the limitation period, both under general and special laws, whether condonable or not. However there remained some degree of controversy with respect to the application of such orders to the period prescribed for filing written statements under the Act read with the amended CPC. The Calcutta High Court had held that the Supreme Court order extending limitation would apply only to the first 30 (thirty) days for filing written statement under Order VIII Rule 1 of the amended CPC and not to the additional 90(ninety) days that follows the prescribed period.¹¹⁸ Recently the Supreme Court put the controversy to rest by clarifying that the orders passed by it extending limitation on account of the pandemic apply to the entire period for filing the written statement whether the same was condonable or not.¹¹⁹

82. The Act introduces significant changes in relation to disclosure, discovery and inspection of documents in suits under the Act. The plaintiff is required to produce not only all documents referred to and relied on in the plaint, but all documents relating to any matter in question in the proceedings, whether in support of or adverse to the plaintiff's case, in the plaintiffs power, possession, control or custody.¹²⁰ The plaintiff is also required to annex a "statement of truth" to the plaint in the format provided.¹²¹ In the event the plaintiff fails to disclose such documents along with the plaint or within the extended period of time by leave of the court (i.e. 30 days from the filing of the suit), the plaintiff will not be allowed to rely on the said documents. The plaintiff must also disclose documents sought to be relied on and which the plaintiff believes to be in the defendant's possession. The defendant must do likewise. The parties must also disclose whether the above documents are originals, office copies or photocopies and also set out in brief, details of parties to each document, mode of execution, issuance of receipt, custody of each documents etc. Accordingly the practice of filing affidavit of documents has been done effectively done away with

¹¹⁸ *Siddha Real Estate Development Pvt. Ltd. v. Girdhar Fiscal Services Pvt Ltd.* IA No. GA2 of 2020 in CS 245 of 2019 judgment dt. 24.12.2020

¹¹⁹ *Prakash Corporates v. Dee Vee Projects Ltd* 2022 SCC Online SC 180.

¹²⁰ Order XI r.1(1)

¹²¹ Appendix -1 to the Act

83. The Calcutta High Court¹²² was called upon to decide whether a Statement of Truth in a written statement in a commercial suit is a mandatory requirement under the Act, and whether the absence thereof warrants striking out the defence in the Suit. The High Court after examining the provision as well decisions of the Delhi and Bombay High Courts has held that the filing of a Statement of Truth was not mandatory and conferred jurisdiction on the Court to allow the Defendant to cure the defect. In other words, a written statement filed without a Statement of Truth would not, as a matter of operation of law, result in striking off the defence.

84. Under Section 18 of the Act, the High Court may issue practice directions to supplement the amended provisions of the CPC as applicable to commercial disputes of specified value. It is worth noting that a number of High Courts, including but not limited to the Bombay High Court, have issued such directions.

Case Management Hearings

85. The Act amends Order XV-A of the CPC to empower commercial courts to hold case management hearings, to ensure proper conduct of trial within a specified time frame. Although modelled on the practice in other jurisdictions, the Supreme Court in the past has also advocated the need for trial courts to hold case management conferences.¹²³ The hearings require courts to draw up a time table for inter alia framing of issues, fixing dates for filing affidavits of evidence, recording evidence, written arguments, oral arguments and fixing time limits for parties and their advocates to address oral arguments. ¹²⁴ In a recent decision the Delhi High Court, under this provision, fixed specific time limits for the oral arguments to be made by the plaintiff.¹²⁵

86. The first case management hearing in a case is required to be held within four weeks from the date of filing of admission and denial of documents by all parties and the court is required to pass orders fixing dates mindful of the fact arguments should be

¹²² *Harji Engineering Works Pvt. Ltd. v. Hindustan Steelworks Construction Ltd.* 2021 SCC Online Cal 2457

¹²³ *Rameshwari Devi v. Nirmala Devi* (2011) 8 SCC 249.

¹²⁴ Order XV-A R2

¹²⁵ *Roland Corporation v. Sandeep Jain* 2019 SCC Online Del 6557.

closed within six months from the date of the first case management hearing. In addition, the Court can also hold case management hearings during a trial, so as to facilitate speedy disposal.¹²⁶

87. The Court has wide powers in a case management hearing including but not limited to directing parties to file compilation of documents or pleadings, consolidating proceedings, striking off evidence or witnesses it finds irrelevant, ordering a separate trial of any issue, directing parties to exchange costs budget, etc.¹²⁷ Where parties fail to comply with such orders, the Court has the power to condone such non-compliance by payment of costs, foreclose such party's right to file affidavits, submissions, arguments, etc and even dismiss the plaint altogether.¹²⁸ Given the importance of case management hearing, the Court cannot adjourn such hearing for the sole reason that an advocate for a party is not present. However, it can adjourn hearing to another date for just reasons on conditions it deems fit.¹²⁹

88. As can be gathered from the above, case management hearings are extremely critical to an expeditious trial of the matter. However, despite the legislative mandate, the case management hearings are not regularly held by commercial courts in matters tried before it. As per a recent empirical study conducted by Vidhi of the Delhi High Court, in only 2 of the 150 cases studied were case management hearings actually conducted.¹³⁰

89. It has been suggested that since interim application themselves take time to be disposed of, it may be advisable to hold case management hearing well before that to monitor the progress of interim applications, while allowing formalities relating to the main suit continue in parallel. One another significant area of variance between practice in other jurisdictions such as the UK in relation to case management hearings is the provision of progress monitoring date, by which date parties are required to report their compliance with the necessary pre-trial time table and

¹²⁶ Order XV-A R5

¹²⁷ Order XV-A R6

¹²⁸ Order XV-A R8

¹²⁹ Order XV-A R7

¹³⁰ Vidhi Report, Pg. 35

preparation for trial fixed at the case management hearing. The Court reviews such reports and where necessary can take active steps to ensure that cases are ready for trial on the date fixed. Such a system would be particularly useful in the Indian context where the court is dependent upon making such enquiries from advocates rather than parties reporting compliance on their own.

Summary Judgment

90. The Act introduced Order XIII-A (summary judgement) which empowered the Court to decide a claim or a part thereof, pertaining to a commercial dispute without recording oral evidence. The provision seeks to avoid long drawn process of leading oral evidence in certain eventualities and consequently enables expeditious disposal of commercial disputes in a time bound manner.¹³¹ An application for summary judgment can be made either by the plaintiff or defendant, after summons has been served on the defendant, but before issues have been framed.¹³² The Delhi High Court has held that the Court may even pass summary judgement *suo moto* in a commercial dispute if enabled by the rules of the Court.¹³³
91. The application for summary judgment must contain all details set forth in Rule 4(1), including but not limited to disclosure of all material facts, include documentary evidence, identify the point of law, state why there are real prospects of succeeding on the claim. The respondent may within 30 days of receipt of notice of application or notice of hearing, file a reply which must contain all details set forth in Rule 4(3) including but not limited to disclosure of all material facts, include documentary evidence, identify point of law, and state why there are real prospects of defending the claim. If the applicant wishes to rely on additional documentary evidence he must serve copies of such evidence to the respondent at least 5 days prior to the date of hearing. On the other if the respondent wishes to rely on additional documentary evidence he must serve copies of such evidence to the applicant at least 15 days prior to the date of hearing,

¹³¹ *Su-Kam Power Systems Ltd. v. Kunwar Sachdev* 2019 SCC Online Del 10764 at Para 40.

¹³² Order XIII A R2

¹³³ *K.R. Impex v. Punj Lyod Ltd.* 2019 SCC Online Del 6667

92. The courts can give a summary judgment against a plaintiff or defendant on a claim if it considers that (i) the plaintiff has no real prospects of succeeding on the claim or the defendant has no real prospect of successfully defending the claim and (ii) there are no other compelling reason why the claims should not be disposed off before recording oral evidence.¹³⁴ The Delhi High Court found that the grounds for a summary judgment in Order XIII-A Rule 3 are identical to Rule 24.2 of the Civil Procedure Rules in England and referenced English case law in aid of interpreting the scope of the provision. Endorsing the English decisions, the High Court held that when an application for summary judgment allows the courts to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective.¹³⁵ As per the Court the expression “real” directs the courts to examine whether there is a “realistic” as opposed to “fanciful” prospect of success and “no other compelling reason” is to be read mutatis mutandis with “no genuine issue requiring trial”. In other words, per the Court, the provisions for summary judgment would be attracted “if the court while hearing such an application, can make the necessary finding of fact, apply the law to the facts and the same is proportionate, more, expeditious and less expensive means of achieving a fair and just result”¹³⁶

93. The Court has wide powers to pass orders on an application for summary judgment including (i) rendering judgment on the claim,(ii) making a conditional order requiring party to deposit sum of money in court, take specified step in relation to claim; provide security for restitution of costs, etc (iii) dismissing the application; (iv) dismissing part of claim and allowing judgment on rest; (v) striking out pleadings and (vi) further directions to proceed for case management.¹³⁷ The Court also has the power to impose costs in application for summary judgment u/s 35 and 35A of the CPC.¹³⁸

¹³⁴ Order XIII-A R3

¹³⁵ *Su-Kam Power Systems Ltd. v. KunwarSachdev* 2019 SCCOnline Del 10764

¹³⁶ *Su-Kam Power Systems Ltd. v. KunwarSachdev* 2019 SCCOnline Del 10764

¹³⁷ Order XIII-A R6

¹³⁸ Order XIII-A R8

94. It may be noted that summary judgement is in addition to other procedural tools available under Order XII Rule 6, Order VII Rule 11, and Order XXXVII Rule 1. The provisions relating to summary judgment which enables courts to decide claims pertaining to commercial disputes without recording oral evidence are exceptional in nature and out of the ordinary course which a normal suit has to follow. In such an eventuality, it is essential that the stipulations are followed scrupulously otherwise it may result in gross injustice. A specific period of time has been provided during which an application for summary judgment can be made. Hence, summary judgement cannot be granted at the admission stage without issuing notice to the defendant.¹³⁹
95. The Bombay High Court¹⁴⁰ recently exercised its powers under Order XIII-A of the CPC to dismiss the Suit of the Plaintiff, before recording of evidence, on the grounds that the Plaintiff had approached the Court with a completely false case (including submitting fabricated documents) only with a view to extort monies from the Defendant. Accordingly the High Court found that the Plaintiff had no real prospect of succeeding in the litigation and that the Defendant was entitled to a summary judgment under the Act.

Scope of Appeals

96. As noted earlier, the 2018 amendment to Section 13 of the Act bifurcates the appellate process. Accordingly appeals from “judgments” or “orders” of Commercial Courts below the level of the district judge lie before the Commercial Appellate Court¹⁴¹, whereas appeals from “judgment” or “orders” of Commercial Courts at the district level or Commercial Division of High Courts lie before the Commercial Appellate Division of the High Court.¹⁴² Both categories of appeals are to be preferred within 60 days from the date of the judgment or order, as the case may be. It may be noted that the word “decision” used in pre-2018 amendment has now been deleted from the Act.

¹³⁹*Bright Enterprises Pvt. Ltd. v. MJ Bizcraft LLP*, (2017) 236 DLT 295.

¹⁴⁰*Jayant Industries v. Indian Tobacco Company* 2022 SCC Online Bom 64

¹⁴¹ S. 13(1) Act

¹⁴² S. 13(1A) Act

97. The proviso to S 13(1A) of the Act clarifies that an appeal shall lie against “orders” (i) specifically enumerated under Order XLIII of the CPC, and (ii) under Section 37 of the Arbitration & Conciliation Act, 1996. Section 13(2) of the Act provides that notwithstanding any other law or Letters Patent of High Court, no appeal shall lie from an “order” or “decree” of a Commercial Division or Commercial Court otherwise than in accordance with provisions of the Act. Finally, the Commercial Appellate Court and the Commercial Appellate Division are required under the Act to endeavour to dispose of appeals within 6 months of the date of filing such appeals.¹⁴³

98. The Delhi High Court, after analysing the provisions of the Act has held that the word “judgment” appearing in Section 13(1) of the Act is actually a misnomer and has to be construed as a “decree” under the CPC. Accordingly the expansive or wider meaning to “judgment” ascribed under the Letters Patent of High Court or under a provision such as Section 10(1) of the Delhi High Court Act, 1996 cannot be imported into Section 13(1) of the Act. Post 2018 Amendment, the Division Bench of the Bombay High Court has, noting the judgment of the Supreme Court in *Kandla Exports* also held that the word “judgement” cannot be construed with reference to its meaning under Clause 15 of the Letters Patent of the High Court in view of the non-obstante clause in sub-section (2) of Section 13 of the Act, which restrict the right to appeal only to such orders specifically enumerated under Order XLIII of the CPC, and under Section 37 of the Arbitration & Conciliation Act, 1996.¹⁴⁴ Accordingly as per the Court the contrary views expressed in *Hubtown Limited*¹⁴⁵ and *Sigmarq Technologies*¹⁴⁶ had to give way.¹⁴⁷

99. The Supreme Court in the context of the pre-2018 amendment has held that appeals under Section 50 of the Arbitration & Conciliation Act, 1996 (Appealable Orders under Part II) have to follow Section 50 alone and not Section 13 of the Act. Hence,

¹⁴³ S. 14, Act.

¹⁴⁴ *Shailendra Bhaduria v. Matrix Partners India Investment Holdings Ltd.* 2018 SCC Online Bom. 13804

¹⁴⁵ *Hubtown Limited v. IDBI Trusteeship Ltd.* 2017 (4) Bom C.R. 210

¹⁴⁶ *Sigmarq Technologies Pvt. Ltd. v. Manugraph India Ltd.* 2017 SCC Online Bom. 9191

¹⁴⁷ *Ibid.*

orders passed in foreign arbitration cannot be challenged under Section 13(1) of the Act.¹⁴⁸

100. More recently the Supreme Court¹⁴⁹ in the context of appeals under Section 37 of the Arbitration & Conciliation Act, 1996 which are governed by the Act, held that the application of Section 5 of the Limitation Act is not excluded by virtue of the provisions of the Act. However, the Court noted that a delay beyond a period of 60 days as provided in Section 13(1-A) of the Act, is to be condoned by way of an exception and not as a rule. Accordingly, in a fit case, where a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such 60 day period, can in the discretion of the Court be condoned.

Bar against Revision Application or Petition against Interlocutory Order of Commercial Court

101. Under Section 8 of the Act, notwithstanding any other law for the time being in force, no civil revision application or petition can be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction, and any such, challenge subject to the provisions of Section 13 of the Act, shall only be raised in an appeal against the decree of the Commercial Court.

102. Recently the Division Bench of the Delhi High Court¹⁵⁰ has held that Section 8 of the Act does not affect the constitutional remedy under Article 227 of the Constitution of India and accordingly a writ petition challenging the orders of the Commercial Court is maintainable and does not limit the High Court's jurisdiction. However the Court cautioned that the writ jurisdiction ought to be exercised sparingly, especially where the civil revision remedy has been taken away by a special legislation i.e. the Act to ensure expeditious disposal of commercial suits.

¹⁴⁸ *Kandla Export Corp. v. OCI Corp.*, (2018) 14 SCC 715.

¹⁴⁹ *Government of Maharashtra v. Borse Brothers Engineers & Contractors Pvt Ltd.* (2021) 6 SCC 460

¹⁵⁰ *Black Diamond Trackparts Pvt. Ltd. v. Black Diamond Motors* 2021 SCC Online Del 3946.

103. The Gauhati High Court¹⁵¹ has held that despite the bar against revision application or petition under Section 8 of the Act, the Court can nevertheless interfere under Article 227 of the Constitution of India, if a very exceptional circumstance, is made out on in the facts and circumstances of a gives case. In the facts of that case, since the evidence of Defendant Witness -1 was allowed despite delay, the order of the Commercial Court not allowing the evidence of Defendant Witness- 2, was held to amount to an exception circumstance, required the Court to interfere in exercise of its jurisdiction under Article 227.

104. Similarly the Punjab & Haryana High Court¹⁵² has held that in view of the non-obstante clause, the provision contained in Section 8 of the Act is mandatory, nevertheless, owing to the ambit and scope of supervisory jurisdiction under Article 227 of the Constitution of Inida, the case could be examined on merits instead of maintainability. On facts however, the Court found that the petition was wholly misconceived, bereft of merit and without any substance and must therefore fail.

105. The Gujarat High Court¹⁵³ has after considering the law on the subject, held that the bar contained under Section 8 of the Act shall not affect the jurisdiction of the High Court under Article 227 of the Constitution of Inida. The High Court observed that if Section 8 were read as barring the writ jurisdiction of the High Court under Article 227 of the Constitution of India, such a provision would suffer from the vice of unconstitutionality.

Costs

106. The Act amends CPC to provide that in any action, costs¹⁵⁴ to “follow the event”, i.e. the loser must bear the winner’s costs.¹⁵⁵ In the event the unsuccessful party is not required to pay i.e. if no order of costs is to be made, reasons must be

¹⁵¹ *G&T Resources Worldwide & Ors. v. Naveen Goenka* (2020) 1 Gau LR, 412

¹⁵² *Active Promoters Pvt. Ltd. v. Assotech Realty Private Limited & Anr.* 2017 SCC Online P&H 5 5471

¹⁵³ *State of Gujarat v. Union of india* 2018 SCC Online Guj 1515.

¹⁵⁴ Costs is understood to mean “reasonable costs” relating to the fees and expenses of the witnesses, legal fees and other fees incurred in connection with the proceedings

¹⁵⁵ Section 35 and 35A of the CPC

provided.¹⁵⁶ The amended provisions are in line with the recommendations of the Supreme Court in *Rameshwari Devi v. Nirmala Devi*¹⁵⁷ and *Sanjeev Kumar v. Raghubir Saran*,¹⁵⁸ as well as the Law Commission's 240th Report on Costs in Civil Litigation. The Act provides for "actual" and "compensatory" costs to be imposed, and has lifted the statutory cap on imposing costs under Section 35-A (and which is notwithstanding any other law which may limit the awarding of costs, e.g. the Delhi High Court (Original Side) Rules).

107. Under the modified Section 35(3) of the CPC, the court may consider a number of factors when awarding costs, including but not limited to the following:

- i. The conduct of the parties
- ii. Whether a party has succeeded on a part or the entirety of its case
- iii. Whether a party made a frivolous claim or counter-claim that wasted judicial time.
- iv. Whether any reasonable settlement offer was made and unreasonably refused.

108. It is the practice of some courts to direct costs to be paid to charitable causes such as the National and State Legal Service Authorities, Advocates Welfare Fund, or the Army Welfare Fund. This does not compensate the other side, and suggests that the approach is only to punish for frivolous litigation or delay. However, costs are intended to be awarded to "indemnify a party against the expense of successfully vindicating his rights in court".¹⁵⁹ Thus, the Law Commission had recommended that for Commercial Courts, "*costs shall necessarily follow the event in all cases, except where the court gives reasons in writing explaining why costs should not follow*".¹⁶⁰ The reference here is to ordinary costs, not to punitive costs, as the Law Commission added that "a successful party to also have costs imposed on it if, for instance,

¹⁵⁶ *Dashrat Rathod v. Fox Studios India* 2017 SCCOnline Bom. 345 quoting 35(2) of the amended CPC

¹⁵⁷ (2011) 8 SCC 249.

¹⁵⁸ (2012) 1 SCC 455.

¹⁵⁹ *Mahindra Chandra Nandi v. Aswini Kumar Acharya*, ILR (1921) 48 Cal 427, quoted with approval in *Sanjeev Kumar v. Raghubir Saran*, (2012) 1 SCC 455.

¹⁶⁰ Law Commission of India, 253rd Report, para.3.21.3.

portions of the claim/defence are proved to be frivolous during trial” (emphasis supplied).¹⁶¹

109. Accordingly under the Act, courts should impose costs on the unsuccessful party in a commercial suit and award them to the successful party. When doing so, the court may set-off against such costs the costs of any interim applications in which the ultimately successful party was unsuccessful, and may also exercise discretion not to award full and actual costs when the successful party succeeds on only some of the claims raised or presents unnecessary or inflated costs in its costs affidavit (e.g. by engaging several senior counsel). The court may also impose exemplary costs against a party who wilfully or negligently fails to disclose relevant documents that were in their power, possession, control, or custody, as required under the provisions of the Act.¹⁶² However as the Delhi High Court has noted that the amended provision only deals with costs being awarded in favour of a party to litigation and imposition of costs for abusing process of law will continue to be governed by Section 151 of CPC.¹⁶³

Miscellaneous Provisions

110. There are a number of miscellaneous provisions in the Act aimed at improving the functioning of commercial courts. Under Section 17 of the Act all commercial courts¹⁶⁴ are required to maintain and update each month statistical data regards the number of suits, applications, appeals or writ petitions filed, the pendency of such cases, the number of cases disposed of, and publish the same on the website of the relevant High Court. This provision was inserted at the recommendation of the 253rd Law Commission which lamented the inadequacy of, and poor track record of keeping relevant date. The Law Commission noted that the systematic collection and publication of data by courts would help in assessing the performance of courts, in improving their transparency and serve to increase the confidence of the

¹⁶¹ Law Commission of India, 253rd Report, para 4.3(k)(iv).

¹⁶² O.XI r.3(6), CPC.

¹⁶³ *Country Inn Private Ltd. v. Country Inns & Suits* 2018 SCC Online Del 8549

¹⁶⁴ Including the commercial appellate court, commercial division of High Court and Commercial Appellate Division

general public in the court.¹⁶⁵ However despite the statutory obligation under the Act, compliance with the provision has been almost non-existent. As per the survey in the Vidhi Report, most High Courts have not made any disclosures mandated under Section 17 of the Act and only 8 High Courts have made partial disclosures.¹⁶⁶ The failure to record and publish data by the relevant High Courts has been a serious impediment to study the extent of the effectiveness of the Act in changing practice.

111. With a view to perhaps rectify the unsatisfactory situation in regard to reporting of data, the Central Government in exercise of its powers conferred under Section 21-A of the Act and in pursuance to Section 17 of the Act issued the Commercial Courts (Statistical Data) Rules 2018 (“**Data Rules**”). In terms of sub-rule (1) of Rule 3 of the Data Rules, the High Court is required to maintain, update and publish the data required under Section 17 of the Act by the tenth day of every month in the form specified in the Schedule I on their website. In addition, under sub-rule (2) of Rule 3 of the Data Rules, the High Courts are required to maintain certain additional data (list of cases e-filed in a month, list of cases in which case management hearings were held etc) in the form specified in Schedule II of the said Rules.

112. In terms of Section 20 of the Act the State Government may in consultation with the High Court establish necessary facilities providing training of judges who may be appointed to any of the commercial courts. The provision for training and continuous education of judges appointed to commercial courts was a specific recommendation of the 253rd Law Commission. The Law Commission had recommended that all judges appointed to the Commercial Court should be required to undergo training in a special program for six months at the National Judicial Academy.¹⁶⁷ However this was not eventually adopted.

113. The 253rd Law Commission also recommended that when nominating judges to commercial courts, the state government or the Chief Justice should nominate such

¹⁶⁵ 253rd Report, Para 3.19

¹⁶⁶ Vidhi Report, Pg 18-19

¹⁶⁷ 253rd Report, Para 3.15

judges that have requisite experience and expertise in commercial laws. Towards this end, the Law Commission also advised that the judges nominated to such courts should exclusively deal with commercial disputes, preferably for a period of at least 2 years.¹⁶⁸ Although Section 3(3), 4(2) and 5(2) of the Act requires the state government to appoint judges with experience in commercial disputes, anecdotal evidence suggests this has not always been the case. Moreover practice suggests that judges of commercial courts also routinely adjudicate non-commercial disputes and are also frequently re-assigned.¹⁶⁹

114. Under Section 19 of the Act the State government is required to provide necessary infrastructure to facilitate the working of a commercial court or commercial division. It was envisaged that commercial courts and divisions would take the benefit of new infrastructure. It was recommended that all proceedings of commercial courts should be digitised and e-filing and all facilities for audio-visual recording should be made available.¹⁷⁰ Specifically in relation to commercial courts at the district level, it was recommended that, as far as possible, they should have separate infrastructure and registries from regular civil courts.¹⁷¹ However, in practice, commercial courts judges are so only in nomenclature, with existing judges continuing to hear matters as before.¹⁷² Accordingly no separate infrastructure or registries have been made available. The provision of infrastructure support to commercial courts has been woefully inadequate.

D. Conclusion

115. The Act marks an important milestone in commercial disputes practice. It brings in much needed procedural modifications aimed at ensuring speedy and efficient disposal of commercial disputes in India. However practice has revealed that the implementation of the Act remains poor and that this has severely impeded its effectiveness. The amendment to the Act in 2018 although introducing some

¹⁶⁸ 253rd Report, Para 3.13

¹⁶⁹ Vidhi Report, Pg. 25

¹⁷⁰ 253rd Report, Para 3.18

¹⁷¹ 253rd Report, Para 3.16

¹⁷² Vidhi Report, Pg. 26.

important changes such as requirements for pre-institution mediation etc for improving quality of commercial disputes practice, has also drastically reduced the “specified value” from Rs. 1 Crore to Rs. 3 lakhs, marking a complete *volte face* from the earlier rationale of extending the provisions of the Act to only “high value” commercial disputes. While the extension of the Act to the lower judiciary can serve an important function, the unfamiliarity with its provisions, non-implementation and lack of necessary infrastructural support are significant impediments to its effectiveness.