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Article

Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 – A Comment

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Introduction:

The justice delivery system of our country can be excruciatingly slow. In commercial disputes, time is of the essence and delays can derail the entire remedy and relief and undermines business confidence in Indians as well as those interested in investing in India. In the case of *White Industries Australia Ltd.* v. *Union of India*[1], inordinate delays in the legal process was viewed as a breach of investment treaty obligation by India.

In order to strengthen the investor beliefs and the ease of doing business in India[2], the Government proposed changes to the existing Arbitration laws and the Court systems through an Ordinance in October, 2015. The ordinance relating to the establishment of Commercial Courts, Commercial Division and Commercial Appellate Division has subsequently been enacted as Act, 2015.[3]

The article summarizes the background, need for such legislation, its salient features, and the positive impact in creating a more effective redressal system.

Background:

The need for such a model of courts was addressed way back in the 188th Law Commission Report published in 2003. The report stressed on the need for having technologically equipped fast track commercial divisions in High Courts, to address the rise in high value litigation as an off-spring of liberalisation and privatisation.[4] It also looked into the feasibility of systems such as e-courts, e-filing, video conferencing in the Commercial Divisions emulating the models abroad. The Cabinet in the year 2009 introduced the Commercial Division of High Courts Bill, 2009 which was examined in detail by the Select Committee of the Rajya Sabha and subsequently by the 253rd Law Commission Report.[5]

The 253rd Law Commission Report, which focuses on the 2015 legislation draws its ground from the shortcomings of the 2009 Bill. The difficulties of lack of original jurisdiction in all High Courts, differences in pecuniary limits within the same Court, heavy backlog of cases and transfer of cases have been discussed in the

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1 UNCITRAL Arbitration Tribunal in Singapore, Final Award dated 30th November, 2011- While dealing with the question as to whether Republic of India had failed to provide effective means for asserting claims and enforcing rights – the Tribunal held, in para 11.4 (including the sub-paras) of the award, that India breached the BIT because of the delay caused by the Indian court in deciding the jurisdiction.

2 http://www.thestatesman.com/news/law/will-commercial-courts-speed-up-justice/122734.html, last accessed, 22nd Feb, 2016 at 1:30 pm.

4 Report 188, Law Commission of India, 2003

5 Report 253, Law Commission of India, 2015, p. 8

light of the 2015 legislation in the Report.[6]

Both the law commission reports refer to the existing and successful models in countries like UK, USA, Singapore and eleven others. The purpose of the Commercial courts in the UK was to provide a simplified procedure for the mercantile community with briefer procedures and experienced judges.[7] Similar objectives could be traced to the establishment of first set of Commercial Courts in New York in USA.[8] Within a short period (of five years, (1993-1998), the New York Courts reported a 36% reduction in the average time to dispose cases and reduction in the number of days taken to settle a case from 648 to 412 days.[9] Other countries such as Scotland, Manila and Singapore have achieved expected results by adopting Commercial Courts Divisions in their respective Judicial Systems.

Salient Features of 2015 Act:

Establishment:

The Act brings into effect three types of Courts for adjudicating commercial disputes, two at the Original Jurisdiction Stage and one at the Appellate Jurisdiction stage.

In the High Courts of Original Jurisdiction, a commercial division shall be carved out to deal with the commercial disputes. In all other cases, a Commercial Court shall be established at the district level to deal with such disputes. The appeals from such adjudications shall be to the Commercial Appellate Division in all High Courts.

Commercial Dispute:

A commercial dispute is defined to include any dispute related to transactions between merchants, bankers, financiers, traders, etc. The transactions could be of the nature of dealing in mercantile documents, partnership agreements, intellectual property rights, insurance, management and consultancy services, joint ventures, shareholders agreements or exploitation of natural resources.[10] The Explanation makes it clear that even governmental contracts fall within the ambit of this definition.[11]

Pecuniary Limit:

The 'Specified Value' of a commercial dispute has been marked at 1 crore rupees and above and Section 12 provides for the procedure for determination of the Specified Value in various cases. Thus, the pecuniary jurisdiction of the Commercial Courts is pegged at Rupees 1 crore and above.

Appointment of Judges:

The provision for appointment of more judges with special expertise in handling commercial disputes has been made in the Act. Furthermore, Section 20 puts the onus on the State Governments to ensure adequate and continuous training facilities for the judges in the

6 Ibid, p. 11-28
7 Supra Note 4, p. 28
8 Ibid, p.29
9 Ibid, p. 33
10 Supra Note 3, Section 2(1)(c)
11 Ibid, Explanation to Section 2(1)(C)

Commercial Courts, Divisions and Appellate Divisions.

Amendments to the Code of Civil Procedure:

Requisite amendments to the Code of Civil Procedure, 1908 have been made through this Act.[12] Section 9 of the Act allows for the transfer of a suit to the commercial division if the counterclaim value of the suit is of a Specified Value.

Time bound evaluation of Appeals:

Appeals are to be disposed within a period of six months from the institution of the appeal.[13]

Transfer of Pending Suits:

The Act provides for the transfer of pending suits to these Commercial Divisions from the date of the establishment of these courts. However, the suits pending only the final order shall not be transferred.[14]

All is not green yet:

Time Bound evaluation of disputes:

The Act gives a time frame only for the disposal of the appeals and not for the adjudication of the original dispute. A time bound remedy is essential even in the initial stage to make the system work effectively and achieve the true objective behind setting up of these Courts. Further, the model as proposed in the 246th Law Commission Report on Arbitration and Conciliation can be adopted. A new provision may be inserted making it mandatory for the disposal of a case in 12 months, which in certain exceptional cases could be extended to 18 months.[15] Even though a radical approach, any delay beyond 18 months, may result in some form of disincentive for the judge if the same has been delayed without adequate cause.

Broad definition:

The Broad Definition of the Commercial Disputes harnesses a huge potential for a plethora of litigation to come. Other such exclusions need to be prevented and an all industry consensus to this definition is one step to be taken at the earliest.

Qualification of Judges:

The procedure for appointment is very vague. The procedure for nomination of judges to the High Court Divisions should be transparent and objective with a stated criteria for eligibility. Perhaps a separate examination for selection and appropriate remuneration will ensure that the best talent is recruited to these specialized courts. Training and development facilities must also be taken up meticulously and regularly to ensure that the quality of judicial pronouncements are of the highest standard.

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[12] Ibid, Section 16 r/w Schedule 1,

[13] Ibid, Section 14

[14] Ibid, Section 15

[15] Srivastava, Dastur, *India Puts its Best Foot Forward- Union Cabinet paves the way for amendments to the Arbitration & Conciliation Act, 1996,* Lex Witness, Volume 7 Issue 4, November 2015,p. 40

E-facilities:

The present Act does not provide for any new or technologically advanced method of conducting the court procedures. The suggestions of e-filing, video conferencing of witness, and use of the latest technology will go a long way in making these courts at par with the systems being followed in some countries. It is relevant to note that change is already underway but the rate of adoption and adaptation to change and technology is too slow in a fast changing world.

Concluding Remarks:

The move towards establishment of the Commercial Courts and Commercial Divisions in India is an idea whose time has already arrived some time ago. The seamless functioning of these courts and an effective justice delivery system should be ensured by holistically including all stake holders and devising pragmatic solutions to the problems. The advancements in technology have to be used to our advantage to be able to perceive results akin to other countries.

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Notifications & Circulars

Buy-back - Companies (Shares Capital and Debentures) Rules, 2014 amended: The Companies (Shares Capital and Debentures) Rules, 2014 were amended by the Ministry of Corporate Affairs on 10-3-2016. Rule 17 deals with the norms that are to be followed by private companies and unlisted public companies for buy-back of their securities. As per Rule 17(1)(n), auditors have to address a report to the Board of directors of the company stating certain disclosures. Said Rule has now been amended to include a proviso to state that when the audited accounts are more than 6 months old, buy back shall be calculated based on un-audited accounts not older than 6 months from the date of the offer document, subject to limited review by the auditors of the company.

Competition law - Combinations - Exemption to 'Group' with less than 50% voting rights: The Ministry of Corporate Affairs has issued 3 Notifications bearing Reference Nos. S.O. 673(E), S.O. 674(E) and S.O. 675(E), all dated 4-3-2016. The following are exempted from the application or operation of Section 5 of the Competition Act, 2002 for a period of five years, from the date of the Notifications:

- A 'Group' exercising less than 50 per cent of voting rights in other enterprise; and
- an enterprise, which has assets of a maximum of Rs. 350 Crore in India or has a turnover of a maximum of Rs. 1000 Crores in India and whose control, shares, voting rights or assets are being acquired.

Further, the Ministry, in consultation with the Competition Commission of India, has

increased the value of assets and turnover, on the basis of wholesale price index, by 100% for the purposes of Section 5 of the Act. It may be noted that Section 5 of the Act deals with regulation relating to Combinations.

SEBI – Some restrictions and clarifications: The SEBI Board has, in a meeting on 12th March, 2016 decided to impose restrictions on willful defaulters, review the manner of dealing with Audit Reports containing Qualifications, and to provide clarification on definition of 'control' in SEBI Takeover Regulations. Press Release No. 56/2016, dated 12-3-2016 has been issued in this regard.

For *restricting access to capital markets* for raising funds from the public by willful defaulters, the following proposals were approved by the Board:

- The issuer company or its promoter or its director, which is in the list of willful defaulters, is not permitted to make a public issue of equity securities/debt securities/non-convertible redeemable preference shares.
- If a company or its promoter or its director is in the list of willful defaulters, it may not be allowed to take control of other listed entity. However, if the listed company or its promoter or its director is a willful defaulter and there is a take over of the listed company, then they may be allowed to make a competing offer for the said listed company as per SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
- The criteria for determining a 'fit and proper person' under SEBI Regulations shall be amended to include that *no fresh registration shall be granted to any entity or its promoters or its directors or key managerial personnel, if such entity is categorized as a willful defaulter.*

A revised *procedure to review audit qualifications* in audit reports as incorporated in SEBI (Listing and Other Disclosure Requirements) Regulations, 2015 has now been proposed by SEBI, which purports that listed entities shall now disclose cumulative impact of all the audit qualifications on relevant financial terms in a separate form called "Statement on Impact of Audit Qualifications" and not in Form B. It was decided that if there are no audit qualifications, the requirement of signing Form A by top officials or directors of the company and auditors will not be necessary. Further, adjustment in the books of accounts of the subsequent year shall now not be necessary. This new mechanism shall be applicable from the financial year which will end in March 2016 and the earlier cases.

To *identify 'Control'* as per the SEBI (SAST) Regulations, SEBI has invited comments on the following amendments to the definition of "control",

- an illustrative list of protective rights not amounting to acquisition of control, subject to obtaining the public shareholders' approval, and
- amend the definition of 'control' as, *"The right or entitlement to exercise at*

least 25% of voting rights of a company irrespective of whether such holding gives de-facto control and/or the right to appoint majority of the non-independent directors of a company."

Exchange Traded Cross-Currency Derivative contracts introduced: Recognised stock exchanges can now offer cross-currency futures and offer contracts in the EUR-USD, GBP-USD and USD-JPY currency pairs and currency option contracts in EUR-INR, GBP-INR and JPY-INR currency pairs. To ensure orderly trading and market integrity, stock exchanges shall now implement a Dynamic Price Bands mechanism in the currency derivatives segment and would allow trading in cross-currency derivatives contracts between 09:00 a.m. and 07:30 p.m. Circular No. SEBI/HO/MRD/DP/CIR/P/2016/38, dated 9-3-2016 has been issued by SEBI in this regard.

Ratio Decidendi

Jurisdiction of Company Court only applicable to parties in Scheme of Arrangement: Delhi High Court has rejected the plea that the Company Court must exercise its jurisdiction to supervise the Scheme of Arrangements, to evict tenants of premises which are not owned by the company. Winding up proceedings were initiated against the company and with a view to realize assets Scheme of Arrangements was accepted by the court. During the pendency of the winding up proceedings and before the sanctioning of the Scheme by the Court, dues of all creditors were settled. However, several applications by third parties regarding retrieving possession of properties of which the Company had been a tenant and which the Company had been using for its business, were filed. It was argued that the new tenants were lawful tenants of the disputed premises, after the Company was evicted from the premises. However, it was the contention of the Company that for proper implementation of the Scheme, directions under Section 392 of the Companies Act were necessary and that the relevant clause under the Scheme which dealt with the jurisdiction of the Court provided that *"any claim by or against the Company shall be instituted before the Company Court."*

The Delhi High Court however held that Section 446 of the Companies Act was not applicable in this case as there was no winding-up order. The Court in this regard observed that except Section 446 there is no other power under the Companies Act, authorizing the Company Court to exercise universal jurisdiction and adjudicate disputes concerning third parties' transactions with the company. Further, noticing that jurisdiction of the Companies Court was also excluded to decide matters which are to be tried by Tribunals and Courts of exclusive jurisdiction, it was held that there was no restriction with regard to the maintainability of eviction proceedings before the lawfully constituted tribunals which have the relevant jurisdiction

to try them. Noting that the disputed events in question took place before the sanctioning of the Scheme under Section 391, it was held that the Court has no jurisdiction to try the said dispute. [*Gurkirpal Singh and Ors. v. Raminder Pal Singh and Ors.* - Co. Appl. 19-25/2005, decided on 29-2-2016, Delhi High Court]

Competition law – Entire National Capital Region (NCR) not one geographic market: The Competition Commission of India (CCI) has held that the entire region of NCR cannot be said to be one geographic market. The CCI was, in the dispute, elaborating on the market for provision of services for development and sale of commercial/ office space. Commission in this regard held that the conditions of competition in the market for commercial/ office space in the sub regions (Ghaziabad, Faridabad or Gurgaon) are not homogenous with that of Delhi. It was held that factors such as different regulatory authorities (and hence different rules and regulations), differential cost of land for development, prices of property, extent of urbanisation, commercial activity supported by the ecosystem, locational advantage for conducting business, availability of transportation/ travel facilities, the level of development of infrastructure, etc. being distinct in Delhi and other sub regions, the same play a crucial role in determining the consumer preferences and hence in determining the relevant market. The relevant market in the instant case was hence found to be 'the market for provision of services for development and sale of commercial/ office space in Delhi'. [*M.M. Mittal v. Paliwal Developers Ltd.* - Case No. 112 of 2015, decided on 25-2-2016, CCI]

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